Google

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

Gt. Brit. Laws, Statutes, &c.
D.L
FGS
KR 89

SHELFORD'S

REAL PROPERTY STATUTES,

COMPRISING

THE PRINCIPAL STATUTES RELATING TO

Real Property

PASSED IN THE REIGNS OF

KING WILLIAM IV. AND QUEEN VICTORIA;

WITH

NOTES OF DECIDED CASES.

NINTH EDITION,

BY

THOMAS H. CARSON,

OF LINCOLN'S INN, ESQUIRE, BARRISTER-AT-LAW;

ASSISTED BY

HAROLD B. BOMPAS,

OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW.

LONDON:

SWEET AND MAXWELL, LIMITED, 3, CHANCERY LANE,

STEVENS AND SONS, LIMITED, 119 & 120, CHANCERY LANE,

Law Publishers.

1893

LONDON:

PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE—E.C.

PREFACE

TO THE NINTH EDITION.

During the long interval which has elapsed since the publication of the Eighth Edition of Shelford's Real Property Statutes, the Decided Cases and the List of Statutes affecting the branches of law treated of in that Edition have alike received considerable additions. Among the new Statutes it is only necessary to mention the provisions for the limitation of actions contained in the Real Property Limitation Act, 1874, and the Trustee Act, 1888; the Married Women's Property Act, 1882; the Land Charges Registration and Searches Act, 1888; the provisions as to vesting orders of trust property and the appointment of new trustees in lunacy, contained in the Lunacy Act, 1890; the Vendor and Purchaser Act, 1874; the Conveyancing Acts, 1881, 1882, and 1892, and the Settled Land Acts, 1882 to 1890.

If the above new matter was to be included in the present edition without unduly increasing the bulk of the Volume, it was necessary to omit or alter much of the old matter. It was found possible to omit some statutes which had been repealed or become obsolete, *e. g.*, 4 & 5 Will. IV. c. 22; 4 & 5 Will. IV. c. 29, and 4 & 5 Vict. c. 21. It was also possible to shorten considerably the statement of the older Judgment Acts; in particular, 2 & 3 Vict. c. 11, 3 & 4 Vict.

c. 82, and 18 & 19 Vict. c. 15. Again, the Legitimacy Declaration Act (22 & 23 Vict. c. 93) seemed scarcely to fall within the scope of the work, and has accordingly been omitted. For the rest, room had to be found by further abridging Mr. Shelford's copious extracts from the Reports of the Real Property Commissioners; and the voluminous character of the notes to the earlier Statutes fortunately admitted of considerable re-arrangement and condensation. With regard to recent decisions, their substance has been added in as short a form as was consistent with clearness. By means of the Addenda, these have been brought down to November, 1892.

It remains to add that, with the view to the use of larger type, the page has been increased in size. Lastly, it is hoped that the number of new marginal notes will add to the usefulness of the work as one of reference.

My best thanks are due to Mr. Harold B. Bompas, of the Inner Temple, Barrister-at-Law, for valuable assistance in the preparation of the present Edition, and in passing it through the press.

THOMAS H. CARSON.

6, New Square, Lincoln's Inn,
November, 1892.

TABLE OF CONTENTS.

In the Table of Statutes, p. lxxi, *post, all the Statutes, whether printed at length or merely cited in the following pages, are placed in chronological order. The page at which any section occurs at length will be found in that Table with an asterisk affixed.*

PAGE

THE PRESCRIPTION ACT, 1832 (2 & 3 Will. 4, c. 71).

Periods limited for establishing Rights of Common and other Profits à Prendre (sect. 1); Rights to Easements other than Light (sect. 2); and Rights to Light (sect. 3) .. .. 1—13
Periods, how to be computed (sect. 4) .. .. .. 13—15
Pleadings (sect. 5) .. .. 16—18
Less period not allowed (sect. 6) 19
Disabilities (sect. 7) 19
Time excluded from Period of Forty Years (sect. 8) 20
Extent (sect. 9) and Commencement (sect. 10) of Act 21

SUBJECTS INCLUDED IN THE PRESCRIPTION ACT.

(1.) Of the Nature of Prescription .. .. .. 21—30
Custom .. .. 24—26
Prescription proper .. .. 26—30
(2.) Of Rights of Common .. .. 30—45
(3.) Of the Presumption of Grants of Easements, and of Licences 45—49
(4.) Of Rights of Way, Public and Private:—
1. Public Rights of Way and Highways .. .. 49—57
2. Private Rights of Way .. .. .. 57—67
(5.) Of Watercourses .. .. 67—87
(6.) Of the Right to Pews .. .. 87—91
(7.) Of the Right to Light and Air .. .. .. 91—100

LIMITATION OF ACTIONS AND SUITS.

I. Limitation of Time for the Recovery of Land or Rent (3 & 4 Will. 4, c. 27).

Interpretation Clause (sect. 1) .. .. 101—112
Period of Limitation fixed (sect. 2) 112
When Right first accrues in the case of Discontinuance of Possession of Land or of Receipt of Rent; in the case of Death of Rightful Owner; in the case of Alienation by Rightful Owner; in the case of future Interests; and in the case of Forfeiture or Breach of Condition (sect. 3) 119
Provisions as to Forfeitures (sect. 4), and Administrators (sect. 6) 123—126
When Right first accrues in the case of Tenancies at Will (sect. 7); Tenancies from Year to Year (sect. 8); and Leases reserving Rent (sect. 9) .. .. 126—136
Provisions as to Entry (sect. 10); Continual Claim (sect. 11); Coparceners (sect. 12); and Possession of Younger Brother (sect. 13) 136—138
Written Acknowledgments of Title (sect. 14) 138
Possession not adverse at passing of Act (sect. 15) 140
Disabilities (sect. 16); Extreme Period of Limitation (sect. 17); Successive Disabilities (sect. 18); beyond Seas (sect. 19) .. 141—145

LIMITATION OF ACTIONS AND SUITS—*continued.*

I. **Limitation of Time for the Recovery of Land or Rent**—continued. PAGE

Concurrent Rights (sect. 20) 145
Operation of the Act in case of Estates Tail (sects. 21—23) .. 146—148
Limitation of Time as to Suits in Equity (sect. 24); in the case of Express Trusts (sect. 25); Concealed Fraud (sect. 26); and Acquiescence (sect. 27) .. .. 149—158
Limitation of Time between Mortgagor and Mortgagee (sect. 28; 1 Vict. c. 28) .. .. 158—163
Limitation of Time as to Church Property & Advowsons (ss. 29–33) 163—167
Final Extinction of Right (sect. 34) 167
Receipt of Rent (sect. 35) 169
Abolition of Real and Mixed Actions, &c. (sects. 36—39) .. 169—173
Spiritual Courts (sect. 43) 173
Scotland and Ireland (sect. 44) 174

PLEADING AND PRACTICE AS TO STATUTES OF LIMITATION 174
Limitations of Time in Practice 175

II. Limitation of Time for the Recovery of Money charged on Land, Legacies, Arrears of Dower, Rent, and Interest (3 & 4 Will. 4, c. 27, ss. 40—42).

Charges and Legacies (sect. 40) 176
Arrears of Dower (sect. 41) 185
Arrears of Rent and Interest (sect. 42) 185

Account of Rents in Equity 190
Interest on Debts generally .. .. 191—194

I. & II.—*continued.* REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 Vict. c. 57).

Period of Limitation in case of Land or Rent shortened to 12 years (s. 1) 194
Future Estates (sect. 2) 194
Disabilities (sect. 3); no allowance for absence beyond Seas (sect. 4); utmost Allowance (sect. 5) 196, 197
Remainders in Tail (sect. 6) 197
Mortgagor (sect. 7) 197
Money charged on Land, Legacies, &c., Period shortened to Twelve Years (sect. 8) 198
Repeal, &c. (sect. 9); Express Trust (sect. 10) 200

III. Limitation of Time in the case of Actions by or against Executors in respect of Injuries to Property, and of Actions on Specialties (3 & 4 Will. 4, c. 42, ss. 2—7).

Actions by or against Executors in respect of Injuries to Property (sect. 2) 201
Period of Limitation for Specialties (sect. 3) 202
Provisions as to Disabilities (sect. 4); Acknowledgments (sect. 5); Judgment or Outlawry reversed (sect. 6); and as to Countries beyond the Seas (sect. 7) .. .. 204—208

IV. Limitation of Time in the case of Actions on Simple Contract Debts (21 Jac. 1, c. 16, ss. 3, 4, 7; 9 Geo. 4, c. 14, ss. 1, 3, 4, 8).

Period of Limitation (1 Jac. 1, c. 16, s. 3) .. .. .. 208—216
Provisions as to Judgment or Outlawry reversed (sect. 4); and Disabilities (sect. 7) 216
Acknowledgments (9 Geo. 4, c. 14) .. .. 217—227

MERCANTILE LAW AMENDMENT ACT (19 & 20 Vict. c. 97, ss. 9—17).

Merchant's Accounts (sect. 9) 227
Absence beyond Seas (sects. 10—12) 228
Acknowledgments—by Agents (sect. 13); by Payment of one Contractor (sect. 14) 229

LIMITATION OF ACTIONS AND SUITS—*continued.* PAGE

V. Limitation of Time in the case of Actions against Trustees (51 & 52 Vict. c. 59, ss. 1, 8, 12).
Title, Definition, &c. (sect. 1) 231
Periods of Limitation (sect. 2) 231
Application of Act (sect. 12) 232

VI. Courts of Equity and the Statutes of Limitation .. 232—238
General Limitation of Actions under Local and Personal Acts .. 238

THE FINES AND RECOVERIES ACT, 1833 (3 & 4 Will. 4, c. 74, ss. 1—76).
Interpretation Clause (sect. 1) .. .. 240—244
Fines and Recoveries abolished (sect. 2) · the Tenure of Ancient Demesne (sects. 4—6); the Amendment of previous Fines and Recoveries (sects. 7—12); the Custody of Fines and Recoveries (sect. 13); Warranty (sect. 14) .. .. .. 244—252
Disposition of Lands entailed; General enabling Clause (sect. 15) .. 252
Provisions as to Tenants in Tail *ex provisione Viri* (sects. 16, 17); Tenants in Tail of the Gift of the Crown; Tenants in Tail restrained from Alienation; and Tenants in Tail after possibility of Issue extinct (sect. 18) 254, 255
Power to enlarge Base Fees (sect. 19) 256
Issue inheritable not empowered to dispose of expectant Interests (sect. 20) 256
Mortgages, &c. by Tenants in Tail (sect. 21) 259
The Protector, definition of (sects. 22—33); Powers of (sects. 34—37) .. .. 261—269
Confirmation of voidable Estates created by Tenant in Tail (sect. 38) . 269
Enlargement of Base Fees (sect. 39) 270
Modes in which Dispositions of Entailed Lands are to be effected (sects. 40—49) .. .. 271—276
Estates Tail in Copyholds (sects. 50—54) .. .. .. 277—280
Bankrupt's Estate Tail (sects. 55—69) .. .. .. 280—288
Money to be laid out in Lands to be entailed (sects. 70—72) .. 288—290
Inrolment of Deeds (sects. 73—76) 290, 291

ALIENATION BY MARRIED WOMEN (3 & 4 Will. 4, c. 74, ss. 77—92; CONV. ACT, 1882, s. 7).
Married Women enabled to dispose of Lands, &c. (sect. 77); other Powers saved (sect. 78) .. .. 292—299
Acknowledgment of Deeds by Married Women (sects. 79—90). 299—303
Husband's Concurrence may be dispensed with (sect. 91) .. 303—306
Conveyancing Act, 1882, s. 7, Provisions as to Acknowledgments of Married Women .. .. 306—308
Rules as to Acknowledgments, &c. .. .. .. 308—311

THE INFANT SETTLEMENTS ACT, 1855 (18 & 19 Vict. c. 43).
Infants may make Settlements with sanction of Court (sect. 1); where Infant dies under Age, Appointment or Disentailing Assurance void (sect. 2); Sanction of Court how given (sect. 3); Limit of Age (sect. 4) .. .. 312—314

ALIENATION BY MARRIED WOMEN OF THEIR REVERSIONARY INTERESTS IN PERSONALTY (20 & 21 Vict. c. 57).
General enabling Clause (sect. 1); Deed to be acknowledged (sect. 2); other Powers not interfered with by Act (sect. 3); Act not to extend to Property settled on Marriage (sect. 4) .. .. .. 315—317

MARRIED WOMEN'S PROPERTY ACT, 1870 (33 & 34 Vict. c. 93). PAGE

Earnings of Married Women (sect. 1), and their Deposits in Savings Banks (sect. 2) to be their separate Property 317, 318
Provisions as to a Married Woman's Property in the Funds (sect. 3); in a Joint Stock Company (sect. 4); and in a Friendly Society, &c. (sect. 5) .. .. 318—320
Deposits in fraud of Creditors of Husband invalid (sect. 6) 320
Personalty (sect. 7), and Rents and Profits of Realty (sect. 8), coming to Married Woman to be for her Separate Use 320
Married Woman may effect Insurance (sect. 10) 320
Husband not liable on Wife's Contracts before Marriage (sect. 12) .. 322
Commencement (sect. 15); Extent (sect. 16); and Title of Act (sect. 17). 322

MARRIED WOMEN'S PROPERTY ACT, 1874 (37 & 38 Vict. c. 50).

Liability of Husband for Ante-nuptial Debts of Wife (sects. 1—5) .. 323

MARRIED WOMEN'S PROPERTY ACT, 1882 (45 & 46 Vict. c. 75).

Married Woman to hold and dispose of Property as *Feme Sole* (sects. 1, 2, 5); Loans by Wife to Husband (sect. 3); Execution of General Power (sect. 4) .. .. 323—329
Deposits and Investments in name of Married Woman (sects. 6—10) 330—332
Policy on Life of Husband (sect. 11) 333
Protection of Separate Property (sect. 12) 333
Ante-nuptial Debts and Liabilities (sects. 13—15) .. .. 333—335
Criminal Proceedings by Husband (sect. 16) 335
Summary Procedure between Husband and Wife (sect. 17) 335
Married Woman as Executrix (sect. 18) 336
Effect of Act on Settlements (sect. 19) 337
Maintenance of Husband and Children (sects. 20, 21); Repeal (sect. 22); Legal Personal Representative of Married Woman (sect. 23); Interpretation (sect. 24) 338

MARRIED WOMEN'S PROPERTY ACT, 1884 (47 & 48 Vict. c. 14).

Evidence by Husband or Wife in Criminal Proceedings against the other 339

THE DOWER ACT, 1833 (3 & 4 Will. 4, c. 105).

Interpretation Clause (sect. 1) 340
Dower allowed out of Equitable Estates (sect. 2); and Seisin of Husband not necessary (sect. 3) 344, 345
Absolute (sect. 4) and Partial (sect. 5) Dispositions of Husband by Deed or Will effectual against Dower 346
Dower may be barred by a Declaration in a Deed (sect. 6); or in Husband's Will (sect. 7); and may be restricted by Will (sect. 8) .. 347
Devise to Widow of Real Estate, out of which she is dowable, bars Dower (sect. 9); but not a Bequest of Personalty (sect. 10) 347, 348
Agreements not to bar Dower (sect. 11); and Legacies in lieu of Dower (sect. 12) 348
Saving Clause (sect. 14) 349
Tenant by the Curtesy .. .. 349—351

THE INHERITANCE ACT, 1833 (3 & 4 Will. 4, c. 106).

Interpretation Clause (sect. 1) 352
Descent to be traced from Purchaser (sect. 2) 355
Devise to Testator's Heir, and Limitation to Grantor's Heir (sect. 3); Mode of Descent, where Heirs take by Purchase under Limitation to Heirs of Ancestor (sect. 4) .. .. 357—360
Descent from Brother or Sister traced through Parent (sect. 5) .. 360
In case of Ancestors, Lineal Ancestors admitted (sect. 6); Male Line preferred (sect. 7); and Mother of more remote Male Ancestor preferred to Mother of less remote Male Ancestor (sect. 8) .. 360—362
Provisions as to half-blood (sect. 9), and attainted blood (sect. 10) 362, 363
Commencement of Act (sects. 11, 12) 364

PAYMENT OF DEBTS OUT OF REAL ESTATES. PAGE

THE DEBTS RECOVERY ACT, 1830 (11 Geo. 4 & 1 Will. 4, c. 47).
Repeal of former Acts (sect. 1) 365
Devises void against Specialty Creditor (sect. 2) 366
Remedies of Specialty Creditor—(a) Where estate not aliened; against Heir and Devisee (sect. 3); or Devisee alone (sect. 4); Remedies—(b) Where Estate aliened before Action brought; against Heir (sect. 6), and Devisee (sect. 8); Plea by Heir (sect. 7) .. .. 367—371
Act not to affect Provisions for Payment of Debts (sect. 5) .. 368
Trader's Real Estate made Assets for Payment of his Simple Contract as well as Specialty Debts (sect. 9) 371
Demurrer of Parol (sect. 10) 372
Provisions as to Conveyances by Infant (sect. 11, and 2 & 3 Vict. c. 60); and by Persons having limited Interests (sect. 12, and 2 & 3 Vict. c. 60, 11 & 12 Vict. c. 87); where Real Estate ordered to be sold for Payment of Debts .. .. 373—376

3 & 4 Will. 4, c. 104.
Freehold and Copyhold Estates made Assets in all cases for Payment of Simple Contract as well as Specialty Debts .. 377—386

DEVISE OF REAL ESTATE CHARGED WITH DEBTS.

THE LAW OF PROPERTY AMENDMENT ACT, 1859 (22 & 23 Vict. c. 35, ss. 14—18, 23).
Where Testator's whole Interest devised to Trustees, Trustees to sell (sects. 14, 15); where whole Interest not so devised, Executors to sell (sect. 16) .. .. 386—389
Above Provisions not to extend to beneficial Devises in Fee or Tail (sect. 18) 390
Purchasers not bound to inquire as to Powers (sect. 17) 390
Receipts for Trust Money (sect. 23) 390

PAYMENT OF MORTGAGE DEBTS (Real Estate Charges Acts, 1854, 1867, 1877).

17 & 18 Vict. c. 113 (Locke King's Act).
Land to be primarily liable for Payment of Mortgage Debts charged thereon (sect. 1); Act not to extend to Scotland (sect. 2) .. 391—395
30 & 31 Vict. c. 69.
General direction to pay Debts, effect of 396
40 & 41 Vict. c. 34 398

THE WILLS ACT (1 Vict. c. 26).
Interpretation (sect. 1), and Repealing Clause (sect. 2) 399
Property disposable by Will (sect. 3); Copyholds (sects. 4, 5); Estates pur Autre Vie (sect. 6) .. .. 401—404
Wills made by Infants (sect. 7); and Married Women (sect. 8) 405—407
Execution and Attestation of Wills (sects. 9—17) .. .. 407—414
Revocation, Alteration, and Revival of Wills (sects. 18—23) .. 414—422
Construction of Wills: Wills to speak from Death (sect. 24): Residuary Devise to include Estates comprised in lapsed or void Devises (sect. 25); General Devise to include Copyholds and Leaseholds (sect. 26); and Estates subject to General Power of Appointment (sect. 27); Devise without words of Limitation (sect. 28); Words "Die without Issue" (sect. 29); Devises to Trustees (sects. 30, 31) .. .. 422—432
Certain cases of Lapse (sects. 32, 33) 433
Application (sect. 34); and Extent of Act (sect. 35) .. 434, 435

THE WILLS ACT AMENDMENT ACT, 1852 (15 & 16 Vict. c. 24) 435—437

THE WILLS ACT, 1861 (24 & 25 Vict. c. 114) 438

THE DOMICILE ACT, 1861 (24 & 25 Vict. c. 121) 440

APPORTIONMENT OF RENTS AND PERIODICAL PAYMENTS. PAGE
33 & 34 Vict. c. 35 .. .. 442—445

JUDGMENTS AFFECTING REAL AND PERSONAL PROPERTY.
THE JUDGMENTS ACT, 1838 (1 & 2 Vict. c. 110, ss. 11—22).
Writs of Elegit (sect. 11), and of Fieri Facias (sect. 12).. 446—451
Judgment to operate as a Charge (sect. 13) .. .. 451—454
Charging Orders (sects. 14, 15) .. .. .. 454—458
Interest on Judgments (sect. 17) 459
Decrees and Orders in Equity, &c. (sect. 16) 459
Registration (sect. 19) 461
Judgments of Courts of Lancaster and Durham (sect. 21); and of Inferior Courts (sect. 22) .. .. 462—464
THE JUDGMENTS ACT, 1839 (2 & 3 Vict. c. 11).
Lis Pendens (sect. 7) 464
Crown Debts (sects. 8—11) .. .. 465—469
THE JUDGMENTS ACT, 1855 (18 & 19 Vict. c. 15, ss. 12, 14) 469
THE LAW OF PROPERTY AMENDMENT ACT, 1860 (23 & 24 Vict. c. 38, ss. 1—5).
Writs of Execution to be registered (sect. 1); Mode of Registration (sect. 2) 470, 471
Protection of Heirs and Executors against Unregistered Judgments (sect. 3) 472
Judgments against Heirs and Executors to be re-registered (sect. 4) 473
23 & 24 Vict. c. 115.
Entry of Satisfaction on Crown Debts and Judgments .. 474—476
THE JUDGMENTS ACT, 1864 (27 & 28 Vict. c. 112).
Judgments not to affect land until land delivered in Execution (sect. 1) 476
Sale upon Application of Creditor to whom Land delivered in Execution (sects. 4—7) 479
LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888 (51 & 52 Vict. c. 64).
Introductory (sects. 1—4) 480, 481
Registration of Writs and Orders affecting land (sects. 5, 6) 481, 482
Registration of Deeds of Arrangement (sects. 7—9) 482
Registration of Land Charges (sects. 10—14) 482
Index and Searches (sects. 15—18) 483
Rules as to Registration and Searches 484

THE REAL PROPERTY ACT, 1845 (8 & 9 Vict. c. 106).
Repeal of 7 & 8 Vict. c. 76 (sect. 1) 485
Immediate Freehold of Corporeal Hereditaments to lie in Grant (sect. 1) 485
Feoffments, Partitions, Exchanges, Leases, Assignments, and Surrenders to be by Deed (sect. 3) 486
Feoffments not to operate by Wrong; Exchanges and Partitions not to imply any Condition; nor "give" and "grant" any Covenant (sect. 4) 487
Strangers may take immediately under Indenture (sect. 5) 488
Alienation of Contingent Interests (sect. 6) 489
Disclaimer by Married Women (sect. 7) 490
Contingent Remainders (sect. 8) 490
Reversion expectant on Lease (sect. 9) 491

THE SATISFIED TERMS ACT (8 & 9 Vict. c. 112).

PAGE

Terms, satisfied and attendant on Inheritance on 31st December, 1845 (sect. 1); or becoming such, after that Date (sect. 2) to cease ..493—495

THE TRUSTEE ACT, 1850 (13 & 14 Vict. c. 60).

Interpretation Clause (sect. 2) 496

Vesting Orders may be made where Trustee, &c. of Land (sects. 3, 4) or Stock (sects. 5, 6) is Lunatic; where Trustee, &c. of Land is an Infant (sects. 7, 8); where Trustee of Land (sects. 9—12) or Stock (sects. 22, 25) is out of Jurisdiction; where Trustee of Land (sects. 13—15) or Stock (sects. 22, 25) is uncertain; in case of unborn Trustee (sect. 16); and where Trustee of Stock refuses to transfer (sects. 23—25) .. .. 500—512

Power to appoint Person to convey (sect. 20) 508

Lands in Lancaster and Durham (sect. 21).. 510

Effect of Orders vesting Legal Right to transfer Stock (sect. 26); vesting Legal Right in Chose in Action (sect. 27); vesting Copyholds, &c. (sect. 28) 513, 514

Application of above Powers to Decrees of Courts of Equity (sects. 29, 30) 515

Directions as to exercise of Right to transfer Stock (sect. 31) 517

Power to appoint New Trustees (sects. 32, 33); and to vest in them Land (sect. 34); and the Right to sue at Law (sect. 35) .. 517—524

Practice upon Applications under the Act (sects. 37—44) .. 524—526

Trustees of Charities (sect. 45) 527

Escheat (sects. 46, 47) 527, 528

Money of Infants, or Persons of unsound Mind may be paid into Court (sect. 48) 528

Decree in the absence of a Trustee (sect. 49) 528

Costs (sect. 51).. 529

Court may direct Commission concerning Person of unsound Mind (sect. 52); or Suit (sect. 53) 530

Extent (sects. 54—57); Title (sect. 58); and Commencement of Act (sect. 59) 530, 531

THE TRUSTEE ACT, 1852 (15 & 16 Vict. c. 55) 532

LUNACY ACT, 1890 (53 Vict. c. 5, ss. 110, 129, 135—143, 341).

Vesting orders of Trust Property and appointment of new Trustees in Lunacy .. .. 538—541

Rules as to Vesting Orders and Forms .. .. .. 541—543

THE LAW OF PROPERTY AMENDMENT ACT, 1859 (Lord St. Leonards, 22 & 23 Vict. c. 35).

Provisions in the case of Leases as to the Effect of Licences to Alien, &c. (sects. 1, 2); as to Apportionment of Conditions of Re-entry (sect. 3) .. .. 544—546

Release of Part of Land from Rent-charge (sect. 10), or Judgment (sect. 11), not to release the whole 546, 547

Powers of Appointment, Mode of Execution of (sect. 12) 547

Sale under Power not avoided by mistaken Payment to Tenant for Life (sect. 13) 548

Assignment of Personalty (sect. 21) 549

LAW OF PROPERTY AMENDMENT ACT, 1859—*continued.* PAGE

Fraudulent Concealment of Deeds, or Falsification of Pedigree by Vendor (sect. 24) 549
Trustees making Payments under Powers of Attorney indemnified (sect. 26) 550
Liability of Executor, &c., in respect of Rents, Covenants and Agreements in Leases (sect. 27); and in Conveyances on Rent-charge (sect. 28); Distribution of Assets after Notice (sect. 29) .. 551—554
Trustee may apply to Court for Advice (sect. 30) 554
Indemnity and Reimbursement Clauses (sect. 31) 555

THE LAW OF PROPERTY AMENDMENT ACT, 1860 (Lord St. Leonards, 23 & 24 Vict. c. 38).

Waiver (sect. 6); and Scintilla Juris (sect. 7) 556
Amending Provisions (sects. 8, 9) 557

THE TRUSTEES AND MORTGAGEES ACT (Lord Cranworth, 23 & 24 Vict. c. 145).

Powers of Trustees for Sale (sects. 1—7); and of Trustees of renewable Leaseholds (sect. 8); Money may be raised by Mortgage (sect. 9); no Sale without consent of Tenant for Life (sect. 10) .. 558—561
Power for Mortgagees to Sell (sects. 11—16); insure mortgaged Property (sect. 11); and appoint Receiver (sects. 11, 17—23) .. 561—564
Provisions as to Incumbrances (sect. 31), and Rights of Persons other than those entitled under the Settlement (sect. 33) 565
Powers of Act may be negatived (sect. 32); Commencement and Extent of Act (sects. 34, 35) 565

VENDOR AND PURCHASER ACT, 1874 (37 & 38 Vict. c. 78).

Commencement of, and Rules as to Title to Real Property (sects. 1, 2); Application thereof to Trustees (sect. 3).. .. .. 566, 567
Representative of Mortgagee and bare Trustee (sects. 4, 5); Married Woman bare Trustee (sect. 6) 567
Tacking of Mortgages (sect. 7); Registration of Wills in Middlesex, &c. (sect. 8) 568
Summary Procedure on Questions of Title (sect. 9) .. .. 568—571

CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 Vict. c. 41).

Commencement, &c., Interpretation (sects. 1, 2) 572, 573
Sales and other transactions (sects. 3—9) .. .. .. 574—585
Leases (sects. 10—14) .. .. 585—589
Mortgages (sects. 15—25) .. .. 589—598
Statutory Mortgage (sects. 26—29) .. .. .. 598—600
Trust and Mortgage Estates on Death (sect. 30) 600
Trustees and Executors (sects. 31—38) .. .. .. 600—605
Married Women (sects. 39, 40) 605, 606
Infants (sects. 41—43) .. .. 606—609
Rent-charges and other Annual Sums (sects. 44, 45) .. 609—611
Powers of Attorney (sects. 46—48) 611, 612
Construction and effect of Deeds and other Instruments (ss. 49—64) 613—617
Long Terms (sect. 65) 617
Solicitors and Trustees adopting Act (sect. 66) 618
Miscellaneous (sects. 67—70) .. .. 619—621
Repeals (sect. 71) 621
Ireland (sects. 72, 73) 622
Schedules to Act .. .. 622—626

CONVEYANCING ACT, 1882 (45 & 46 Vict. c. 39).

	PAGE
Preliminary (sect. 1)	627
Searches (sect. 2)	627—629
Notice (sect. 3)	629
Leases (sect. 3)	629
Separate Trustees (sect. 5)	630
Powers (sect. 6); Powers of Attorney (sect. 8)	630
Executory Limitations (sect. 10)	631
Long Terms (sect. 11); Mortgages (sect. 12); Saving Clause (sect. 13)	632

CONVEYANCING ACT, 1892 (55 & 56 Vict. c. 13).

Preliminary (sect. 1)	633
Leases, Forfeiture (sects. 3—5)	633
Separate Trustees (sect. 6)	634
Rules as to Searches and Powers of Attorney, Appendix of Forms, and Fees	635—642

SETTLED ESTATES ACT, 1877 (40 & 41 Vict. c. 18).

Title and Interpretation (sects. 1—3)	643, 644
Leases (sects. 4—15)	644—648
Sales (sects. 16—19, 22)	648—650, 651
Dedication for Streets, &c. (sects. 20—22)	650, 651
Application to Court (sects. 23—33)	651—655
Application of Moneys arising from Leases or Sales (sects. 34—37)	655—658
Powers of Court (sects. 38—44)	658—660
Ireland (sect. 45)	660
Leases by Tenants for Life, &c. (sects. 46—48)	660, 661
Infants, Lunatics, &c. (sect. 49)	661
Married Women (sects. 50—52)	662, 663
Miscellaneous Provisions (sect. 53—59)	663, 664
Orders under Settled Estates Act	665—674

SETTLED LAND ACT, 1882 (45 & 46 Vict. c. 38).

Preliminary (sect. 1)	674
Definitions (sect. 2)	674—677
Sale, Exchange, &c. (sects. 3—5)	677—679
Leases (sects. 6—14)	680—684
Mode of giving effect to Sales, Leases, &c. (sects. 16—20)	684—686
Investment or other Application of Capital Money (sects. 21—24)	687—691
Improvements (sects. 25—30)	691—695
Contracts (sect. 31)	695
Miscellaneous Provisions (sects. 32—37)	696—699
Trustees (sects. 38—45)	699—702
Court, Procedure, &c. (sects. 46—49)	702—705
Restrictions, Savings, and General Provisions (sects. 50—57)	705—709
Limited Owners generally (sect. 58)	709
Infants, Married Women, Lunatics (sects. 59—62)	711—713
Settlement by way of Trust for Sale (sect. 63)	713
Repeals (sect. 64)	715
Ireland (sect. 65)	715

SETTLED LAND ACT, 1884 (47 & 48 Vict. c. 18). PAGE

Preliminary (sects. 1—3) 716
Fines (sect. 4); Notices to Trustees (sect. 5) 717
Consents and Powers under sect. 63 of Settled Land Act, 1882 (sects. 6, 7) 717, 718
Curtesy (sect. 8) 718

SETTLED LAND ACT, 1887 (50 & 51 Vict. c. 30).

Improvements include Rent-charges (sects. 1, 2) 719

SETTLED LAND ACT, 1889 (52 & 53 Vict. c. 36).

Option of Purchase in Building Leases 720

SETTLED LAND ACT, 1890 (53 & 54 Vict. c. 69).

Preliminary (sects. 1—3) 720
Definitions (sect. 4) 721
Exchanges (sect. 5); Contracts (sect. 6); Leases (sects. 7, 8) 721, 722
Mansion and Park (sect. 10) 723
Raising Money (sect. 11); Dealings between Tenant for Life and Estate (sect. 12) 723
Application of Capital Money (sects. 13—15) 723, 724
Trustees, &c. (sects. 16—18) 724, 725
Vacation of Writs or Orders affecting Land (sect. 19) 725

Rules and Appendix of Forms .. .. 725—734

CONFIRMATION OF SALES ACT (25 & 26 Vict. c. 108).

No Sale reserving Minerals, &c. shall be invalid on Ground that Power did not authorize Reservation (sect. 1) 735
Trustees may (with sanction of Court) sell Land or Minerals separately (sect. 2) 736

SALES OF REVERSIONS (31 Vict. c. 4).

Bonâ fide Purchase of Reversion not to be set aside on mere ground of Undervalue (sect. 1) 736

THE PARTITION ACT, 1868 (31 & 32 Vict. c. 40).

Court may direct Sale instead of Partition on request of any Party interested (sect. 3); and shall direct Sale on Request of Parties interested to extent of Moiety, unless good reason to contrary (sect. 4) .. .. 739—741
Provision as to Purchase of Share of Party desiring Sale (sect. 5); and bidding by Parties interested (sect. 6) 741, 742
Application of Provisions of Trustee Act, 1850, and Settled Estates Acts (sects. 7, 8) 742
Parties to Partition Suits (sect. 9); Costs (sect. 10); General Orders (sect. 11); and Jurisdiction of County Courts (sect. 12) .. 743—745

THE PARTITION ACT, 1876 (39 & 40 Vict. c. 17).

Notice of Judgment (sects. 3, 4); Successive Sales (sect. 5); Requests by Married Women, &c. (sect. 6); Application of Acts (sects. 2, 7) 746—748

TABLE OF CASES.

PAGE

Abbot *v.* Burton 359
——— *v.* Weekly 2, 5
Abd-ul-Messih *v.* Farra 401
A'Beckett, Ex parte 215
Abergavenny's (Lord) case .. 448
Abergavenny *v.* Brace 109, 114, 147, 255
——————— *v.* Straker .. 26, 27
Abington *v.* Lipscomb 105
Acason *v.* Greenwood, Re Grey .. 298
Acey *v.* Simpson 348
Ackroyd *v.* Smith 5, 63
Acton *v.* Blundell 67, 69
—— *v.* White 297
Adair, Re 644, 649
Adam *v.* Bristol 202
Adames, Re 330
Adams and Kensington, Re .. 570
——— Trusts, Re 518
———, Re (1887, W. N. 175) 496, 503
———, Re (23 Ch. D. 525) .. 321
——— *v.* Adams 251
——— *v.* Andrews 48
——— *v.* Barry 182
——— *v.* Clutterbuck 487
——— *v.* Gamble 297
——— *v.* Taunton 294
——— *v.* Waller 236
Adamson, Re 419
Addams *v.* Ferick 392, 552
Addington *v.* Clode 29
Adeane *v.* Mortlock 62
Adey *v.* Arnold 385
Adnam *v.* Sandwich 121
Affleck *v.* James 294
Agar *v.* Fairfax 740
Agg-Gardner, Re 570, 575
Ailesbury, Re 678, 701, 704, 706, 707, 722
Ainsley *v.* Ainsley 262
Ainsworth, Re 437
Airey *v.* Bower 429
Akerman *v.* Akerman 237
Albany's case 296
Albert & Co., Re 178
Alcock *v.* Moorhouse 490
——— *v.* Sparhawk 387
Alden *v.* Gregory 155
Alderson *v.* Elzey 589
——— *v.* White 160
Aldred's case 28, 99

PAGE

Aldrich *v.* Cooper 380, 381, 385, 386
Alexander, Re 438
——— *v.* Barnhill 329
——— *v.* Kirkpatrick .. 416
——— *v.* Mills 296
——— *v.* Wellington .. 257
——— *v.* Young 298
Alford, Re, Hunt *v.* Parry .. 609
Algeo, Re 292
Alison, Ex parte 192
———, Re, Johnson *v.* Mounsey. 160, 161, 167, 168
——— *v.* Frisby, Re Frisby 199, 230
Allan, Re, Havelock *v.* Havelock. 609
——— *v.* Gomme 29, 62
Allaway *v.* Oakeley, Re Powell .. 682, 685, 703, 711, 715
Allcard *v.* Skinner .. 158, 233
Allen and Cooper, Re 604
——, Re 431, 529
—— *v.* Allen (2 Dr. & War. 307) 242, 243
—— *v.* —— (30 Beav. 395) .. 395
—— *v.* —— (55 L. T. W. N. 220) 740
—— *v.* Cort, Re Harrison *Add.*
—— *v.* England 127
—— *v.* Heber 357
—— *v.* Maddock 410
—— *v.* Norris, Re Norris .. 602
—— *v.* Sayer 117
—— *v.* Seckham 94
—— *v.* Taylor 93
—— *v.* Walker 112
—— *v.* Williams 451
Alleyn *v.* Darcy 450
Allfrey *v.* Allfrey 233
Allgood *v.* Gibson 8, 23, 37
Alliance Bank *v.* Carey .. 203, 211
Alsop *v.* Bell 238
Alston, Re 143
——— *v.* Grant 80
——— *v.* Scales 66
——— *v.* Trollope 236
——— *v.* Wells 271
Ambler, Re 602
Ames *v.* Mannering 183
Amiss, Re 408
Amos *v.* Smith 207, 225
Amott *v.* Holden 109, 204
Ancaster *v.* Mayer .. 380, 392
Anderson's case 467

PAGE

Anderson, Re 306
——— *v.* Anderson (30 Beav. 207) .. 148, 172
——— *v.* ——— (13 Eq. 381) 410, 414, 435
——— *v.* Pignet 342, 493, 494, 495
Anderton and Milner, Re .. 588
Andrew *v.* Andrew 422
——— *v.* Cooper, Re Bowden 232, 553
——— *v.* Motley 416
——— *v.* Williams 202
Andrews, Ex parte 305
———, Re 649
——— *v.* Andrews, Re D'Angibau 313
——— *v.* Weall, Re Weall .. 556
——— *v.* Hailes 40
Angelo, Re .. 498, 499, 511, 517
Anglo-Italian Bank *v.* Davies 447, 477
Angus *v.* Dalton 46
Anon. *v.* Cooper 106
—— (Bridg. 10) 41
—— (2 Cas. Ch. 217) 238
—— (Dyer, 7) 448
—— (Hardr. 407) 2
—— (18 Ves. 258) 377
—— (2 Jur. 945) 305
—— (4 Leon. 207) 294
—— (13 L. J. 73) 527
—— (6 Mod. 149) 60
—— (2 Roll. R. 255) 57
—— (1 Ves. jun. 140) 78
Anstee *v.* Nelms 119
Anstis, Re, Chetwynd *v.* Morgan. 275
Anthony, Re, Anthony *v.* Anthony 393, 398, 452, 453
Antrim *v.* Buckingham 296
Apperley *v.* Hereford .. 165, 171
Appleton, In re 302
——— *v.* Rowley 350
——— *v.* Sturgis 471
Arabin, Re 663, 696
Arbib and Class, Re .. 518, 570
Arbuckle *v.* Cowtan 448
Arbuthnot *v.* Bunsilall .. 192, 459
Arcedeckne *v.* Kelk 97
Archbold *v.* Scully .. 114, 135, 149, 157, 186, 233
Archdale *v.* Anderson 577
Archer's case 488
Archer, Re 436
——— *v.* Leonard .. 220, 222
Arden, Re 521
——— *v.* Sullivan 487
Ardley *v.* St. Pancras 62
Ards *v.* Watkin 106, 546
Arkwright *v.* Gell .. 9, 68, 72
Arlett *v.* Ellis 39, 44
Armagh *v.* Attorney-General .. 165
Armit, Re 313
Armstrong, Settlement Re .. 518
Armstrong, Ex parte .. 512, 533
———, Re, Ex parte Boyd .. 337
———, Re, Ex parte Gilchrist .. 328, 329
——— *v.* Milburn .. 211, 214
Arnold *v.* Blaker 52

PAGE

Arnold *v.* Dixon 742
——— *v.* Gravesend 453
——— *v.* Hardwick 268
——— *v.* Holdbrook 52
——— *v.* Woodhams 299
Arnsby *v.* Woodward 125
Arrowsmith, Ex parte 89
———, Re (4 Jur. N.S. 1123) 500, 503
——— (6 W. R. 642) .. 540
Arthur, Re 437
Arundel *v.* Steer 36
Ash, Re 410
Ashburnham *v.* St. John 447
Ashby *v.* James 225
Asher *v.* Whitlock 118, 168, 402
Ashford *v.* Brooks, Re Hooper *Add.*
Ashley *v.* Freckleton 91
Ashlin *v.* Lee 205
Ashmore, Re 408
Ashton *v.* Stock 121
Ashwell, Re .. 108, 180, 187
——— *v.* Staunton 193
Ashworth *v.* Outram 318
Askew *v.* Woodhead 697
Aspinalls to Powell .. 570, 571
Aspden *v.* Seddon 26
Astley *v.* Essex 123, 124
——— *v.* Micklethwait 491
Aston, Re .. 411, 502, 521
——— *v.* Meredith 743
Atherton, Re 302, 677
Athill *v.* Athill 395
Atkins *v.* Hill 173
——— *v.* Shephard, Re Shephard 477
——— *v.* Tredgold 219, 229, 230
Atkinson, Re, Atkinson *v.* Bruce. 676, 677, 703, 704, 707, 710, 711
——— *v.* Bradford Society .. 216
——— *v.* Teesdale 43
A. G. *v.* Acton Board .. 75, 79, 80
—— *v.* Andrew 467
—— *v.* Barnsley .. 28, 72, 75, 99
—— *v.* Basingstoke 79
—— *v.* Biphosphated Guano Co. 50, 51
—— *v.* Birmingham 79
—— *v.* Brackenbury 428
—— *v.* Bradford Canal 80
—— *v.* Brewers' Co. 191
—— *v.* Bristol 153
—— *v.* Brunning 377
—— *v.* Caius College 191
—— *v.* Cambridge .. 26, 54
—— *v.* Chambers 85, 87
—— *v.* Christ's Hospital .. 153
—— *v.* Christchurch (3 Giff. 514) 647
—— *v.* ——— (2 Russ. 324) 191
—— *v.* Clerkenwell 80
—— *v.* Cockermouth .. 79, 80
—— *v.* Colney Hatch .. 79, 81
—— *v.* Coventry 153
—— *v.* Davey 153
—— *v.* Davis 153, 191
—— *v.* Day 272
—— *v.* Dorking 72, 80
—— *v.* Doughty 99
—— *v.* Dudley 235

	PAGE
A. G. *v.* Eardley	110
—— *v.* Edmunds	467
—— *v.* Emerson .. 37, 38,	84, 86
—— *v.* Ewelme Hospital ..	112
—— *v.* Exeter	191
—— *v.* Fishmongers' Co. ..	152
—— *v.* Flint	153
—— *v.* Gauntlett	16
—— *v.* Gee	79
—— *v.* Great Eastern Rail. Co...	74, 82, 320
—— *v.* Hackney	80, 81
—— *v.* Halifax	80
—— *v.* Hall	149
—— *v.* Horner	26, 29, 45
—— *v.* Hotham	112
—— *v.* Johnson	84
—— *v.* Jones	86
—— *v.* Kingston	79
—— *v.* Leeds	79, 80
—— *v.* Leonard	467
—— *v.* London	84
—— *v.* Lonsdale	70, 77, 84
—— *v.* Ludlow	192
—— *v.* Magdalen College	109, 149, 151, 153
—— *v.* Mathias	22, 24
—— *v.* Mid-Kent Rail. Co. ..	81
—— *v.* Nethercote	459
—— *v.* Newbury	191
—— *v.* Parsons	111
—— *v.* Payne	153
—— *v.* Persse	153
—— *v.* Poulden	153
—— *v.* Pretyman	191
—— *v.* Queen Anne's Co.	12, 94
—— *v.* Richmond	79
—— *v.* Sands	109, 467
—— *v.* Shrewsbury Co. ..	54, 80, 84
—— *v.* Smythies	153
—— *v.* Stafford	191
—— *v.* Stephens	131
—— *v.* Terry	77, 84
—— *v.* Thetford	456
—— *v.* Tomline .. 39, 40,	84, 86, 126
—— *v.* Wax Chandlers' Co. ..	191
—— *v.* Wilkinson	427
—— *v.* Windsor	402
—— *v.* Walthamstow	79
—— Straits Settlement *v.* Wemyss	86
Attwater *v.* Attwater	299
Attwood *v.* Taylor	192
Austen, Re	412, 520
Austin *v.* Amhurst ..	22, 23, 31
——— *v.* Bennet	105
——— *v.* Llewellyn	147
——— *v.* Martin	388
——— *v.* Mills	464
Averall *v.* Wade	454, 546
Avery *v.* Griffin ..	293, 295, 337
Avison *v.* Holmes ..	448, 450, 453
Axford *v.* Reid	322
Ayles *v.* Cox ..	514, 524, 530
Aylesford, Re ..	677, 698, 705
——— *v.* G. W. Rail. Co.	*Add.*
——— *v.* Morris ..	193, 738
Ayling, Re	409
Ayling *v.* Mercer	589
Aylwin, Re	297
Aynsley *v.* Glover 11, 46, 91,	94, 96, 97
Ayres *v.* Willis	348
Ayr Harbour Trustees *v.* Oswald.	7
Ayton *v.* Bolt	222
Bache, Re	521
Back *v.* Stacey	96
Backhouse *v.* Siddle	477
Bacon *v.* Ford, Re Kensington ..	462
Bacon's case	410
Badcock, Re	499, 504
Badger *v.* Ford	39, 42
Badham *v.* Morris	96
Baggett *v.* Meux	295, 298
Bagott *v.* Orr	38
Bahin *v.* Hughes	556
Baildon *v.* Walton	224
Baile *v.* Baile	215
Bailey, Re	407, 452, 478
——— *v.* Appleyard 2, 3, 4, 6,	14, 18
——— *v.* Bailey	387
——— *v.* Collett	551
——— *v.* Ekins	369
——— *v.* Frowan	409
——— *v.* Holmes, Re Ives ..	652
——— *v.* Jamieson	53
——— *v.* Icke	93
——— *v.* Stevens .. 3, 18,	37, 46
Bain *v.* Sadler	378
Baine, Ex parte	379
Baines *v.* Lumley 122, 131,	134, 135
Baird *v.* Fortune	58, 64
—— *v.* Williamson	81
Baird's case	553
Baker, Re, Collins *v.* Rhodes..	158, 233, 236
—— Re, Nicholls *v.* Baker ..	236, 383
—— *v.* Bradley	298
—— *v.* Brereman	23, 28
—— *v.* Child	91
—— *v.* Dewey	179, 259
—— *v.* Story	416
—— *v.* Tynte	455
—— *v.* Whetton	161
—— *v.* White	433
Baldwin *v.* Baldwin	180
Balfe *v.* Lord	163
Ballacorkish Co. *v.* Harrison	25, 69
Ball, Re, Slattery *v.* Ball.. ..	432
—— *v.* Cullimore	128
—— *v.* Harris .. 378,	388, 389
—— *v.* Herbert	85
—— *v.* Kemp-Welch	745
Ballard, Re, Lovell *v.* Forester ..	209, 237
——— *v.* Dyson	64
——— *v.* Tomlinson ..	70, 79
Balston *v.* Benstead	69
Baltic Co. *v.* Simpson	97
Bamfield *v.* Tupper ..	213, 224
Bamford *v.* Bamford ..	185, 343
——— *v.* Turnley ..	79, 100
Bampton *v.* Birchall	238
Banbury, Re	655

	PAGE
Bandy *v.* Cartwright	488
Bangham, Re	410, 427
Bankart *v.* Houghton	100
——— *v.* Tennant	48
Bankes *v.* Le Despencer ..	266, 268
——— *v.* Small .256; 268, 272, 274,	275
Banks *v.* Goodfellow	402
—— *v.* Heaven, Re Burton ..	609
Banner *v.* Berridge .. 150, 154, 181, 221, ...	234
Barber, Re .. 499, 500, 518, 656,	657
———, Re, Burgess *v.* Vinnicome	414
———, Re, Ex parte Stanford ..	583
——— *v.* Browne, Re Clerke ..	443
——— *v.* Shore	178, 204
Barclay *v.* Owen .. 162, 183, 184,	206
Bardin, Re	644
Baring *v.* Abingdon ..	*Add.*
——— *v.* Stanton	193
Barker, Re, Buxton *v.* Campbell ..	*Add.*
———, Re (58 L. T. 303) ..	504
———, Re (17 Ch. Div. 244) ..	742
——— *v.* Barker	179, 350
——— *v.* May	369
——— *v.* Perowne, Re Clarke ..	443
——— *v.* Richardson ..	12, 45, 71
Barker's Trusts, Re	518
Barking *v.* Read	44
Barkshire *v.* Grubb	59
Barkworth *v.* Young	433
Barlow *v.* Browne	173
——— *v.* Rhodes	41, 59
——— *v.* Ross	96
——— *v.* Teal	133
Barnes *v.* Loach	93, 94
——— *v.* Mawson	39
——— *v.* Thrupp	454
——— *v.* Vincent	406
——— *v.* Wood	293
Barnett, Re	534
——— *v.* Cox	239
Barnwell *v.* Ironmonger	393
Barraclough *v.* Johnson ..	50, 51, 52
Barrett *v.* Birmingham	185
Barrington, Re	554
——— ——— *v.* Evans	149
——— ——— *v.* Searle	208
Barrow's case	193
Barrow *v.* Barrow	293, 312
——— *v.* Isaacs	589
Barrs-Haden, Re ..	649, 678, 708
Barry *v.* Lowry	61
Bartholomew, Re	319
Bartlett, Ex parte	166
Barton *v.* Barton	746
——— *v.* Briscoe	298
——— *v.* North Staffordshire R. Co.	210
Barwick *v.* Matthews	42
Bass *v.* Gregory	7, 46, 99
—— *v.* Welsted	494
Bassett *v.* Knollys	740
——— *v.* Moxon	516
Bastard *v.* Smith	74
Batchelor, Re, Sloper *v.* Oliver ..	316
——— *v.* Middleton	160
——— *v.* Yates, Re Yates ..	593

	PAGE
Bate *v.* Bate	380, 381
Bateman, Re	90
——— *v.* Bateman	385
——— *v.* Bluck	49
——— *v.* Pinder	219
Baten's case	72
Bates *v.* Brothers	447, 453
—— *v.* Hillcoat	454
Bateson *v.* Green	39, 40
Bath *v.* Bradford	369
Batho, Re	500, 502
Batt *v.* Cuthbertson	297
Battersby *v.* Kirk	145, 208
Batthyany *v.* Walford	202
Battishill *v.* Reed	9
Battley *v.* Faulkner	212
Batton *v.* Gedge .. 23, 49, 54, 62,	67
Baxendale *v.* De Valmer	411
——— *v.* M'Murray ..	72, 75
Baxter, Re	512, 533
——— *v.* Bower	98, 99
——— *v.* Portsmouth	384
——— *v.* Taylor	51, 66
Bayley *v.* G. W. R. Co. ..	9, 58, 59
Baylis *v.* Bower	98, 99
——— *v.* Tyssen-Amhurst ..	33
Bayly *v.* Went	596
Baynall *v.* Carlton	455
Beadsworth *v.* Torkington	18, 35, 43
Beale *v.* Symonds	378
Bealey *v.* Shaw	68, 70, 73
Beally *v.* Greenslade	224
Beaman *v.* Kinsella	38
Beamish *v.* Stephan	477
——— *v.* Sutton ..	516, 532, 742
Bean *v.* Bloom	23, 31, 36
Beardman *v.* Wilson	106
Beardmore *v.* Tredwell	100
Beasley *v.* Clark	17
——— *v.* Roney	326, 330
Beasney's Trusts, Re	142
Beaudely *v.* Brook	60
Beaufort *v.* Phillips	460
——— *v.* Swansea	86
Beaumont, Re ..	698, 704, 737
Beaupré, Re	330
Beavan, Re	420
——— *v.* Oxford .. 448, 453, 457,	462
Beck, Re	689, 707
—— *v.* Pierce 212, 214, 226, 233,	335
—— *v.* Welch	270, 284
Beckett *v.* Buckley ..	447, 478
——— *v.* De la Cour	162, 183, 184
——— *v.* Howe	408
——— *v.* Leeds	55
——— *v.* Sutton ..	516, 532, 742
——— *v.* Tasker	328, 337
Beckford *v.* Wade ..	150, 155, 234
Beckley *v.* Newland	257
Beddall *v.* Maitland	119
Beddingfield *v.* Onslow	77
Beddington *v.* Atlee ..	93, 577
Bedford *v.* British Museum ..	98
——— *v.* Dawson	96
——— *v.* Forbes	461
Beeching *v.* Morphew	236
Beere *v.* Hoffmeister	269

	PAGE
Beeston *v.* Weate ,,	..6, 10, 72, 73
Begbie *v.* Crook ..	 294
Beggan *v.* Macdonald	 9
Beioley *v.* Carter ..	644, 654, 658
Belaney *v.* Belaney	 493
Belbin *v.* Skeats ..	 409
Belch *v.* Smith ..	 64
Belcher *v.* Williams	 745
Belchier, Ex parte	 556
Belfast Co. *v.* Boyd	.. 74, 77
Bell, Re, Carter *v.* Stadden	456, 457
——, Re, Lake *v.* Bell ..	209, 235
—— *v.* Bell.. ..	.. 150, 152
—— *v.* Fothergill ..	 417
—— *v.* Holtby ..	 266
—— *v.* Love ..	 25
—— *v.* Midland Rail. Co.	48, 66
—— *v.* Nangle ..	 132
—— *v.* Quebec ..	.. 82, 83
—— *v.* Stocker ..	 323
—— *v.* Twentyman	 77
Bellamy, Re.. ..	 570
——, Re, Elder *v.* Pearson ..	326
—— and Metropolitan Board, Re ..	.. 583, 615
—— *v.* Sabine	 465
—— *v.* Wells ..	 100
Bellis, Re	 387
Belt, Re	 657
Bence *v.* Gilpin ..	.. 294, 404
Bench *v.* Biles ..	 387
Bending *v.* Bending	 346
Bendyshe, Re ..	 300
Benett *v.* Costar ..	 37
Benham *v.* Keane ..	453, 461, 462
Benjamin *v.* Storr ..	 54
Bennet *v.* Davis ..	.. 305, 351
Bennett *v.* Barnard	 237
—— *v.* Cooper ..	 180
—— *v.* Harfoot ..	 373
—— *v.* Lytton ..	.. 391, 552
—— *v.* Reeve ..	.. 32, 35
—— *v.* Sharp ..	 409
Bennison *v.* Cartwright ..	.. 15
Benshaw, Re ..	 518
Bensley *v.* Burdon	 259
Benson *v.* Benson ..	.. 418, 435
—— *v.* Chester ..	 33
—— *v.* Maude ..	 182
—— *v.* Scott ..	 343
Bentley, Re, Wade *v.* Wilson ..	699, 702, 711, 712
Benton, Re, Smith *v.* Smith	.. 298
Berkeley *v.* Hardy	 489
Berkley *v.* Berkley	 520
Berens *v.* Fellowes	 360
Beridge, Re ..	 276
Bermingham *v.* Burke	 237
Bermondsey Vestry *v.* Brown	51, 52, 54
Bernard *v.* Minshull	405, 406, 429
Berney *v.* Bickmore	 40
Berridge *v.* Ward ..	 55
Berrington *v.* Evans	 237
—— *v.* Phillips	 192
—— *v.* Scott	 261
Berry *v.* Berry ..	 433
—— *v.* Gibbons..	 465

	PAGE
Bessell *v.* Lansberg ..	 133
Best *v.* Standeven ..	 426
Beswick *v.* Orpen ..	.. 236, 384
Bethell *v.* Bethell ..	.. 213, 224
Bethlem Hospitals, Re	692, 696, 703
Betts *v.* Thompson	.. 39, 40, 44
Bevan, Re	.. 109, 413
—— *v.* Gething..	 225
—— *v.* London Portland Cement Co.	.. *Add.*
Bewley *v.* Atkinson	 13
Beyfus and Masters, Re ..	570, 571
—— *v.* Bullock ..	 465
Beynon, Re ..	 220
—— *v.* Cook ..	 738
Bibb *v.* Thomas ..	 420
Bickerton *v.* Walker ..	259, 614
Bickett *v.* Morris ..	 85
Bickley *v.* Bickley ..	.. 356, 358
—— *v.* Guest ..	 296
Bicknell, Re ..	 655
Bidder *v.* North Staffordshire R. Co.	 63
Biddle, Re	 501
Biederman *v.* Seymour ..	.. 358
Biggs *v.* London ..	 53
—— *v.* Peacock ..	 740
Bignold, Re ..189, 518, 519, 521	
—— Re, Bignold *v.* Bignold.	348
Bilke *v.* Roper, Re Smith..	406, 407, 421, 435
Billing *v.* Brogden, Re Brogden..	520, 602
—— *v.* Webb ..	 300
Binckes *v.* Pash ..	 95
Bingham's case ..	 358
Binks *v.* Rokeby ..	 391
Binns *v.* Nichols ..	 180
Birch, Re, Roe *v.* Birch ..	233, 236
—— *v.* Cropper ..	 520
—— *v.* Wright ..	.. 131, 132
Birch Wolfe *v.* Birch ..	149, 234
Birchall, Re, Birchall *v.* Ashton..	294, 602
Bird *v.* Barstow ..	 327
—— *v.* Christopher	 296
—— *v.* Gammon ..	.. 219, 220
—— *v.* Higginson..	.. 47, 487
—— *v.* Kirkby ..	 124
—— *v.* Wenn ..	 590
—— *v.* Wright ..	 129
Birkett *v.* Morris ..	 77
Birley *v.* Birley ..	 268
Birmingham, Re ..	 195
—— *v.* Kirwan ..	 346
—— Banking Co. *v.* Ross	93, 578
—— Canal Co. *v.* Lloyd.	78
Birt, Re	.. 419, 437
Biscoe *v.* Kennedy	 322
Bishop of Bristol, Re	 448
Bishop of Sarum, Re	 523
Bishop, Re	 408
—— *v.* Bishop ..	 340
—— *v.* Colebrooke	 316
—— *v.* Curtis ..	 402
—— *v.* De Burgh ..	 289

	PAGE
Bishop *v.* Howard	132
—— *v.* Wall	406
Bishop's Waltham R. Co., Re	479
Bissett *v.* Burgess	382
Bithray, Re	479
Bizzey *v.* Flight	411
Blachford *v.* Worsley	180, 182, 189, 200
Black *v.* Homersham	443
—— *v.* Jobling	418
Blackburn, Re	429
—— *v.* Somers	72, 73
Blackett *v.* Bradley	25
Blackmur *v.* Blackmur	301
Blackwood *v.* The Queen	382, 401
Blagrave *v.* Bristol Waterworks Co.	53
Blaiklock *v.* Grindle	406
Blaine, Re	511
Blair *v.* Bromley	214, 232, 233
—— *v.* Cordner	459
—— *v.* Deakin	79
—— *v.* Nugent	181, 184
—— *v.* Ormond	149, 204, 207
Blake, Ex parte	318
——, Re	177, 517, 602
—— *v.* Blake	242, 408, 422
—— *v.* Gale	156, 227, 233, 236
—— *v.* Gale, Re Gale	211
—— *v.* Hynes	355
—— *v.* Usborne	87, 89
Blakeley Ordnance Co., Re	456
Blakemore *v.* Glamorganshire Canal Navigation	78
Blaker *v.* Herts. Co.	593, 598
Blanchard, Re	519, 522, 525
—— *v.* Blanchard	47
—— *v.* Bridges	47, 92, 93, 94
Bland *v.* Davidson	238
—— *v.* Dawes	297
—— *v.* Lipscombe	37
Bleckley, Re	418
Blennerhasset *v.* Day	155
Blewitt, Re	261, 276, 408, 420
—— *v.* Tregonning	2, 3, 23, 45, 46
Blight *v.* Hartnoll	425
Bliss *v.* Collins	546
—— *v.* Hall	99
Blofield *v.* Payne	43
Blogg *v.* Johnson	193
Blomfield *v.* Eyre	190
Blood *v.* Keller	48
Bloomar, Re	516
Bloomfield *v.* Johnston	37, 38
Bloor *v.* Davis	368
Blosse *v.* Clanmorris	255
Blount *v.* Layard	37, 38, 82, 85
Blower *v.* Blower	189
—— *v.* Morrett	348
Bloxam *v.* Favre	402, 438
Blundell *v.* Catterall	52, 86
Blunden *v.* Baugh	134
Blyth and Young, Re	571
Boaley *v.* Holder	154
Board *v.* Board	118
Boatwright *v.* Boatwright	216, 226
Bobbett *v.* S. E. R. Co.	121, 194
Boden, Re	508
Bodger *v.* Arch	225
Bodkin, Re	178
Boehm *v.* Wood	150
Boldero *v.* Halpin	182, 238
Bolding *v.* Lane	184, 187, 189
Bolitho *v.* Hillyar	315
Bolling *v.* Hobday	117, 137, 167
Bolton, Re	384, 411, 657, 689, 696, 710
—— *v.* Bolton	59, 60, 313, 430
—— *v.* School Board for London	567
—— *v.* Stannard	388
—— *v.* Tomlin	132
—— *v.* Ward	486
Bond *v.* Freke	589
—— *v.* Kent	178
—— *v.* Rosling	486
Bonifant *v.* Greenfield	294
Bonner *v.* G. W. R. Co.	13, 92
—— *v.* Lyon	328
—— *v.* Wilkinson	258
Bonny *v.* Ridgard	150
Bonomi *v.* Backhouse	211
Bonsor and Smith, Re	125
Boote *v.* Dalton, Re Percival	416
Booth, Re	302
—— *v.* Alcock	92
—— *v.* Leicester	192
—— *v.* Purser	160
—— *v.* Ratte	84
—— *v.* Smith	547
—— *v.* Warrington	233
Boothby *v.* Bailey	90
—— *v.* Vernon	350
Bootle *v.* Blundell	369
Boreham *v.* Hall	100
Borrows *v.* Ellison	141
Bostock *v.* Floyer	556
—— *v.* Smith	343
Boswell *v.* Coaks	459
—— *v.* Gurney, Re Summers	194
Boteler *v.* Allington	166
Botham *v.* Gregg	166
Bothamley *v.* Sherson	392, 423, 425
Bothe *v.* Crampton	173
Boughton, Re	652
Boulcott *v.* Boulcott	421
—— *v.* Winmill	39
Bourdin *v.* Greenwood	221
Bourke, Re	511, 524, 525
—— *v.* Alexandra Co.	18, 97
—— *v.* Davis	25, 49, 82
Boulton, Re	554
Boury *v.* Pope	95
Bowden, Re, Andrew *v.* Cooper	232, 553
—— *v.* Layland, Re Marsden	236
—— *v.* Henderson	142
Bowen, Re, James *v.* James	326, 405
—— *v.* Barlow	422
—— *v.* Brecon R. Co.	448
—— *v.* Jenkins	33, 43
Bower *v.* Hill	95
Bowes, Re, Strathmore *v.* Vane	236
—— *v.* Bute	745
Bowles *v.* Hyatt, Re Hyatt	211, 236, 366, 378, 379, 380
Bowman, Ex parte	656

	PAGE
Bowman *v.* Taylor	258
Bowmer, Re	517
Bown, Re	298
—— Re, O'Halloran *v.* King ..	298
Bowra *v.* Wright	373, 516
Bowyer, Re	697
—— *v.* Woodman ..	179, 187
Box, Re	554
—— *v.* Tubb	81
Boyce, Re	500
—— Re, Crofton *v.* Crofton ..	214
Boycott, Re	520
Boyd, Ex parte	328, 337
——, Re	646
—— *v.* Allen	740
—— *v.* Pawle	280
Boyer *v.* Norwich	166
Boyes *v.* Cook	429
Boyle *v.* Peterborough	268
—— *v.* Tamlyn	80
Brabin *v.* Tradum	90
Brace, Re, Welch *v.* Colt ..	429
Bracegirdle *v.* Peacock	54
Bracken, Re, Doughty *v.* Townson	554
Brackenbury, Re	520, 529
Bradburn *v.* Foley	25
—— *v.* Morris	64
Bradbury *v.* Grinsell	71
—— *v.* Wright	106
Braddock, Re	409
Brader *v.* Kirby	533
Bradley, Re	499
—— *v.* Heath	173
—— *v.* James	225
—— *v.* Munton	530
—— *v.* Peixoto	299
Bradshaw, Ex parte	499, 510, 511
——, Re	496
—— *v.* Eyr	42
—— *v.* Toulmin	143
Bradstock *v.* Scovel	257
Braithwaite *v.* Britain	230
—— *v.* Skinner	174
Brakespeare *v.* Innes	468
Branch *v.* Browne	374
Brandon *v.* Robinson	299
Brangwin *v.* Parrot	193
Brass, Re	496, 511
Brassington *v.* Llewellyn.	160, 168, 244
Braunstein *v.* Lewis ..	326, 328
Bray *v.* Stephens	387, 388
—— *v.* Tofield, Re Greaves	232, 237
Braybrooke *v.* Inskip	389
Braythwayte *v.* Hitchcock	127, 132
Breach, Ex parte	154
Brealy, Re	663
Brearcliff *v.* Dorrington	457
Breary, Re	503
Brecon Co. *v.* Neath Co. ..	27, 28
Breeds, Re	555
Bremer *v.* Freeman	402
Bremner *v.* Hull	25
Brenchley *v.* Still	407, 409
Brent *v.* Haddon	80
Brentnall, Re	520
Brentwood Co., Re	179

	PAGE
Brereton *v.* Edwards	450, 456, 457
Brett *v.* Beales	27
—— *v.* Clowser	59
Brettle, Re	298
Brewer *v.* Square	597, 598
Brewster, Re	418
Brian *v.* Winwood	118
Briant, Re, Poulter *v.* Shackel ..	316
Brice *v.* Stokes	157
Bridge and Macrae, Re	569
—— *v.* Branch	464
—— *v.* Quick	*Add.*
Bridger, Re	405
—— *v.* Deane, Re Deane ..	269
Bridges *v.* Hinton	38
—— *v.* Hinxman	379
—— *v.* Longman	389
Bridgman, Re	518
Bridgman *v.* Gill	209
Bridgwater *v.* Bootle-cum-Linacre	86
Brier, Re, Brier *v.* Evison ..	556
Briggs *v.* Chamberlain ..	243, 292
—— *v.* Wilson	225, 236
Bright *v.* Larcher	182, 387
—— *v.* Legerton	233
—— *v.* North	82
—— *v.* Walker ..	8, 9, 19, 20, 45, 46
Brighton *v.* Brighton Guardians ..	121, 126, 194
Brigstock *v.* Smith	222
Bringloe, Re	427
—— *v.* Goodson ..	258, 259
Briscoe *v.* Drought	69
Bristed *v.* Wilkins	457
Bristol, Re	443
Bristow *v.* Booth ..	404, 496, 514
—— *v.* Cormican ..	38, 85, 120
British Mutual Co. *v.* Smart	370, 379
British Museum *v.* Finnis ..	50
Brittlebank *v.* Goodwin	235
Brittledon, Re	339
Britton *v.* Wade	166
Broadbent *v.* Groves ..	179, 398
—— *v.* Ramsbottom	68
—— *v.* Wilks	24
Broadwater, Re ..	692, 693, 701, 704
Broadwood, Re ..	289, 657, 662
Brocklehurst *v.* Jessop ..	183, 225
Broder *v.* Saillard	96, 100
Brogden, Re, Billing *v.* Brogden ..	520, 602
Brompton, Re	437
Brook, Ex parte	492
—— *v.* Archer	10, 15
—— *v.* Brook	431, 520
—— *v.* Hertford	739
—— *v.* Smith	374
—— *v.* Willet	18
Brooke, Re, Brooke *v.* Rooke ..	387
—— *v.* Haynes	258
—— *v.* Kent	420
Brooking, Re	290
Brooksbank *v.* Smith	155, 156, 233
Broome *v.* Swan	245
Browell *v.* Reed	294

	PAGE
Brown, Re (18 Ch. Div. 61)	.. 405
——— (1 K. & J. 521)	.. 426
——— (50 L. T. 373)	.. 501
——— (27 Ch. D. 179)	685, 698, 707, 723, 726
——— (11 W. R. 19)	.. 737
——— and Sibley, Re ..	.. 244
Brown *v.* Alabaster ..	.. 59
——— *v.* Bamford ..	298, 456
——— *v.* Best	.. 75
——— *v.* Blake	270, 271
——— *v.* Brown	.. 416
——— *v.* Cross	.. 157
——— *v.* Gordon	227, 230
——— *v.* Howard	.. 212
——— *v.* Joddrell	.. 384
——— *v.* Lynch	.. 237
——— *v.* Mallett	77, 84
——— *v.* Morgan	.. 327
——— *v.* Newall	.. 238
——— *v.* Pocock	.. 298
——— *v.* Raindle	.. 343
——— *v.* Russell	.. 28
——— *v.* Rutherford, Re Rutherford	.. 214
——— *v.* Shuker	.. 371
——— *v.* Weatherby ..	.. 379
Browne's (Lady) case ..	.. 72
Browne *v.* Collins	698, 699
——— *v.* Cork (Bishop of)	.. 160
——— *v.* Hammond ..	.. 434
Browning *v.* Beston ..	.. 124
Brownlow *v.* Tomlinson ..	.. 57
Brownson *v.* Lawrance ..	.. 394
Bruce, Ex parte	.. 306
—— *v.* Ailesbury ..	*Add.*
Brumfitt *v.* Roberts ..	6, 89
Brummell *v.* Macpherson	.. 545
Brumridge *v.* Brumridge ..	.. 555
Brune *v.* Thompson ..	.. 112
Brunskill *v.* Caird	.. 656
Brunt, Re	.. 518
——— *v.* Brunt	.. 417
Brunton *v.* Hall	18, 57
——— *v.* Neale	.. 448
Bryan *v.* Clay	.. 382
——— *v.* Cowdal	.. 168
——— *v.* Whistler ..	6, 48, 91
——— *v.* White	.. 409
Bryant and Barningham, Re	570, 678
——— *v.* Foot	26, 46
——— *v.* Lefever	7, 99
Bryce, Re	.. 407
—— *v.* Bury	.. 272
Brydges *v.* Brydges ..	.. 271
Buccleuch *v.* Eden ..	213, 222
——— *v.* Metropolitan Board of Works ..	.. 68
——— *v.* Wakefield ..	.. 25
Buchanan *v.* Harrison ..	358, 362
Buck *v.* Robson	203, 385
Buckell *v.* Blenkhorn ..	.. 411
Buckingham *v.* Drury ..	341, 342
Buckland *v.* Pocknell ..	.. 179
Buckler's case	.. 115
Buckley, Re	.. 609
——— *v.* Buckley	395, 397

	PAGE
Buckley *v.* Coles	.. 61
——— *v.* Howell	.. 736
——— *v.* Nightingale ..	.. 370
Buckmaster *v.* Buckmaster	.. 313
——— *v.* Russell ..	219, 222
Buckton *v.* Hay, Re Ridley	.. 298
Buckworth *v.* Simpson ..	.. 132
——— *v.* Thirkel ..	.. 350
Budding *v.* Murdoch ..	.. 18
Bulkeley *v.* Eglinton ..	.. 520
Bull *v.* Faulkner	.. 454
Bullard *v.* Harrison ..	60, 64, 80
Bullers *v.* Dickinson ..	.. 94
Bullis *v.* Jones, Re Jones	.. 700
Bullock *v.* Bennett ..	.. 425
Bulteel *v.* Plummer ..	.. 269
Bunting *v.* Marriott ..	.. 552
——— *v.* Sargent ..	131, 168
Burden *v.* Kennedy ..	.. 450
Burdick *v.* Garrick ..	193, 209, 210, 215, 235
Burge, Re, Gillard *v.* Lawrenson	174, 235
Burgess, Re	342, 520
——— *v.* Northwick ..	.. 57
——— *v.* Vinnicome, Re Barber	.. 414
——— *v.* Wheate	.. 109
Burgoyne *v.* Showler ..	.. 409
Burke *v.* Gore	697, 699
——— *v.* Jones	.. 235
Burleigh *v.* Stott	.. 229
Burn *v.* London and S. Wales Co.	590
Burnell *v.* Burnell ..	190, 743
Burnet *v.* Man	.. 362
Burnett, Re	.. 554
——— *v.* Lynch	.. 488
Burnley, Re	652, 655
Burns *v.* Irving	.. 455
Burrell *v.* Egremont ..	.. 180
——— *v.* Maxwell ..	.. 529
——— *v.* Smith	.. 378
Burridge *v.* Bradyl ..	.. 348
Burroughs, Lynn and Sexton, Re	569
——— *v.* M'Creight	137, 140, 152
Burrowes *v.* Gore	.. 181
Burrows *v.* Baker	.. 222
——— *v.* Holley	.. 460
Bursill *v.* Tanner	327, 328
Burt, Re	.. 530
—— *v.* Arnold, Re Jeffery	.. 609
—— *v.* Gray	.. 589
—— *v.* Victoria Co. ..	26, 70, 85
Burton, Re, Banks *v.* Heaven	.. 609
——— *v.* Barclay	.. 492
——— *v.* Newbery	414, 419, 421, 435
——— *v.* Revell	.. 487
Busby *v.* Chesterfield Co.	.. 82
——— *v.* Seymour ..	.. 380
Busfield, Re	.. 653
Bush *v.* Cowan	.. 428
—— *v.* Martin	.. 223
—— *v.* Trowbridge ..	.. 82
—— *v.* Western	.. 78
Bushby *v.* Dixon	134, 362
Butcher *v.* Kemp	.. 346
Bute, Re	505, 523
—— *v.* Cunynghame ..	.. 395

	PAGE
Butler, Re	150, 289, 316
—— and Baker's Case ..	.. 293
—— *v.* Butler ..	326, 328, 329, 334, 426
—— *v.* Carter	.. 235
—— *v.* Cumpston ..	.. 319
Butlin, Re	.. 319
Butt *v.* Imperial Gas Co.	 99
Buttanshaw *v.* Martin ..	.. 265
Buttery *v.* Robinson ..	.. 107
Buxton *v.* Bateman ..	.. 90
—— *v.* Campbell, Re, Barker	*Add.*
Buzzard *v.* Capel	6, 107
Byerley *v.* Windus ..	.. 89
Byng, Re	676, 688
Byram *v.* Tull, Re Dixon	.. 326
Byrd, Re	.. 407
Byrne *v.* Frere	.. 155
Byron's Charity	.. 696
Byron, Re, Williams *v.* Mitchell	.. 427
—— *v.* Cooper	.. 149
C.'s Settlement, Re ..	.. 605
Cadbury *v.* Smith	181, 235
Cadge, Re	.. 419
Cadman *v.* Cadman ..	453, 477
Cahill *v.* Cahill	.. 293
Caine, Re	295, 304, 305
Calcraft *v.* Roebuck ..	.. 192
—— *v.* Thompson ..	.. 98
Caledonian R. Co. *v.* Carmichael	.. 191
Calland *v.* Troward ..	.. 166
Callaway, Re	.. 411
Calliope (the)	.. 84
Calne R. Co., Re	.. 479
Calver *v.* Laxton, Re Jones	.. 384
Calvert *v.* Thomas	.. 593
Cambrian R. Co., Re ..	.. 479
Camden *v.* Murray ..	.. 652
Cameron, Re, Nixon *v.* Cameron	387
Campbell, Re (1888, W. N. 176)	499, 518
——, Re (18 L. T. 202)	.. 500
——, Re (31 Beav. 176)	.. 520
—— *v.* Campbell ..	.. 384
—— *v.* Graham ..	.. 180
—— *v.* Lang	.. 49
—— *v.* Sandys ..	.. 242
—— *v.* Wilson ..	27, 45, 61
Canham, *v.* Fisk	29, 70, 93
Cannon *v.* Johnson ..	.. 745
—— *v.* Pack	.. 386
—— *v.* Rimington ..	123, 147
—— *v.* Villars	.. 62
Cantrell, *v.* Stephens ..	.. 61
Cape *v.* Scott	34, 43
Capel's case	.. 270
Capel *v.* Girdler	.. 271
Caplin, Re	.. 427
Capron *v.* Capron	.. 443
Carbery *v.* Preston ..	.. 180
Carburton, Re	.. 305
Cardigan *v.* Armitage ..	.. 57
—— *v.* Curzon-Howe	674, 677, 678, 686, 689, 703, 704, 706, 707, 710
Cardinall *v.* Molyneux ..	.. 91
Cardos, Re	.. 455
Carleton *v.* Hutton ..	.. 91
—— *v.* Leighton ..	.. 257
Carlisle *v.* Graham ..	.. 37
—— *v.* Towns	.. 280
Carlyon *v.* Lovering ..	7, 74
—— *v.* Truscott ..	391, 644
Carmarthen *v.* Hawson ..	.. 386
Carnarvon *v.* Villebois ..	.. 30
Carnegie *v.* Carnegie ..	.. 297
Carpenter, Re	499, 530
—— *v.* Buller ..	.. 259
Carr, Re	645, 649
—— *v.* Benson	.. 48
—— *v.* Foster	14, 15
—— *v.* Griffith, Re Griffith	443, 445
—— *v.* Lambert	32, 33, 43
—— *v.* L. & N. W. R. Co.	.. 258
—— *v.* Singer	.. 277
Carrill *v.* Pack	.. 41
Carrington *v.* Roots ..	.. 49
Carroll *v.* Darcy	.. 237
—— *v.* Hargrave ..	180, 235
Carruthers *v.* Carruthers	.. 342
Carstairs *v.* Taylor ..	.. 81
Carter, Re (1885, W. N. 184)	.. 211
—— Re (9 C. B. N. S. 701)	.. 302
—— *v.* Haswell ..	.. 425
—— *v.* Hughes ..	.. 448
—— *v.* Murcot	.. 85
—— *v.* Sanders ..	.. 370
—— *v.* Sebright ..	.. 529
—— *v.* Silber	312, 313
—— *v.* Stadden, Re Bell	456, 457
Cartwright v. Last ..	94, 97
Cary *v.* Stephenson ..	.. 125
Casberd *v.* Ward	.. 467
Casborne *v.* Scarfe ..	.. 251
Case *v.* Midland R. Co. ..	.. 83
Casmore, Re	.. 437
Cass *v.* Wood	.. 740
Cassidy *v.* Firman ..	.. 224
Casson *v.* Dade	.. 409
Castle *v.* Fox	423, 424
—— *v.* Gillett	.. 388
—— *v.* Wilkinson ..	.. 293
Castle Sterry, Re	.. 521
Castleton *v.* Fanshaw ..	.. 236
Cathrow *v.* Eade	.. 454
Catley *v.* Sampson ..	.. 380
Cattell *v.* Corrall	264, 273
Caudery *v.* Finnerty ..	.. 459
Cave, Re, Mainland *v.* Cave	*Add*
—— *v.* Cave	.. 429
—— *v.* Harris	423, 424
Cavey *v.* Ledbitter ..	.. 100
Cawkwell *v.* Russell ..	.. 76
Cawley *v.* Furnell	.. 222
Cecil *v.* Langdon ..	517, 602, 682, 711
Cecil's case	.. 467
Cetti *v.* Bartlett	.. 461
Chad *v.* Tilsed	.. 86
Chaddick, Re	.. 662
Chadwick *v.* Broadwood ..	.. 135
—— *v.* Holt	455, 460

	PAGE
Chadwick *v.* Marsden	74
——— *v.* Turner	568
Chalk *v.* Wyatt	78
Challoner *v.* Marshall	277
Chalmer *v.* Bradley	152
Chalmers *v.* Storil..	347
Chamber, &c. Co. *v.* Hopwood	9, 72
Chamberlain, Ex parte	197
——— Re	644, 653
——— *v.* Drake	124
Chambers, Re	647, 650
——— *v.* Kingham	271
Chamney, Re	409
Champernoon *v.* Williams ..	271
Champion, Re, Dudley *v.* Champion	424, 435
——— *v.* Rigby	235
Champneys *v.* Burland ..	477, 478
Chandler *v.* Pocock	428
——— *v.* Thompson ..	94, 99
Channell *v.* Ditchburn	229
Chaplin *v.* Chaplin..	254, 368, 372
——— *v.* Leroux	357
Chapman *v.* Auckland Union	79, 80
——— *v.* Corpe..	160
——— *v.* Cripps	51
——— *v.* Jones	90
——— *v.* Tanner	178
——— & Hobbs, Re	618
Chappell *v.* Rees	189
Chapple *v.* Durston	209
Charlemont *v.* Spencer	405
Charles *v.* Andrews ..	178, 342
——— *v.* Burke	429
——— *v.* Finchley Board.. ..	80
Charlewood *v.* Hammer	597
Charlton *v.* Durham	181
——— *v.* Low	211
Charman, Ex parte	191
Charter *v.* Charter	379
——— *v.* Trevelyan	155
Chasemore *v.* Richards ..	7, 69, 70
——— *v.* Turner ..	219, 221
Chatfield *v.* Berchtoldt	405
Chatterton *v.* Watney	477
Chauncey, Re	500, 518
Chawner, Re 389, 555,	680, 681, 707
Chaytor, Re ..678,	688, 704, 708
Cheese *v.* Cheese	374
Cheesman *v.* Hardham	43
Cheetham *v.* Hampson	80
Chell, Re	500
Chellew *v.* Martin..	431
Cheney *v.* Hall	270
Cherrington *v.* Abney	94
Chesalyn *v.* Dalby	220
Chesterfield's case..	255
Chesterfield *v.* Jansen	738
Chetham *v.* Hoare.. ..	154, 155
Chetwynd *v.* Morgan, Re Anstis..	275
Chichester *v.* Hall..	105
Chilcott, Re	655
Childs *v.* Monins	173
Chilton *v.* London 3, 24, 25, 31,	37, 112
Chinnery *v.* Evans 162, 182, 183, ...	184, 189
Cholmeley *v.* Paxton ..	548, 736

	PAGE
Cholmondeley, Re..	654
——— *v.* Clinton 134, 149,	358
Christ Church Act .. 23, 24,	31
Christ's Hospital *v.* Grainger ..	153
Christian, Re	408
——— *v.* Devereux	180
——— *v.* Whitaker, Re Whitaker	337
Christie *v.* Fonsick	213
——— *v.* Ovington	567
——— *v.* Van Tromp	598
Christmas *v.* Whinyates ..	417, 418
Christopher *v.* Sparke	177
Chubb *v.* Stretch	322
Church *v.* Edwards	262
——— *v.* Wright	43
Churcher *v.* Martin 118, 121,	151, 152
Churton *v.* Frewen ..	89, 90
Clagett, Re	459
Clanricarde *v.* Henning	235
Clare Re	304
—— *v.* Wood	453
Claridge, Re	408
Clark's case..	407
Clark, Ex parte	479
—— Re	293
—— Re, Maddick *v.* Marks ..	429
—— *v.* Alexander ..	218, 225
—— *v.* Clark	293, 424
—— *v.* Elphinstone ..	120, 174
—— *v.* Henderson	187
—— *v.* Hooper	226
—— *v.* London School Board ..	96
—— *v.* Royle	178
—— *v.* Somersetshire	75
Clarke, Re	298, 407
——— Re, Barker *v.* Perowne ..	443
——— *v.* Abingdon	193
——— *v.* Chamberlain ..	262, 266
——— *v.* Clark	97
——— *v.* Clarke ..	146, 168, 402
——— *v.* Cogg	60
——— *v.* Franklin ..	347, 349
——— *v.* Green	317
——— *v.* Mercer	39
——— *v.* Pannell	597
——— *v.* Royal Panopticon ..	389
——— *v.* Scripps	417
——— *v.* Smith	357
——— *v.* Thornton 677, 688, 692, 693, 697, 709,	711
——— *v.* Tinker	34, 35
Clarkson *v.* Clarkson	417
——— *v.* Henderson	234
——— *v.* Woodhouse ..	35, 40
Clay *v.* Clay	153
—— & Tetley, Re 388, 390,	570, 571
—— *v.* Thackerah.. ..	9, 17
Claydon *v.* Green	320
Clayton *v.* Blakey	128, 133
——— *v.* Corby ..	17, 20, 22, 30
Cleave *v.* Jones	225
Cleaver *v.* Cleaver..	175
——— *v.* Mutual Association	321, 333
Clegg *v.* Dearden	80
—— *v.* Rowland	553
Clements *v.* Lambert ..	41, 59

	PAGE
Clements *v.* Ward, Re Smith	326
Cleoburey *v.* Beckett	416
Clere's case	243
Clergy Corporation, Re	555
Cleveland, Re	652, 657, 658
Cliff, Re	411, 438
Clifford *v.* Clifford	428
——— *v.* Hoare	63
——— *v.* Wicks	91
Clift, Re	602
Clifton *v.* Burt	381
Cline, Re	443
Clinton, Re	523
——— *v.* Bernard	373
Clissold, Re	520
Clitheroe, Re	709, 710
Clive *v.* Clive	298, 442
Clough, Re	658, 662
Cloves *v.* Awdry	427
Clowes, Re	*Add.*
——— *v.* Staffordshire Co.	82
Clutton, Ex parte	520
——— *v.* Lee	465
Coates *v.* Coates	237
——— to Parsons, Re	569, 601, 602
Coatsworth *v.* Johnson	589
Cobb *v.* Selby	60
Cockburn *v.* Edwards	183, 225
Cocker *v.* Cowper	48
——— *v.* Musgrove	451
Cockerell, Ex parte	304, 316
——— *v.* Cholmley	549
Cockrill *v.* Sparke	224, 230
Cocks *v.* Romaine	99
Codling *v.* Johnson	61
Cody *v.* Cody	842
Cofield *v.* Pollard	427
Cogswell *v.* Armstrong	425
Coke's case	467
Colborne *v.* Wright	106
Colchester *v.* Brooke	77, 82, 83
——— *v.* Roberts	66
Cole *v.* Scott	423, 424
—— *v.* Miles	53
Cole's case	553
Coleby *v.* Coleby	393
Coleman, Re	409
——— and Jarron, Re	414, 569, 571
——— *v.* Birmingham	338
——— *v.* Foster	48
——— *v.* Rawlinson	450
Coles *v.* Benbow	511, 535
—— *v.* Trecothick	183
Collard *v.* Roe	348
——— *v.* Sampson	411
Colleton *v.* Garth	842
Collett *v.* Collett	644
Collier *v.* Walters	433
Colling, Re	499, 516, 532
Collinge, Re	676, 677, 685, 704
Collingridge *v.* Paxton	449, 450
Collingwood, Re	515
——— *v.* Pace	360
Collins, Re; Collins *v.* Collins	609
——— *v.* Archer	171
——— *v.* Blantern	259
Collins *v.* Collins	179
——— *v.* Goodall	108
——— *v.* Lewis	381
——— *v.* Paddington	175
——— *v.* Pitts, Re Pitts	609
——— *v.* Rhodes, Re Baker	158, 233, 236
——— *v.* Slade	62, 67
Collinson, Re	530
——— *v.* Margesson	222, 225
Collis *v.* Stack	221
Collyer *v.* Mason	251
——— *v.* Willcock	224
Colsell *v.* Budd	208
Colston *v.* Roberts, Re Fleck	397
Colvin *v.* The King's Proctor	143
Colyer, Re	409, 411, 521
——— *v.* Finch	388, 389
Comber, Re	427
Commissioners of Donations *v.* Wybrants	158
Commissioners of French Hock *v.* Hugo	76
Commissioners of Sewers *v.* Glasse	29, 33, 44
Commissioners of Stamps *v.* Hope	382, 401
Compton, Re, Norton *v.* Compton	384
——— *v.* Bloxham	420
——— *v.* Richards	93
Coney, Re, Coney *v.* Bennett	460, 477
Conlon *v.* Moore	322
Connell, Re	456
Conolan *v.* Leyland	328
Conron *v.* Conron	387
Consett *v.* Ritson	26
Constable's case	86
——— *v.* Constable	433, 677, 698, 708
——— Nicholson	3, 22, 24
Conway *v.* Fenton	656
Conybeare, Re	519
Cood *v.* Pollard	179
Cook, Re	554
—— *v.* Bath	29, 54, 65, 95
—— *v.* Cook	481
—— *v.* Chilcott	81
—— *v.* Dawson	387, 388, 389
—— *v.* Elphin	171
—— *v.* Gregson	377, 382
—— *v.* Hutchinson	262
—— *v.* Lambert	436
Cooke, Re	570
——— *v.* Cooke	312, 313
——— *v.* Forbes	100
——— *v.* Green	56
——— *v.* Soltau	177
Cookes, Re	711
——— *v.* Cookes	690, 699, 700
Coombe *v.* Vincent; Re Stedman	743, 744
Coombes *v.* Brookes	518
——— *v.* Coombes	236
——— *v.* Gibson	385
Coombs, Re	436, 519, 530
Coope *v.* Cresswell	206, 366, 367, 370

	PAGE
Cooper and Allen, Re ..	569, 571
——, Re 405, 477,	503, 517
——, Cooper *v.* Vesey	259, 568
——, —— *v.* Slight ..	296
—— *v.* Barber	71
—— *v.* Bockett	407, 419
—— *v.* Cooper	269
—— *v.* Crabtree	95
—— *v.* Emery	144
—— *v.* France	356
—— *v.* Griffin	456
—— *v.* Hubbuck	11, 14 95, 99
—— *v.* Jones	514
—— *v.* Larochc	298
—— *v.* Macdonald	253, 273, 297, 350, 518
—— *v.* Marshall ..	41, 44
—— *v.* Martin	429
—— *v.* Straker	12
—— *v.* Todd	521
Coote *v.* Lowndes	394
Cope, Re	408
Copper *v.* Spottiswoode	178
Copland *v.* Davies	375
Coppin *v.* Coppin	178
—— *v.* Gray	149
Corbet's case	34
Corbet, Re	655
—— *v.* Corbet	342
Corbett *v.* Jonas	*Add.*
Corbishley, Re	143
Corby, Re	413
—— *v.* Hill	64
Corcor *v.* Payne	47, 57
Cordell's case	433
Cork and Bandon R. Co. *v.* Goode	203, 209
Cork *v.* Russell	452, 478
Corker *v.* Payne	37
Cormick *v.* Trapaud	270
Corne *v.* Malins	209
Cornforth *v.* Smithard	221
Cornill *v.* Hudson	228
Cornish *v.* Stubbs	49
Corporation of Clergymen's Sons *v.* Swainson	173
Corpus Christi Coll. *v.* Rogers ..	195
Corrall *v.* Cattell	264
Corry *v.* Cremorne ..	342, 493
Corser *v.* Cartwright ..	387, 388, 389
Corwen *v.* Pym	90
Cory *v.* Greenwich	6
Cosbie *v.* Sugrue	124
Cosh and Metropolitan District R. Co., Re	570, 571
Costard and Wingfield's case ..	36
Cotching *v.* Bassett	99
Cottam *v.* Partridge ..	210, 225
Cotterell *v.* Dutton	141
—— *v.* Griffiths	96, 99
Cotterill, Re	521
—— *v.* Purchase	155
Cottington *v.* Fletcher	166
Cottrell *v.* Cottrell	415, 697
—— *v.* Hughes	494
Coulson, Ex parte	327, 328

	PAGE
Councill, Re	434
Counden and Clerk's case ..	357
Courtauld *v.* Legh	12
Courtenay *v.* Williams ..	218, 237
Courtown *v.* Ward	36
Courtoy *v.* Vincent	450
Cousens *v.* Rose	62
Cousins, Re	629
Coutts *v.* Gorham	93
Coventry *v.* Willes	25
Coverdale *v.* Charlton	55
Coward and Adam, Re ..	569, 571
Cowbridge R. Co., Re ..	448, 452, 477, 478, 479
Cowlam *v.* Slack	32
Cowling *v.* Higginson ..	18, 64
Cowlisham *v.* Cheslyn	46
Cowper, Re	479
—— *v.* Andrews	36
—— *v.* Cowper	360
—— *v.* Godmond	213
—— *v.* Harmer ..	500, 509, 510
Cox, Re	443
—— *v.* Barnsley	448
—— *v.* Bateman	384
—— *v.* Bennett ..	299, 327, 422, 423
—— *v.* Bent	127
—— *v.* Cox	193
—— *v.* Dolman	189
—— *v.* Glue	43
—— *v.* Matthews	70, 71, 93
Coxwell *v.* Franklinski	235
Cozens *v.* Crout	414
Crabtree, Re	529, 653
Cracknell *v.* Thetford	82
Cradock *v.* Piper	380, 453
Cragg *v.* Taylor	455, 456
Cramer, Re	511
—— *v.* Cramer	534
Crane *v.* Kilpin	193
Crawford *v.* Cocks	209
—— *v.* Crawford ..	209, 224
—— *v.* May, Re May	329, 383, 384
Crawshay *v.* Crawshay	268
Creach *v.* Wilmot	43
Creed, Re	142
Cresset *v.* Mitton	67
Cresswell *v.* Cresswell	414
—— *v.* Davidson	587, 588, 589
—— *v.* Dewell	181, 235, 315
—— *v.* Hawkins	242
Crewe *v.* Dickin	294
Crichton *v.* Collery	38
Crisp *v.* Martin	6, 88, 90
Crispin *v.* Cumano	453
Crocker *v.* Waine	270
Croft *v.* Howel	164
Crofton *v.* Crofton, Re Boyce ..	214
Crofts, Re	405
—— *v.* Crofts	409
—— *v.* Middleton	257, 292, 293
Croker *v.* Hertford	402
Cronin *v.* Roche	429
—— *v.* Rogers	588, 589
Crook *v.* Crook	743, 744

	PAGE
Crook *v.* Sampson	.. 90
Crookes *v.* Whitworth ..	.. 748
Croome *v.* Guise	.. 105
Crosby *v.* Fortescue ..	.. 279
——— *v.* Wadsworth ..	.. 49
Crosley, Re, Munns *v.* Burn	.. 214, 233, 237
Cross, Re	645, 647, 655
——, Re, Harston *v.* Tenison	.. 157, 233, 234
—— *v.* Kennington ..	.. 387
—— *v.* Lewis	12, 45, 92
Crosskill *v.* Bower	.. 193
Crossley *v.* Lightowler	29, 65, 68, 75, 76, 79, 85
Croughton, Re	.. 298
Crow *v.* Baldmere	.. 271
Crowder *v.* Stewart ..	.. 384
——— *v.* Tinkler ..	.. 78
Crowe, Re	513, 523
Crowe's Mortgage, Re	499, 514, 525, 533
Crowther *v.* Crowther ..	118, 454
Croxon *v.* Lever	.. 373
Crumbie *v.* Wallsend Board	.. 211
Crump *v.* Lambert ..	6, 99, 100
Cubitt *v.* Maxse	.. 50
Cuckfield Burial Board, In re	.. 109
Culley *v.* Doe ..	117, 137, 141
Culmady *v.* Rowe	.. 86
Culsha *v.* Cheese	.. 425
Cumberland Banking Co. *v.* Maryport Co.	.. 598, 774
Cumberlege *v.* Cumberlege-Ware, Re Ware	 243
Cuming, Re ..	499, 509, 515, 516
Cummins *v.* Cummins ..	.. 378
Cunard, Re	520, 521
Cunningham *v.* Antrobus	.. 312
——— *v.* Foot ..	151, 189
——— *v.* Moody ..	349, 362
——— and Frayling, Re ..	567
Cundee, Re	654, 662
Cuno, Re, Mansfield *v.* Mansfield	325, 326, 406
Cunyngham *v.* Thurlow ..	.. 614
Cupit *v.* Jackson	.. 108
Curlewis *v.* Mornington ..	.. 216
Currey, Re, Gibson *v.* Way	298, 605, 606
Currie, Re	496, 502, 520
Curriers' Co. *v.* Corbett ..	93, 97, 98
Curtis, Re	.. 520
——— *v.* Curtis	.. 185
——— *v.* Fulbrook ..	.. 379
——— *v.* Kesteven Council	55, 56
——— *v.* Price	.. 254
Curwen *v.* Milburn	211, 215, 218, 221
——— *v.* Salkeld	.. 26
Cust *v.* Middleton	.. 646
Cuthbert *v.* Purrier ..	143, 299
——— *v.* Wharmby ..	.. 553
Cutts *v.* Gilbert	415, 416

	PAGE
Dabbs *v.* Humphries ..	.. 220
Dacre *v.* Patrickson ..	393, *Add.*
Dadds, Re	.. 418
D'Adhemar *v.* Bertrand,	521, 526, 602
Dagworth *v.* Radford ..	.. 343
Daintree *v.* Butcher ..	.. 408
Dalgleish, Re	.. 519
Dalison, Re	.. 719
Dallas, Re	.. 308
Dallow, Re	410, 437
Dalton, Re	.. 313
——— *v.* Angus	6, 7, 94
——— *v.* Midland Counties R. Co.	.. 319
Daly, Re	.. 411
—— *v.* Blomfield	.. 114
—— *v.* Lynch	.. 341
Damarell *v.* Protheroe ..	.. 105
Dames & Wood, Re ..	.. 570
Dancer *v.* Crabb	.. 417
Dand *v.* Kingscote ..	.. 62
Dane, Re	.. 151
—— *v.* Kirkwall	.. 384
D'Angibau, Re, Andrews *v.* Andrews	.. 313
Daniel *v.* Anderson ..	.. 9
——— *v.* Arkwright ..	.. 269
——— *v.* Ferguson ..	.. 98
——— *v.* Gracie	.. 131
——— *v.* North ..	4, 12, 45, 61
——— *v.* Upley	.. 296
Daniell, Re	.. 410
Daniels *v.* Davison ..	.. 128
Dann *v.* Spurrier	.. 98
Darby's case	.. 410
D'Arcy *v.* Blake	.. 344
Dare *v.* Heathcote	19, 64
Darley Main Co. *v.* Mitchell	.. 211
Darley *v.* Tennant ..	186, 199, 203
Darling *v.* Clue	.. 14
Dartmouth *v.* Spittle ..	.. 121
Darwin *v.* Upton	90, 92
Daubeny *v.* Cockburn ..	.. 269
Davenhill *v.* Fletcher ..	.. 348
Davenport, Re	.. 527
——— *v.* King ..	740, 741
——— *v.* Tyrrel ..	.. 137
Davey *v.* Miller	.. 504
David *v.* Sabin	.. 583
Davidson, Re	500, 518
——— *v.* Gent	.. 258
——— *v.* Illidge	378, 383, 384
Davies' case	.. 2
——— Trusts, Re	.. 503
Davies, Ex parte	.. 529
———, Re (1 Ch. 90) ..	.. 321
———, Re (2 Rob. 337 ..	.. 408
———, Re (13 Eq. 166) ..	.. 428
———, Re (3 Mac. & G. 278),	518, 531
———, Re (12 Eq. 214) ..	.. 499
———, Re, Davies *v.* Davies	.. 427
——— *v.* Bush	.. 257
——— *v.* D'Arcy	.. 252
——— *v.* Davies	312, 661
——— *v.* Edwards ..	.. 224
——— *v.* Hodgson ..	.. 518, 521
——— *v.* Lowndes,	115, 170, 244, 361

PAGE

Davies v. Lynch 402
——— v. Marshall .. 92, 95, 99
——— v. Sear 60
——— v. Stephens 50, 51, 57, 61
——— v. Williams, 10, 15, 31, 43, 44, 125
——— v. Wright 598
Davis & Cavey, Re 569, 570, 571
Davis, Re 517, 519
———, Re, Evans v. Moore, 181, 199, 200
——— v. Chanter 519
——— v. Davis 393
——— v. Dowding 373
——— v. Kirk 359
——— v. Marlborough .. 255, 448
——— v. Reyner 173
——— v. Tollemache .. 272, 285
——— v. Uphill 268, 269
——— v. Witts 89
Davison, Re, Greenwell v. Davison 426
——— v. Gill 54
Davys & Saurin, Re 570
Dawes v. Hawkins .. 52, 53
Dawkins v. Penrhyn 151, 154, 169, 174, 253
Dawney v. Cashford 61
Daws v. Bagnall 211
Dawson, Re .. 500, 517, 518
——— v. Bank of Whitehaven, 343, 344
——— v. Clarke 555
——— v. Norfolk 61
——— v. Paver 75, 81
——— v. Small 432
Day v. Beddingfield 90
—— v. Croft 530
—— v. Day ..127, 174, 392, 393
—— v. Freunel 322
—— v. Savadge 23
—— v. Spooner 35
—— v. Woolwich Society .. 615
Deacon v. Lakin, Re Shakespear . 328
——— v. S. E. R. Co. 63
Dean v. Allen 552
—— v. Thwaite 154, 211
Deane, Re, Bridger v. Deane .. 269
Dearle, Re.. 437
Dearman v. Wyche .. 149, 177
Dearmer, Re, James v. Dearmer . 318
De Beauvoir v. Owen, 105, 108, 142, 169
Debenham v. Digby 487
De Bode, Re 111, 417
De Burgh Lawson v. De Burgh Lawson 387
De Bussche v. Alt 156
De Caux v. Skipper 590
Dee v. East India Co. 86
Deeble v. Lineham .. 51, 73
Deeks v. Strutt 173
De Grey v. Richardson 349
De la Hunt & Pennington, Re .. 430
De la Pole v. Dick 460
De la Rue, Re 411
De la Saussaye, Re 418

PAGE

De la Warr, Re 555, 698
——— v. Miles 3, 9, 14, 31, 37
Deloraine v. Browne 155
De Lusi, Re 428
Dempsey v. Lawson 416
Dench v. Dench 419
Dendy, Re 643, 652, 653
——— v. Simpson 56
Dengate v. Gardiner 318
Denn v. Cartwright (2 Camp. 572) 132
—— v. ——— (4 East, 31).. 132
—— v. Fearnside 127
—— v. Roake 427
Dennet v. Pass 547
Dennett v. Atherton 488
Dennis, Re (1891, P. 326) .. 421
———, Re (12 W. R. 575) .. 521
———, Re (5 Jur. N. S. 1388) .. 555
Dent v. Auction Mart Co. 96, 97, 99
—— v. Clayton 293, 343
Denys v. Shuckburgh 122, 191, 211, 217
De Pradel, Re 406
Derbyshire, &c. R. Co. v. Bainbrigge 454
Derham v. Kiernan 509, 516, 533
Dering v. Kynaston 272
De Rutzen v. Lloyd 26
De Salis v. Crossan 36
Des Barres v. Shey 112, 116, 174
De Stackpoole v. De Stackpoole.. 314
De Tabley, Re 662
De Teissier, Re, De Teissier v. De Teissier .. .. *Add.*
Devine v. Holloway 145
Devonshire's case 467
Devonshire v. Eglin 48
——— v. Pattinson .. 37, 38, 85
Devoy v. Devoy 534
Dewar v. Maitland .. 499, 503
Dewdney, Ex parte 236
Dewell, Re.. 420
Dewhirst, Re 499, 519
——— v. Wrigley .. 70, 77
D'Huart v. Harkness .. 411, 438
Dickens' case 410
Dickens v. Unthank 244
Dickenson v. Allsop 461
——— v. Grand Junction Canal Co. 69, 81
——— v. Hatfield 220
——— v. Teasdale .. 151, 183
Dicker v. Popham 97, 98
Dickin v. Dickin 577
——— v. Hamer 340
Dickinson, Re 521
——— v. Dickinson, Re Ord .. 424
——— v. Harbottle 94
——— v. Kitchen 450
Dicks v. Batten 740
Dickson, Re, 385, 496, 510, 511, 513, 519, 520
———, Re, Hill v. Grant .. 609
——— v. Robinson 347
Dickson-Poynder v. Cook, Re Poynder 650
Digby v. Irvine 447

	PAGE
Digge's case	.. 296
Dilkes, Re	.. 409, 436
—— *v.* Broadmead ..	.. 552
Dillon *v.* Coppin	.. 486
—— *v.* Cruise	.. 181
—— *v.* Cunningham ..	.. 322
—— *v.* Grace	.. 296
Dinning *v.* Henderson ..	.. 380
Dinsdale *v.* Iles	.. 128
Dix *v.* Burford	.. 555
Dixie *v.* Dixie	.. 644
Dixon, Re	.. 308
——, Re, Byram *v.* Tull	.. 326
—— *v.* Baty	40, 118
—— *v.* Curwen	.. 82
—— *v.* Gayfere ..	150, 168, 178
—— *v.* Holroyd ..	.. 203
—— *v.* Saville	.. 344
—— *v.* Wrench	.. 456
Dobbyn *v.* Somers	.. 35
Dobson *v.* Blackmore ..	53, 83
Docwra, Re, Docwra *v.* Faith	.. 293, 337, 567
Dodd *v.* Burchall	.. 60
—— *v.* Gronow	.. 744
Dodds *v.* Dodds	.. 432
—— *v.* Thompson ..	.. 106
Dodkin *v.* Brunt	.. 519
Dodson *v.* Mackey ..	.. 220
Doe *v.* Amey	.. 132
—— *v.* Andrew	.. 142
—— *v.* Angell ..	108, 114, 134, 135, 141
—— *v.* Bancks	.. 125
—— *v.* Barnard (Cowp. 595)	.. 117
—— *v.* Barnard (13 Q. B. 945	.. 168
—— *v.* Barrell	.. 460
—— *v.* Bartle	.. 303
—— *v.* Barton	117, 129
—— *v.* Baytup	.. 117
—— *v.* Beauclerk	.. 124
—— *v.* Beckett	.. 131
—— *v.* Bell	.. 133
—— *v.* Benham	107, 131
—— *v.* Bingham	.. 124
—— *v.* Birch	.. 125
—— *v.* Birchmore ..	.. 168
—— *v.* Blackburn	.. 356
—— *v.* Blakeway	116, 123
—— *v.* Bliss	.. 124
—— *v.* Bold	.. 126
—— *v.* Bousfield	.. 124
—— *v.* Bramston	.. 144
—— *v.* Brawn	.. 450
—— *v.* Britain	.. 296
—— *v.* Brightwen ..	116, 117
—— *v.* Cadwallader ..	.. 129
—— *v.* Calloway	.. 279
—— *v.* Carter	.. 127
—— *v.* Chamberlaine ..	.. 128
—— *v.* Clark	.. 277
—— *v.* Clarke	.. 117
—— *v.* Cleveland	.. 117
—— *v.* Coombes	.. 136
—— *v.* Cooke	117, 168
—— *v.* Cooper	.. 136

	PAGE
Doe *v.* Cox	127, 129
—— *v.* Crago	.. 132
—— *v.* Crisp	.. 124
—— *v.* Danvers ..	123, 134, 172
—— *v.* Dauncey	.. 277
—— *v.* Davidson	.. 41
—— *v.* Davies (1 Esp. 461)	.. 118
—— *v.* —— (7 Exch. 89)	.. 129
—— *v.* —— (2 M. & W. 503)	.. 117
—— *v.* Deakin	.. 142
—— *v.* Dilnot	.. 244
—— *v.* Dixon	.. 359
—— *v.* Dobell	.. 133
—— *v.* Dodd	.. 132
—— *v.* Donston	.. 450
—— *v.* Dyball	.. 168
—— *v.* Edgar	.. 116
—— *v.* Edmonds ..	123, 139, 140
—— *v.* Edwards	.. 116
—— *v.* Evans	447, 490
—— *v.* Ewart	.. 251
—— *v.* Eyre (3 C. B. 557; 5 C. B. 713) ..	.. 296
—— *v.* —— (17 Q. B. 366)	.. 118, 162
—— *v.* Finch	.. 172
—— *v.* Flynn	.. 135
—— *v.* Ford	.. 259
—— *v.* Freeman	.. 278
—— *v.* Frowd	.. 134
—— *v.* Gartham	.. 130
—— *v.* Gatacre	.. 255
—— *v.* Geekie	.. 132
—— *v.* Godsill	.. 123
—— *v.* Goldwin	.. 133
—— *v.* Gower	131, 134
—— *v.* Green	.. 132
—— *v.* Greenhill	.. 457
—— *v.* Gregory	115, 116
—— *v.* Griffin	.. 143
—— *v.* Groves	.. 127
—— *v.* Guy	.. 173
—— *v.* Gwinnell	.. 343
—— *v.* Hales	.. 129
—— *v.* Hall	.. 278
—— *v.* Hampson	56, 460
—— *v.* Harbrow	.. 116
—— *v.* Hares	.. 259
—— *v.* Harris (6 Ad. & Ell. 209)	417
—— *v.* —— (16 M. & W. 517) ..	.. 294
—— *v.* Haslewood ..	.. 116
—— *v.* Heakin	.. 117
—— *v.* Hellier	.. 124
—— *v.* Hilder	65, 494
—— *v.* Hinde	.. 107
—— *v.* Hirst	.. 112
—— *v.* Horrocks	.. 137
—— *v.* Howell	.. 257
—— *v.* Howells	.. 259
—— *v.* Hughes (6 Exch. 223)	.. 388
—— *v.* —— (7 M. & W. 139)	.. 133
—— *v.* Hulse	.. 116
—— *v.* Hutton	.. 362
—— *v.* Jackson	.. 128
—— *v.* Jauncey	.. 116

	PAGE
Doe *v.* Jesson	141, 142
—— *v.* Jones (1 B. & C. 238	.. 172
—— *v.* —— (10 B. & C. 718)	.. 130
—— *v.* —— (1 Cr. & J. 528)	.. 173
—— *v.* —— (9 M. & W. 372)	.. 450
—— *v.* —— (15 M. & W. 380)	.. 40
—— *v.* —— (13 Q. B. 774)	.. 494
—— *v.* —— (4 T. R. 310)	.. 141
—— *v.* Keen	137, 362
—— *v.* Kemp	.. 56
—— *v.* Langdon	.. 494
—— *v.* Langfield	.. 116
—— *v.* Lawder	.. 128
—— *v.* Lawes	.. 356
—— *v.* Lawley	116, 138
—— *v.* Lawrence	.. 258
—— *v.* Lightfoot	.. 162
—— *v.* Liversedge ..	122, 146
—— *v.* Llandaff	.. 245
—— *v.* Loch	37, 57
—— *v.* Long	.. 138
—— *v.* Ludlam	.. 385
—— *v.* Luxton	.. 242
—— *v.* Lynes	.. 116
—— *v.* Lyons	.. 251
—— *v.* M'Keay	.. 130
—— *v.* Maisey	.. 129
—— *v.* Martin	168, 243
—— *v.* Martyn	.. 257
—— *v.* Mason	.. 277
—— *v.* Massey ..	40, 118, 162
—— *v.* Mee	.. 278
—— *v.* Meyler	.. 546
—— *v.* Millett	.. 116
—— *v.* Milward	.. 133
—— *v.* Moore	.. 126
—— *v.* Morris	111, 118
—— *v.* Morse	.. 131
—— *v.* Moulsdale ..	146, 195, 494
—— *v.* Mulgrave	.. 267
—— *v.* Mulliner	.. 118
—— *v.* Murrell	.. 118
—— *v.* Nepean	.. 142
—— *v.* Oliver	257, 464
—— *v.* Olley	129, 279
—— *v.* Ossingbrooke ..	.. 277
—— *v.* Oxenham	114, 123
—— *v.* Page	.. 126
—— *v.* Palmer	.. 419
—— *v.* Parke	.. 117
—— *v.* Parry	.. 448
—— *v.* Pasquali	134, 136
—— *v.* Pearsey	.. 56
—— *v.* Pearson	137, 299
—— *v.* Peck	.. 125
—— *v.* Perkins	.. 115
—— *v.* Pett	.. 115
—— *v.* Pettet	.. 116
—— *v.* Phillips	.. 122
—— *v.* Pike	.. 148
—— *v.* Plowman	.. 494
—— *v.* Plumtre	.. 115
—— *v.* Porter	.. 133
—— *v.* Price (9 Bing. 356)	.. 128
—— *v.* —— (16 M. & W. 603)	.. 494
—— *v.* Prince	.. 488
Doe *v.* Pullen	.. 132
—— *v.* Read	.. 46
—— *v.* Rees	39, 118
—— *v.* Rivers	242, 349
—— *v.* Roberts (2 B. & Ald. 367)	259
—— *v.* —— (13 M. & W. 520)	110, 111
—— *v.* Rock	127, 130
—— *v.* Roe	.. 247
—— *v.* Rolfe	122, 259
—— *v.* Ross	.. 172
—— *v.* Rowlston	.. 142
—— *v.* Sandars	.. 343
—— *v.* Sayer	.. 128
—— *v.* Scarborough	245, 253, 258, 267
—— *v.* Scott	.. 116
—— *v.* Shelton	258, 303
—— *v.* Simpson	.. 277
—— *v.* Skirrow	.. 259
—— *v.* Smaridge	.. 132
—— *v.* Smith	133, 450
—— *v.* Smyth	.. 294
—— *v.* Stanion	128, 136
—— *v.* Staple	.. 296
—— *v.* Summersett ..	.. 133
—— *v.* Sumner	131, 167
—— *v.* Thomas (3 M. & G. 815)	.. 356
—— *v.* —— (6 Exch. 854)	.. 128
—— *v.* Thompson (5 Ad. & Ell. 532)	.. 141
—— *v.* Thompson (6 Ad. & Ell. 721)	.. 126
—— *v.* Tidbury	.. 40
—— *v.* Timins	.. 357
—— *v.* Tom	.. 129
—— *v.* Tomkins	.. 259
—— *v.* Tomkinson ..	.. 403
—— *v.* Truby	.. 277
—— *v.* Trueman	.. 124
—— *v.* Turner	127, 128
—— *v.* Vardill	.. 360
—— *v.* Walker	.. 424
—— *v.* Walters	.. 133
—— *v.* Waterton	.. 112
—— *v.* Watts	131, 132
—— *v.* Webber	.. 117
—— *v.* Weller	131, 295
—— *v.* Wells	.. 135
—— *v.* Wharton	130, 448
—— *v.* Wilkins	.. 116
—— *v.* Wilkinson	54, 117
—— *v.* Williams (5 Ad. & Ell. 296) ..	141, 159, 177
—— *v.* —— (7 Carr. & P. 332) ..	39, 117, 118
—— *v.* Wilson (4 B. & Ald. 303)	259
—— *v.* —— (11 East, 56)	51, 117
—— *v.* Wood (2 B. & Ald. 738)	.. 48
—— *v.* —— (14 M. & W. 687) ..	127, 132
—— *v.* Woodroffe	115, 148
Doherty, Re	.. 570
Doidge *v.* Carpenter ..	.. 42
Dollond *v.* Johnson ..	.. 382
Don, Re	.. 360

PAGE

Donaldson, Re 411, 412
——— *v.* Donaldson 656
Donisthorpe, Re 521
Dooby *v.* Watson 210, 235
Dorchester *v.* Entsor 27
Dorling *v.* Claydon 355
Dormer *v.* Fortescue .. 185, 191
Dorning, Re 647, 648
Dorset *v.* Girdler 78
Doss *v.* Secretary, &c. of India .. 174
Dost-Aly-Khan, Re 441
Douce, Re 407
Doughty *v.* Townson, Re Bracken 554
Douglas *v.* Douglas .. 423, 424
Dovaston *v.* Payne .. 53, 54
Dowdall *v.* Bryne 138
——— *v.* McCartan 397
Dowdeswell *v.* Dowdeswell .. 379
Dower *v.* Dower 180
Dowglass *v.* Kendal 31
Dowling, Re 308
——— *v.* Dowling 431
——— *v.* Hudson 391
——— *v.* Winfield 143
Downe *v.* Fletcher .. 322, 327
Downes *v.* Morris 378
Downs *v.* Cooper 135
Dowson *v.* Bell 347
Dowtie's case 363
Doyle *v.* Kaufmann 175
Drake *v.* Kershaw, Re Kershaw 392, 398
——— *v.* Robinson 385
——— *v.* Trefusis 656
Drant *v.* Vanse 422
Draper, Re 496, 517, 521
Draycott *v.* Harrison .. 327, 328
Dresser *v.* Gray, Re Gray .. 423
Drew *v.* Norbury 135
—— *v.* Willis 456
Drewe, Re 520
Drewell *v.* Towler 6, 18
Drewett *v.* Sheard 76
Dring *v.* Greetham 378
Drinkwater *v.* Ratcliffe .. 740, 741
Driver, Re 507, 519, 523
——— *v.* Thompson .. 296, 303
Drought *v.* Jones 189
Druce, Re 500, 502, 518, 537
Drummond and Davie, Re 256, 273, 329
——— *v.* Parish 412
——— *v.* Sant 118, 130, 152
Drury *v.* Kent 41
—— *v.* Man 385
Dryden *v.* Frost 179
Duberley *v.* Page 39, 40
Dublin *v.* Judge 139
——— *v.* Trimleston .. 122, 164
Dudden *v.* Clutton Union .. 69
Dudley, Re .. 678, 699, 702, 711, 712
——— and Ward *v.* Dudley .. 171
——— *v.* Champion, Re Champion 424, 435
Dudson, Re .. 251, 254, 261, 262, 263, 265, 569
Duffill, Ex parte 306

PAGE

Duffy, Re 419
Dugdale *v.* Dugdale .. 299, 381
Duggan *v.* Carey 36
Duggins, Re 408
Dumergue *v.* Rumsey 450
Dumpor's case 544, 545
Dunball *v.* Walters 98
Duncan *v.* Dixon 313
——— *v.* Lawson 401, 439
——— *v.* Louch 57, 64, 66
Duncombe's case 64
Duncombe *v.* Randall 75
Dundas *v.* Blake 151, 181
Dundee Harbour *v.* Dougall .. 102
Dunk *v.* Hunter 128
Dunkley *v.* Scribnor 386
Dunlop *v.* Dunlop 393
Dunne *v.* Doyle 178
Dunnill *v.* Dunnill 299
Dunraven *v.* Llewellyn 32
Dunster *v.* Glengall 457
Duppa *v.* Mayo 556
Durane, Re 416
Durell *v.* Pritchard 98
Durham and Sunderland R. Co. *v.* Walker 57, 63
Durrant and Stonor, Re 292
Duval *v.* Terry 238
Du Vigier *v.* Lee .. 149, 177, 187
Dyce *v.* Hay 22, 32
Dye *v.* Dye 297, 405
Dyers' Co. *v.* King 97
Dyer *v.* Paynter 740
Dyke *v.* Rendall 342
Dynevor *v.* Tennant 57

Eagar *v.* Furnivall .. 349, 434
Eagle *v.* Charing Cross Rail Co... 96
Eardley *v.* Knight 193, 459
Earle *v.* Bellingham 182
—— and Webster, Re 569, 676, 714
East, Re 500, 501, 521
East India Co. (The) *v.* Campion .. 238
East India Dock Co., Re 450
East of England Banking Co., Re 193
Eastcourt *v.* Weeks 124
Eastern Counties R. Co. *v.* Dorling 84
Easton *v.* Richmond Board .. 56
Eastwood *v.* Clark, Re Gadd 517, 602
——— *v.* Vincke 361
Eaton *v.* Swansea Waterworks Co., 10, 15
Ebsworth and Tidy, Re 570, 575, 652
Eccles *v.* Cheyne 434
Ecclesiastical Commissioners *v.* Kino .. 11, 12, 29, 94, 95, 96, 97
Ecclesiastical Commissioners *v.* N. E. Rail. Co. 211, 214
Ecclesiastical Commissioners *v.* Rowe 114, 123, 164, 195
Ecclesiastical Commissioners *v.* Sligo 186
Ecclesiastical Commissioners *v.* Treemer .. .. .. *Add.*
Eckersley *v.* Platt 417, 418
Eddel, Re 433

	PAGE
Eddels *v.* Johnson	381, 424
Edgar *v.* Fishery Commissioners,	37, 38
Eden, Re	305
Edie and Brown, Re	570
Edmonds *v.* Goater ..	219, 221
Edmunds *v.* Downes ..	220, 224
——— *v.* Waugh	188
Edsall, Re	302
Edwards, Re	321
———, Re, Williams *v.* Trench	191, 192
——— and Rudkin, Re ..	575
——— *v.* Appleby	284
——— *v.* Champion	243
——— *v.* Clay	212
——— *v.* Edwards	451
——— *v.* Exeter ..	166, 171
——— *v.* Janes	225
——— *v.* Lloyd, Re Lloyd	690, 699
——— *v.* M'Leay	43
——— *v.* Rogers	257
——— *v.* Slater	243
——— *v.* Warden	174, 201, 235
Edwick *v.* Hawkes	119
Eeles, Re	417
Egerton *v.* Massey	491
Egg *v.* Blayney	583
Eggleton *v.* Newbegin, Re Newbegin ..	211, 238
Egmont, Re	719
Egremont *v.* Pulman	77
Eidsforth *v.* Armstead	388
Eisdale *v.* Hammersley	296
Eland *v.* Eland	347, 391
Elder *v.* Pearson, Re Bellamy ..	326
Eldridge *v.* Knott	108
Ellerthorpe, Re	504
Ellice, Re	418
Elliot *v.* Davenport	433
—— *v.* Handcock	387
—— *v.* Merryman	388, 391
Elliott, Re	647, 649
——— *v.* Dearsley ..	387, 397
Elliottson *v.* Feetham	99
Ellis, Re (24 Beav. 426) ..	512, 513
—— Re (17 Eq. 409)	298
—— *v.* Crawford	118
—— *v.* Johnson, Re Glanvill	298, 299, 327
—— *v.* Lewis	346
—— *v.* Manchester, &c. Co. ..	93
—— *v.* R.	467
Ellison, Ex parte	293
———, Re	521
——— *v.* Iles	66
Elmhirst *v.* Spencer	79
Elmore *v.* Pirrie	78, 98
Elvis *v.* York	171
Elvy *v.* Norwood	188
Elwell *v.* Crowther	77
Elwes *v.* Payne	27
Elwood *v.* Bullock	25
Ely *v.* Bliss	102, 103, 117
—— *v.* Cash	103
Embrey *v.* Owen ..	68, 74, 77, 96
Emerson *v.* Inchbird	357
——— *v.* Selby	32
Emery *v.* Day ..	218, 223, 224
Emmanuel *v.* Parfitt, Re Tucker .	330
Empson's case	258
Emuss *v.* Smith	422, 423
England *v.* Wall	17
English *v.* Burnell	31
Ennor *v.* Barwell	14, 68, 69
Eno *v.* Tatham	393, 394
Ernest *v.* Croysdill	235
Errington *v.* Prior	456
Esdaile, Re, Esdaile *v.* Esdaile	677, 688
Espley *v.* Wilkes	58, 63
Estcourt *v.* Estcourt	342
European R. Co., Re ..	192, 459
——— Society *v.* Radcliffe ..	383
Eustace, Re	430
Evans, Ex parte	215
———, Ex parte (13 Ch. Div. 252)	477
———, Re (30 Beav. 232) ..	554
———, Re (14 Ch. Div. 511) ..	657
———, Re (2 Scott's N. R. 83) ..	249
——— *v.* Bagshaw	739
——— *v.* Brown ..	378, 380, 381
——— *v.* Davies	226
——— *v.* Davis	249
——— *v.* Evans	358, 743
——— *v.* Jones	253
——— *v.* Moore, Re Davis	181, 199, 200
——— *v.* Roberts	450
——— *v.* Simon	221
——— *v.* Smallcombe	233
——— *v.* Williams	473
——— *v.* Wyatt	395
Everall *v.* Smalley	277
Everett *v.* Everett	424
——— *v.* Paxton	328, *Add.*
——— *v.* Robertson	220, 221, 223
Everingham *v.* Ivatt	404
Everitt *v.* Automatic Weighing Co.	*Add.*
Ewan *v.* Franklin	409
Ewart *v.* Cochrane	74
——— *v.* Graham	3, 56
Exeter *v.* Devon	77
Eynon, Re	408
Eyre, Re	649
——, Re, Eyre *v.* Eyre	613
—— *v.* Monro	385
—— *v.* Saunders	651, 652
—— *v.* Walsh	162
Eyton, Re	689
Fahey *v* Dwyer	9
Fairchild *v.* Gayre	166
Fairclaim *v.* Little	125
Fairley *v.* Tuck	347
Fairthorne *v.* Donald	209
Fairtitle *v.* Gilbert	259
Fannin *v.* Anderson	217
Farley's case	343
Farley *v.* Bonham	343
——— *v.* Bryant	367
Farmar *v.* Brock	410
Farmer *v.* Martin	268
Farnell, Re .. 645, 646, 647, 648,	680
Farquhar *v.* Morris	193

PAGE

Farquharson *v.* Floyer .. 381, 424
Farran *v.* Beresford .. 177, 182
Farrant, Re 522
Farrar *v.* Farrars, Ld. 593
——— *v.* Winterton 422
Farrell *v.* Coogan 18
——— *v.* Gleeson 177
Farrer *v.* St. Catherine's College . 418
Farrow *v.* Vansittart 63
Faulder, Re 499
Faulds *v.* Jackson 409
Faulkner *v.* Bellingham 108
——— *v.* Daniel 182
Faussett *v.* Carpenter 152
Fawcett *v.* Eastern Counties R. Co. 461
Fawell *v.* Heelis 179
Fay *v.* Prentice 71
Fearn *v.* Lewis 222
Fearnside *v.* Flint..187, 199, 200, 203, 235
Fearon *v.* Debrisay 269
——— *v.* Mitchell 26
Fector *v.* Philpot 467
Fell *v.* Biddolph 414
Fellows, Re 522, 524
Fenner *v.* Duplock 135
Fenny *v.* Child 132
Fentiman *v.* Smith 48
Fenton *v.* Imbers 213
——— *v.* Wills 381
Fenwick, Re 406, 415
——— *v.* Laycock 451
——— *v.* Reed 163
Ferguson *v.* Ferguson 424
——— *v.* Gibson 384
——— *v.* Livingston 186
Fergusson *v.* Fyffe 216
Ferrand *v.* Bradford 82
Ferraris *v.* Hertford 410
Ferrers *v.* Stafford Co. 179
Fettiplace *v.* Gorges 297
Fewings, Ex parte .. 192, 459
Field, Re 289
—— *v.* Evans 298
—— *v.* Moore 300, 312
—— *v.* Peckett 387
—— *v.* White 236, 384
Fieldhouse *v.* Croft 450
Finch *v.* Finch (35 L. T. 235) .. 174, 211, 237
—— *v.* —— (L. R. 1 P. & M. 371) 418
—— *v.* G. W. R. Co. .. 62, 64
—— *v.* Hattersley 387
—— *v.* Jukes 571
—— *v.* Resbridger 73
Findlay, Re 499, 534
Finlinson *v.* Porter 73
Finney *v.* Hind 456
Finnis to Forbes 570
Firth, Re 306
—— *v.* Slingsby ..199, 209, 220, 233
Fish, Ex parte 305
Fisher and Haslett, Re 630
———, Re 523
——— *v.* Giles 162
——— *v.* Prowse 52
——— *v.* Shirley 313, 382

PAGE

Fiske *v.* Mitchell 222
—— *v.* Rovitt 91
Fitch *v.* Rawling 6, 23
Fitzgerald *v.* Fitzgerald 315
Fitzmaurice, Re 162, 184
Fitzpatrick *v.* Robinson and others 52
Fitzwalter *v.* Waterhouse .. 744
Fitzroy, Re 415
——— Bessemer Co., Re.. .. 210
Flack *v.* Longmate 344
Fladong *v.* Winter 208
Fleck, Re, Colston *v.* Roberts .. 397
Fleetwood's case .. 448, 450, 467
Fleetwood, Ex parte 468
Fleetwood, Re, Sidgreaves *v.* Brewer .. 414, 416
——— *v.* Hull 588
Flegg *v.* Prentice .. .. *Add.*
Fleming *v.* Buchanan .. 378, 381
——— *v.* Crouch 740, 741
Fletcher, Re 305
——— *v.* Ashburner 289
——— *v.* Bealey 79
Flight *v.* Thomas 4, 11, 14
Flinn *v.* Calow 443
Flitcroft's case 210, 235
Flitcroft, Re 514
Flood, Re 606
—— *v.* Patterson 217, 229
Flower, Re.. 570
——— *v.* Hartopp 112
——— *v.* Low Leyton 80
Focus *v.* Salisbury 130
Foley, Ex parte 510
—— *v.* Hill 209, 232
Folkard *v.* Hemmett 39
Follett *v.* Pettman 419
——— *v.* Tyrer 350
Folson *v.* Sheard 647, 648
Foot *v.* Stanton 409
Footner *v.* Sturgis.. 454
Forbes *v.* Adams 293
——— *v.* Lea Board 84
——— *v.* Peacock .. 389, 391
——— *v.* Smith 216
Ford and Hill, Re 569
—, Re 645, 646
—— *v.* Ager 162
—— *v.* De Pontes 416, 422
—— *v.* Grey 136, 137
—— *v.* Lacey 86
—— *v.* M. R. Co... 59
—— *v.* Wastell 454
Forder *v.* Wade 343, 344
Fordham *v.* Fordham 290
——— *v.* Wallis 227, 236, 380
Foreman *v.* Whitstable .. 28, 112
Forest, Ex parte 215
Forster *v.* Davies 519
——— *v.* Patterson 141, 161, 198
——— *v.* Thompson 149
Forsyth *v.* Bristowe 205
Forth *v.* Norfolk 447
Foss, Ex parte 450
Foster's case 108
Foster, Re (7 C. B. 120) 308
———, Re (1 De G. & J. 386) .. 663

	PAGE
Foster and Lister, Re	569
—— *v.* Abraham	519
—— *v.* Bates	125, 184
—— *v.* Cook	381
—— *v.* Dawber (6 Exch. 839) ..	223, 224
—— *v.* —— (1 Dr. & Sm. 172)	519
—— *v.* Foster	740, 742
—— *v.* Handley	378
—— *v.* Hodgson	210
—— *v.* Mackenzie	237
—— *v.* Parker	373, 510
—— *v.* Pitfal	254
—— *v.* Reeves	487
—— *v.* Wright	37, 86
Foulkes *v.* Williams, Re Williams	427
Fourdin *v.* Gowdey	402
Fowke *v.* Draycott	304
Fowler, Re	520
—— *v.* Churchill ..	456, 457
Fowlers *v.* Walker	94
Fowles, Re	662
Fox *v.* Dolby	688
—— *v.* Pursell	96
Foxton *v.* Manchester, &c. Banking Co.	209
Frampton *v.* Stephens	343
France's case	124
France *v.* Campbell	450
Francis *v.* Clemow	387
—— *v.* Grover ..	108, 151, 186
—— *v.* Hawkesley	219
—— *v.* Hayward	6
—— *v.* Ley	90, 91
Frank *v.* Frank	341
—— *v.* Mainwaring	272
Franklin, Re	653
Franklyn, Re	503, 514
Franks *v.* Bollans	293
—— *v.* Mason	178
Frankum *v.* Falmouth	68
Fraser, Re	411, 416
Freake *v.* Cranefeldt ..	216, 235
Free Fishermen of Faversham	24, 38
Freeland *v.* Pearson	434
Freeman, Re ..	518, 519, 520
—— *v.* Barnes	130
—— *v.* Freeman	415
—— *v.* Stacey	186
—— *v.* Tottenham, &c. R. Co.	53
—— *v.* Whitbred	443
Freer *v.* Hesse	462, 494
Freke *v.* Carbery	401, 439
Freme, Re, Freme *v.* Logan ..	491
—— *v.* Clements	425
French, Re	554
—— *v.* French	366
Frewen, Re, Frewen *v.* Frewen ..	553
—— *v.* James ..	688
—— *v.* Phillips	9, 12, 46
Fripp, Ex parte	284
Frisby, Re, Alison *v.* Frisby	199, 230
Frith and Osborne, Re	569
——, Re	408
—— *v.* Lewis	293
Fritz *v.* Hobson	54, 57, 67
Frodsham *v.* Frodsham ..	511, 525
Fry, Re, Fry *v.* Lane	738
—— *v.* Noble ..	343, 347, 349
—— *v.* Tapson	556
Fryer *v.* Royle	380
Fuggle *v.* Bland	477
Fuller, Re (Morgan, 213) ..	313
—— (1892, P. 337)	*Add.*
—— *v.* Earle	456
—— *v.* Redman ..	215, 219, 221, 223, 236, 472
Fullford *v.* Fullford	434
Fullwood *v.* Fullwood	158, 210, 232
Fulthorpe *v.* Forster	163
Fulton *v.* Andrew	407
—— *v.* Creagh	141, 145
Furnival *v.* Boyle	238
Fursden *v.* Clegg	139, 140
Fyson *v.* Pole	238
Fytche *v.* Fytche	347
Gadd, Re, Eastwood *v.* Clark	517, 602
Gaddis *v.* Bann Reservoir ..	82
Gael *v.* Fenwick	392
Gaffee, Re	298
Gainsborough *v.* Watcombe Co. ..	629
Gainsford *v.* Dunn	387
Gale, Re, Blake *v.* Gale	211
—— *v.* Abbott ..	15, 96, 97, 99
—— *v.* Gale	422, 428
Gallagher *v.* Humphrey	64
Gally, Re	439
Gandy *v.* Macaulay, Re Garnett ..	234
Gann *v.* Gregory	420
—— *v.* Whitstable (Free Fishers of)	84
Garden, Re	501
—— *v.* Bruce	214
Gardiner, Re ..	502, 518, 521
—— *v.* Courthope	418
—— *v.* Williamson ..	108, 487
Gardner, Re (10 Ch. D. 29) ..	500, 504, 511
——, Re (1 C. B. N. S. 215)	306
——, Re, Loug *v.* Gardner	*Add.*
—— *v.* Cowles ..	499, 534
—— *v.* M'Mahon	223
Garland *v.* Carlisle	194
—— *v.* Mead	402
Garmstone *v.* Gaunt	376
Garner *v.* Briggs	460
Garnett, Re, Gandy *v.* Macaulay	234
—— Orme and Hargreave, Re	677, 700
Garrard *v.* Tuck ..	122, 130, 152, 494
Garratt *v.* Sharpe	94
Garrod, Re	517
Garth *v.* Ward	465
Gartside, Re	518
Garty, Re	519
Gaskell *v.* Gaskell	739
Gaskin *v.* Balls	98
—— *v.* Rogers	414
Gatenby *v.* Morgan	430
Gateward's case	23, 31, 36
Gatti, Carlo, Re	438
Gaunt *v.* Fynney	99
—— *v.* Taylor	188, 459

	PAGE
Grant *v.* Wainman	259
Gaussen, Re	420
Gautret *v.* Egerton	65
Gaved *v.* Martyn .. 10, 26, 68, 72,	74
Gawler *v.* Wade	367, 368
Gayford *v.* Moffatt ..	9, 60
Gaze *v.* Gaze	408
Geake *v.* Ross	192
Geaves *v.* Price	416
Gell *v.* Hayward	67
General Finance Co. *v.* Liberator Society	258, 259
General Rolling Stock Co., Re	215, 237
Genese, Re	329
Gentry, Re	416
Geo. 3, Re	402
Gerrard *v.* Cooke	63, 64
Gery *v.* Redman	56
Gethin, Re	456
Gething *v.* Keighley	233
Gibbes, Re, White *v.* Randolf ..	430
Gibbin, Re	521
Gibbins *v.* Eyden ..	350, 395, 424
Gibbons, Re	517, 601
——— *v.* Baddall	179
——— *v.* Kibbey	293
——— *v.* Moulton	296
——— *v.* Snape	280
Gibbs *v.* Flight	461
—— *v.* Fremont	192
—— *v.* Guild ..210, 214, 232,	233
—— *v.* Hayden	598, 740
—— *v.* Pike	460
Gibson, Re	423
——— *v.* Clark	112
——— *v.* Gibson	346, 425
——— *v.* Way, Re Currey	298, 605, 606
——— *v.* Wise	118, 121
Gifford *v.* Manley	385
Gilbert *v.* Smith	742, 744
Gilchrist, Ex parte	297, 328, 329
Giles *v.* Grover	450
—— *v.* Groves	18
—— *v.* Warren	417
Gill, Ex parte	304
—— *v.* Continental Gas Co.	456, 457
Gillard *v.* Lawrenson, Re Burge	174, 235
Gillett, Re	519, 523
Gilman *v.* Chute	178
——— *v.* Crowley	487
Gilmore, Ex parte	305
Giraud, Re	523
Glanvill, Re, Ellis *v.* Johnson ..	298, 299, 327
Glanville, Re	524
Glave *v.* Harding	59
Gleadow *v.* Atkin	208
Glenny and Hartley, Re	569
Glenorchy *v.* Bosville	242
Glenton and Saunders, Re ..	569
Gloag and Miller, Re	570
Glossop *v.* Heston, &c. Board	79, 80
Gloucester, &c. R. Co., Re ..	215
Gloucestershire Co. *v.* Phillips ..	327
Glover *v.* Coleman	15
——— *v.* Lane	40
——— *v.* Smith	409

	PAGE
Glyn *v.* Bank of England ..	208
Glynne *v.* Nicholas	77
Goate *v.* Goate	223
Godbold *v.* Freestone	358
Goddard *v.* Ingram	229
Godfrey, Re ..316, 496, 507,	514
——— *v.* Harben	381
——— *v.* Tucker	478
Godmanchester *v.* Phillips ..	56
Godolphin *v.* Abingdon	358
——— *v.* Penneck	385
Godwin *v.* Culley	221
——— *v.* Winsmore	343
Gold Ores Co. *v.* Parr	194
Golds and Norton, Re	570
Goldsmid *v.* Goldsmid	269
——— *v.* G. E. R. Co. ..	27
——— *v.* Tunbridge Wells Commissioners ..	72, 75, 79
Gooch *v.* Haworth	448
Goodale *v.* Gawthorne	356
Goodall *v.* Skerratt ..	142, 147
Goodchild *v.* Dougal	304
——— *v.* Terrett	379
Goodday *v.* Michell	6
Goode *v.* Burton	179
——— *v.* Job	130, 140
Goodfellow *v.* Goodfellow ..	347
Goodhart *v.* Hyett	80
Good Intent Benefit Society, Re ..	518
Goodlad *v.* Burnett	423
Goodman *v.* Saltash 21, 23, 24, 28,	38
Goodrich *v.* Marsh	743
Goodright *v.* Cator	243
——— *v.* Davids	124
——— *v.* Mead	243, 270
——— *v.* Searle	359
——— *v.* Wells	359
Goodson *v.* Richardson	54
Goodtitle *v.* Atker	54
——— *v.* Bailey	258
——— *v.* Baldwin ..	111, 112
——— *v.* Herbert	133
——— *v.* Morse	259
——— *v.* Newman	362
——— *v.* White (15 East, 174)	359, 363
Goodwin, Re	644, 649
——— *v.* Lee	392
——— *v.* Parton	230
Goold *v.* White	277
Gordon, Re	421
——— *v.* Gordon	155
——— *v.* James	614, 615
Goring *v.* Goring	173
Gorley *v.* Gorley	138
Gort *v.* Clark	98
Gorten *v.* Dyson	173
Gosling *v.* Carter	388
Gott *v.* Atkinson	369
Gough *v.* Bage .. 515, 524,	526
——— *v.* Bult	189
Gould, Ex parte, Re Walker ..	589
——— *v.* Johnson	213
——— *v.* Okenden	155
Goulder *v.* Camm	298
Gove *v.* Gawen	409

PAGE

Gowan *v.* Broughton 381
Grabowski's Settlement, Re .. 193
Grace *v.* Baynton 509, 516
Grafton *v.* London and Birmingham Rail. Co. 255
Graham, Ex parte .. 170, *Add.*
———, Re 304, 406
——— *v.* Campbell 97
——— *v.* Connell .. 455, 456
——— *v.* Jackson 606
Grand Junction Canal Co. *v.* Shugar 70
Grand Union Canal Co. *v.* Ashby 39
Grange, Re 521
——— *v.* White 748
Granger *v.* Collins.. 488
Grant, Re 529
——— *v.* Easton 464
——— *v.* Ellis 114, 123
——— *v.* Grant 238, 520
——— *v.* Gunner 40
——— *v.* Mills 179
——— *v.* Yea 276
Gravenor, Re 267
——— *v.* Brooke 363
——— *v.* Watkins 431
Graves *v.* Graves 387
——— *v.* Key 259
Gray, Re 649
——, Re, Dresser *v.* Gray .. 423
—— and Metropolitan R. Co. 569, 570
—— *v.* Bateman 209
—— *v.* Bell 373
—— *v.* Bond 6, 61, 85
—— *v.* Chaplin 156
Graydon, Re 267, 276
Grayson, Re 533
Greated *v.* Greated 394
Great Northern Rail. Co. *v.* Sanderson 569, 570, 571, 577
Greator, Re 437
Greatrex *v.* Hayward 72
Great Western R. Co. *v.* Cunliffe 193
Greaves, Re 428
———, Re, Bray *v.* Tofield 232, 237
——— *v.* Greenwood .. 143, 361
——— *v.* Tofield 470
——— *v.* Wilson 448, 553
Gree *v.* Rolle 130
Green, Re (1 Eq. 288) 142
———, Re (10 Ch. 272) 501, 518, 521, 537
———, Re (2 D. F. & J. 121) .. 552
———, Re (29 L. J. Ch. 716) .. 554
———, Re (2 De G. F. & J. 121). 555
———, Re (10 Jur. N. S. 1098).. 647
——— *v.* Biggs 597
——— *v.* Dunn 425
——— *v.* Giles 432
——— *v.* Green 432
——— *v.* Humphreys 222
——— *v.* Lowes 379
——— *v.* Paterson 254, 272, 279, 280, 293
——— *v.* Pulsford 269
——— *v.* Tribe 418, 421
Greene, Re 644
——— *v.* Gordon, Re Jones .. 428

PAGE

Greene *v.* Hoare 489
Greenfield *v.* Hanson 588
Greenville, Re 711, 712
Greenway *v.* Bromfield .. 150, 189
——— *v.* Greenway .. 431, 432
——— *v.* Hockin 89
Greenwell *v.* Davison, Re Davison 426
Greenwich Board of Works *v.* Mandslay 51
Greenwood, Re (1892, P. 7) 417, 419
———, Re (27 Ch. D. 359).. 505
———, Re, Greenwood *v.* Greenwood .. 348
——— *v.* Hornsey 95
Greetham *v.* Colton 388, 389, 391
Gregory *v.* Gregory 235
——— *v.* Harman 173
Gregson, Re 520, 602
——— *v.* Hindley 162, 184, 185
Greig, Re 418
Grenfell *v.* Girdlestone 178, 184, 219
Grenville *v.* Blyth.. 251
Gresley *v.* Adderley 150
——— *v.* Mousley .. 235, 402
Gretton *v.* Haward 254
Grenchy (De) *v.* Wills 323
Greves, Re 410
Greville *v.* Browne .. 387, 388
——— *v.* Tylee 419
Grey, Re, Acason *v.* Greenwood.. 298
—— *v.* Jenkins 649, 652
Grey Coat Hospital *v.* Westminster Commissioners .. 453
Grierson, Re 302
Grieve, Ex parte 504
Griffith, Re (1889, W. N. 171) .. 525
———, Re (49 L. T. 161) .. 697
———, Re, Carr *v.* Griffith 443, 445
——— *v.* Blake 97
——— *v.* Hughes 299
——— *v.* Matthews 90
——— *v.* Pound 593
Griffiths, Re 646
———, Re, Tate *v.* Rolls .. 553
——— *v.* Gale 434
——— *v.* Griffiths 409
——— *v.* Hughes 460
Griggs *v.* Gibson 293, 350
Grimes *v.* Peacock.. 59
Grimstead *v.* Marlow .. 16, 23, 36
Grimwood *v.* Bartels 742
Grissell, Ex parte 479
———, Re 322
Groghegan *v.* Fegan 59
Groom, Re 531
Groome *v.* Blake 150
Grose *v.* West 56
Grove, Ex parte 301
Grove, Re 649
——— *v.* Comyn 740
Groves *v.* Carbert 740
Growcock *v.* Smith 385
Grundy *v.* Buckridge 521
Guardhouse *v.* Blackburn .. 407
Gue, Re, Smith *v.* Gue .. *Add.*
Guest *v.* Cowbridge R. Co. .. 452, 478, 479, 480

PAGE

Guibert, Re 520
Gullan *v.* Grove 417
Gullett *v.* Lopes 34
Gully *v.* Davis 426
—— *v.* Exeter 171
Gurly *v.* Gurly 342
Gurney *v.* Gurney 414
Guy *v.* Mannock 242
—— *v.* West 56
Gwilliam *v.* Barker 450
Gwillim *v.* Gwillim 408
Gwinnell *v.* Eames 65
Gwyn *v.* Hardwicke 53
——— *v.* Neath Canal Navigation Co. 258
Gwynn *v.* Gwynn 225
Gyett *v.* Williams 388

Hackett, Re 412
——— *v.* Baiss 98
Hacking *v.* Whalley 746
Haddon *v.* Fladgate 297
Haigh, Re 305
Hainault Forest Act, Re 87
Hale and Smyth, Re 569, 677, 706
—— *v.* Oldroyd 20, 76
—— *v.* Tokelove 410, 421
Hales *v.* Petit 363, 528
Halfhide *v.* Robinson 740
Hall, Re 341, 522, 525
——, Re, Hall *v.* Hall .. 517, 602
—— *v.* Bootle 50
—— *v.* Byron 39, 42
—— *v.* City of London Co. .. 488
—— *v.* Hale 509, 516
—— *v.* Harding 43
—— *v.* Hill 347
—— *v.* Lichfield Co. 99
—— *v.* Lund 74
—— *v.* Maule 109
—— *v.* Metcalfe 27
—— *v.* Nottingham 25
—— *v.* Swift 15, 19, 76
—— *v.* Waterhouse 297
Hall-Dare, Re 621, 658
——— *v.* Hall-Dare .. 272, 275
Hallack *v.* Cambridge 89
Hallett *v.* Hastings, Re Hastings 233
Hallett to Martin 569
Halliday, Re 662
——— *v.* Phillips 6, 46, 87, 88, 91
Hallyburton, Re 406, 411
Hally's case 410
Halton *v.* Cove 166
Haly *v.* Barry 456, 457
Hamer's Devisees case 379
Hamilton, Re .. 448, 453, 477
——— *v.* Buckmaster 388
——— *v.* Hamilton 313
——— *v.* Jackson 342
——— *v.* Kirwan 269
——— *v.* Musgrave 37
Hammerton *v.* Honey .. 24, 25
Hammond-Brown, Ex parte *Add.*
Hammond *v.* Hall 69
——— *v.* Smith 213, 222

PAGE

Hanan *v.* Power 185
Hanbury, Re 696, 703
——— *v.* Hussey 740
Hance *v.* Truwhitt 422
Hanchett *v.* Briscoe 316
Hancock, Re, Hancock *v.* Berry 188, 211, 234
——— *v.* Hancock 337
Hancox *v.* Spittle 510
Handcock *v.* Handcock .. 454, 547
Hankey *v.* Martin .. 270, 284, 287
Hanks *v.* Palling 167
Hanmer *v.* Chance .. 2, 19, 39
——— *v.* Flight 17
Hannington *v.* True, Re Smith 395, 397
Hanover *v.* Bank of England .. 519
Hanson *v.* Stubbs 382
Harber *v.* Rand 66
Harbidge *v* Warwick 12
Harcourt's case 41
Harcourt *v.* White .. 149, 181, 233
Hardaker *v.* Moorhouse 296
Hardcastle *v.* Denison 277
Harden Chapel, Re 524
Hardiman, Re, Pragnell *v.* Batten. 744, 746
Harding, Re .. 714, 717, 718
——— *v.* Ambler 179
——— *v.* Harding 393, 397
——— *v.* Sutton .. 330, 406, 407
——— *v.* Wilson 58, 63
Hardisty *v.* Wells, Re Wells 415, 423, 429, 430
Harford, Re 521
Hargreaves, Re 650
——— and Thompson, Re. 569, 570
——— *v.* Michell 235
——— *v.* Wright 503, 507, 510
Hargrove *v.* Congleton 36
Harley *v.* Harley 450
Harlock *v.* Ashberry .. 114, 149, 161, 162, 177, 182, 183
Harman *v.* Uxbridge, R., Re 569, 616
Harmood *v.* Oglander 153, 190, 381
Harnett *v.* Macdougall 298
Harper, Re 300
——— *v.* Charlesworth .. 49, 51
——— *v.* Williams 192
Harrington *v.* Lichfield 171
Harris, Re (28 Ch. D. 171) 325, 326, 662
———, Re (23 W. R. 734) .. 437
———, Re (42 L. T. 583) 651, 653
——— *v.* Booker 447
——— *v.* Davis 432
——— *v.* Davison 453
——— *v.* De Pinna .. 6, 9, 12, 99
——— *v.* Drewe 91
——— *v.* Graham 296
——— *v.* Harford 605, 606
——— *v.* Harris (29 Beav. 110) .. 233
——— *v.* ——— (11 W. R. 62) .. 343
——— *v.* ——— (56 L. T. 507) .. 383
——— *v.* Jenkins 18, 66
——— *v.* Jewell 461

PAGE

Harris *v.* Osbourn 215
——— *v.* Quine .. 211, 214, 215
——— *v.* Watkins .. 294, 387
Harrison, Re (5 Ch. 408) 430
———, Re (Seton, 4th ed. 516) 498
———, Re (22 L. J. Ch. 69) 518, 523
———, Re, Allen *v.* Cort *Add.*
———, Re, Re Little .. 605, 606
——— *v.* Duignan .. 150, 187
——— *v.* Elvin 408
——— *v.* Harrison .. 328, 347
——— *v.* Harrison, Re Little 269, 605, 606, 614
——— *v.* Paynter 450
——— *v.* Pennell 454
——— *v.* Smith 516, 526
Harrop, Re 689, 696, 699
——— *v.* Hirst 74, 77
——— *v.* Howard 298
——— *v.* Wilson 341
Harston *v.* Tenison, Re Cross. 157, 233, 234
Hart, Re 304, 305
—— *v.* Minors 173
—— *v.* Nash 225
—— *v.* Prendergast 223
—— *v.* Stephens 226
Harter *v.* Harter 407
Hartland *v.* Jukes 213
——— *v.* Murrell 387
Hartley, Re (29 W. R. 356) .. 416
———, Re (1879, W. N. 169) .. 521
———, Re, Nuttall *v.* Whitaker. *Add.*
——— *v.* Allen 445
Hartly *v.* O'Flaharty 454
Hartnall, Re 511, 512
Hartpoole *v.* Walsh 163
Hartshorn *v.* Watson 203
Harty *v.* Davis 185
Harvey, Re 498
——— *v.* Bridges 44
——— *v.* Clark 652
——— *v.* Gilbard 464
——— *v.* Harvey 415, 430
——— *v.* Reynolds 117
——— *v.* Walters 6, 72, 76
——— *v.* Wilde 379
Harvie *v.* Rogers 65
Harwood, Re 534
——— *v.* Tooke 357
Hasluck *v.* Pedley 443
Hassard *v.* Cantrell 43
Hassell, Ex parte .. 141, 145, 150
Hastings, Re, Hallett *v.* Hastings 233
——— *v.* Ivall 86
Haswell *v.* Haswell 297
Hatch *v.* Hatch 155
Hatcher, Ex parte 323
Hatfield Co., Re 193
Hattatt, Re 520
Hatten *v.* Russell .. 678, 690, 700, 701, 702, 703, 707
Hatton, Re 409
——— *v.* Haywood 448, 452, 477, 478
Hatton's case 467
Havelock, Re 523
——— *v.* Havelock, Re Allan .. 609

PAGE

Hawke *v.* Bacon 43
Hawkes *v.* Hubback 298
——— *v.* Saunders 173
Hawkins, Ex parte 422
——— *v.* Carbines .. 63, 64
——— *v.* Gathercole .. 447, 453
——— *v.* Hawkins .. 210, 392
——— *v.* Herbert 744
——— *v.* Kemp 294
——— *v.* Rutter .. *Add.*
——— *v.* Shewen 382
Hawksbee *v.* Hawksbee 118
Hawksley *v.* Barrow .. 405, 419
Hawksworth, Re (1887, W. N. 113) 337
———, Re (1 L. R. Ir. 179) 740, 745
Hawthorn *v.* Sheddon 428
Hay *v.* Gordon 174
Haydon *v.* Williams 140, 218, 220
Hayes, Re 293, 411
Haymes *v.* Cooper 457
Haynes, Re, Kemp *v.* Haynes .. 707
Hayward *v.* Cannington 35
Haywood *v.* Tidy 313
Hazeldine, Re 519
Hazle, Re 707, 710
Headlam *v.* Hedley 56
Head's Trustees, Re 387
Healey *v.* Batley 50
Heaphy, Re 517
Hearle *v.* Greenbank .. 297, 350
Heath, Re 419
——— *v.* Bucknall 95
——— *v.* Crealock 258, 259
——— *v.* Dendy 348
——— *v.* Elliott 34
——— *v.* Maydew 96
——— *v.* Pugh .. 149, 161, 174, 177
Heathcote, Re 410
Heaton *v.* Dearden 739
Hebblethwaite *v.* Peever 199
Hedgely, Re, Small *v.* Hedgely 322, 370
Hedger *v.* Rowe 357
Hedley *v.* Fenwick 63
Heenan *v.* Berry 181
Hegan *v.* Johnson 128
Heigate *v.* Williams 65
Hele *v.* Boxley .. 238, 494, 547
Hellard *v.* Moody, Re Ridge 682, 714
Hellmann, Re 555
Helmore *v.* Smith 450
Helps *v.* Hereford 257
—— *v.* Winterbottom 212
Heming *v.* Archer 374, 375
Hemingway, Re 647
Hemming *v.* Blanton 162
Hemp *v.* Garland 213
Hemsley, Re 655, 659
Henchman *v.* A.-G. 109
Henderson *v.* Akins 151
Henderson *v.* Eason 138
Henderson-Roe *v.* Hitchins, Re Smith 609
Hendy *v.* Stephenson 46
Heneage, Re 322
Henfrey *v.* Henfrey 416

PAGE

Henley, Re 109, 382
Henning *v.* Burnett .. 62, 66
Henriques *v.* Bensusan 234
Henry *v.* Smith 161, 177, 180, 188, 189
Hensler, Re, Jones *v.* Hensler .. 434
Hensman *v.* Fryer 381, 424
Henty *v.* Wrey 269
Henvell *v.* Whitaker 387
Hepburn, Re 211, 235
——— *v.* Skirving 424
Hepworth *v.* Hill 393
Herbalt and Chaytor, Re .. 570
Herbert, Re 523
——— *v.* Herbert 412
——— *v.* Webster 298
Hercy *v.* Ballard 153
——— *v.* Dinwoody 155
Herefordshire Banking Co., Re .. 193
Hernando, Re, Hernando *v.* Sawtell 429
Herons, Re 342
Herrick *v.* Sixby 174
Herring *v.* Clark .. 500, 509, 532
Hertz *v.* Union Bank of London 92, 94
Hervey *v.* Olliver 745
——— *v.* Smith 6
Hetherington, Re 521, 630
——— *v.* Graham 438
Hewett *v.* Barr 175
Hewitt, Re 508, 530
Hewlins *v.* Shippam .. 5, 46, 48
Hey, Re 515
Heywood *v.* Heywood 358
Hiatt *v.* Hillman 563
Hickley *v.* Strangways, Re Strangways 677, 703, 704, 710
Hickman *v.* Upsall .. 142, 190
——— *v.* Walker 126
Hicks, Re 416
——— *v.* Cooke 156
——— *v.* Harris 349
——— *v.* Sallitt 190
Hickson *v.* Aylward 447
——— *v.* Wolfe 425
Higginbottom, Re .. 517, 601
——— *v.* Hawkins 149, 234
Higgins and Hitchman, Re .. 570
——— and Percival, Re .. 569, 570, 571, 576
——— *v.* Crawford 180
——— *v.* Sargent 191
Higgs *v.* Dorkis 743
——— *v.* Duke 740
——— *v.* Mortimer 204
——— *v.* Weaver 383
Higham *v.* Rabbett 64
Hilbers *v.* Parkinson .. 272, 275
Hildreth *v.* Adamson 82
Hilhouse, Re 410
Hill's case 410
Hill, Re (1 Rob. 276) 412
——, Re (1874, W. N. 228) .. 520
—— *v.* Barry 36
—— *v.* Brown 460
—— *v.* Cook 76, 77
—— *v.* Grant, Re Dickson .. 609
—— *v.* London 262
—— *v.* Manchester and Salford Waterworks Co. .. 258

PAGE

Hill *v.* Maurice 370, 376
—— *v.* Pritchard 253, 267
—— *v.* South Staffordshire R. Co. 192
—— *v.* Stawell 185
—— *v.* Tupper 5
—— *v.* Walker 236
—— *v.* Wormsley, Re Wormsley . 392
Hillary *v.* Waller 45
Hilliard, Re (42 L. T. 79) .. 513
———, Re (38 L. T. 93) 656
Hilton, Re 649
——— *v.* Granville .. 25, 39
Hincheliffe *v.* Kinnoul 58
Hinde *v.* Chorlton 6, 89
—— *v.* Gray 488
Hindmarch, Re 419
Hindmarsh, Re 209
——— *v.* Charlton 408
Hinsley *v.* Ickeringill, Re Ickeringill 428
Hinton *v.* Hinton 343, 344
Hirst, Re 737
Hitchcock *v.* Beardsley 143
Hitchman *v.* Walton 129
Hitchon *v.* Bennett 372
Hix *v.* Gardiner 105
Hoare, Re 657
——— *v.* Metropolitan Board .. 6
——— *v.* Niblett 328
Hobbs *v.* Knight 417, 435
——— *v.* Wade .. 117, 137, 141
Hobson, Re (7 Ch. Div. 708) .. 656
———, Re (33 Ch. D. 493) .. 448
———, Re (55 L. T. 255) .. 477
———, Re, Webster *v.* Rickards . 330
——— *v.* Sherwood 739
——— *v.* Todd 43
——— *v.* Trevor 257
Hodgens *v.* Hodgens 456
Hodges *v.* Croydon Canal Co. .. 187
——— *v.* Hodges .. 381, 605
Hodgkinson *v.* Crowe 588
——— *v.* Ennor .. 70, 79
Hodgson, Re 517, 519
——— Re, Kenlis *v.* Hodgson 502, 518, 531
——— *v.* Bower .. 509, 516
——— *v.* Hodgson 510
——— *v.* Hooper 127
——— *v.* Patterson 461
Hodkinson *v.* Quin 388
Hodle *v.* Healey 136, 160
Hodsdon *v.* Dancer 429
——— *v.* Grissell 41
Hodson and Howes, Re 563, 593, 594
Hogan *v.* Hand 128
Holbrook, Re 526, 535
Holcroft *v.* Heel 27
Holden, Ex parte 453, 462
——— *v.* Tilley 66
Holder, Re 479
——— *v.* Coates 57
——— *v.* Durbin 522
Holdich *v.* Holdich 347
Hole, Re 651
—— *v.* Barlow 100
—— *v.* Estcott 296

	PAGE
Holford *v.* Bailey	.. 38
——— *v.* Hankinson ..	17, 46
——— *v.* Pritchard ..	.. 487
Holker *v.* Porritt	.. 69
Holland's case	.. 171
Holland, Ex parte	.. 322
———, Re	496, 501
——— *v.* Clark ..	173, 184, 185
——— *v.* Worley	.. 98
——— *v.* Holland ..	234, 385
Hollingshead *v.* Webster ..	206, 226, 230, 378
Hollins *v.* Verney	14, 15, 18
Hollis *v.* Goldfinch ..	6, 85
Holme *v.* Seller	.. 58
——— *v.* Williams ..	373, 374
Holmes *v.* Bellingham ..	.. 55
——— *v.* Buckley	.. 78
——— *v.* Goring	5, 60
——— *v.* Kerrison ..	.. 214
——— *v.* Muntze	.. 450
——— *v.* Newlands ..	113, 141
Holsworth *v.* Goose ..	.. 296
Holt *v.* Everall	.. 321
—— *v.* Rochdale	.. 79
Holtby *v.* Hodgson ..	.. 327
Holyland *v.* Lewin ..	425, 434
Homan *v.* Andrews	182, 185, 226
Hone, Re	.. 434
Honeywood *v.* Foster ..	.. 280
Hony *v.* Hony	.. 234
Hood *v.* Easton	.. 160
—— *v.* Hood	.. 393
Hook *v.* Hook	.. 356
Hooke, Re	.. 654
Hooper, Re	.. 554
———, Re, Ashford *v.* Brooks	*Add.*
——— *v.* Lane	.. 194
——— *v.* Ramsbottom ..	.. 179
——— *v.* Stephens ..	.. 225
——— *v.* Strutton ..	388, 504, 526
Hope *v.* Booth	.. 179
—— *v.* Hope	326, 329
Hopewell *v.* Barnes ..	.. 457
——— *v.* De Pinna ..	.. 142
Hopkins *v.* Ramadge ..	.. 242
Hopper, Re	.. 524
Hopwood *v.* Schofield ..	.. 66
Hore *v.* Becher	.. 315
Horn *v.* Horn ..	370, 391, 450
Horne, Re (39 Ch. D. 84)	704, 711, 714
——— (29 L. T. 830) ..	.. 644
——— (54 L. T. 301) ..	.. 329
——— and Hellard, Re ..	.. 569
——— *v.* Pountain ..	456, 457
Horner *v.* Swan	.. 614
Hornsey Board *v.* Monarch Society	182, 199
Horsfall, Re	.. 305
——— *v.* Holland	.. 88
Horsford, Re	420, 436
Horsley *v.* Cox	.. 456
Horton, Re	.. 655
———, Horton *v.* Perks	.. 258
Horwood, Re	.. 521
Hoskins, Re	.. 521
——— *v.* Knight ..	.. 451
——— *v.* Robins	30, 31, 33, 36, 47
Hotchkin, Re ..	692, 693, 701
Hotham, Re	.. 555
——— *v.* Somerville ..	.. 453
Houghton, Re	688, 692, 698, 699, 703
House Property Co. *v.* H. P. Horsenail Co.	.. 100
Household, Re	.. 656
Hovenden *v.* Annesley	135, 149, 152, 153, 155, 233
How, In bonis	.. 143
—— *v.* Nichol	.. 467
Howard, Re (L. R. 1 P. & M. 636)	416
———, Re (3 W. R. 605)	.. 514
———, Re (1892, 2 Ch. 233)	.. 719
——— *v.* Bank of England	.. 319
——— *v.* Jalland	742, 748
——— *v.* Sheerwood ..	.. 132
——— *v.* Shrewsbury	118, 190, 255
Howarth *v.* Howarth ..	496, 517
Howcutt *v.* Bonner ..	.. 205
Howden, Re	.. 411
Howe *v.* Stowell	.. 86
Howell *v.* King	.. 65
——— *v.* Palmer	.. 516
——— *v.* Young	211, 212
Howley *v.* Jebb.	.. 36
Howlin *v.* Sheppard ..	.. 120
Howlitt *v.* Lambert ..	.. 216
Howson, Re	.. 321
——— *v.* Trant	.. 479
Howton *v.* Frearson ..	.. 60
Hoyle, Re	647, 648
———, Hoyle *v.* Hoyle	*Add.*
Hubbard, Re	.. 416
——— *v.* Lees	.. 411
Huber *v.* Steiner	.. 211
Huddersfield *v.* Jacomb ..	.. 740
Hudson *v.* Fernyhough ..	.. 175
——— *v.* Maddison ..	.. 100
——— *v.* Parker	.. 408
——— *v.* Tabor	.. 6
Huggins *v.* Coutes ..	.. 213
Hughes, Re	.. 600
——— *v.* Coles ..	187, 194, 201
——— *v.* Doulben ..	.. 369
——— *v.* Jones	.. 425
——— *v.* Kearney ..	.. 179
——— *v.* Kelly	.. 187
——— *v.* Lumley	453, 461
——— *v.* Palmer	.. 125
——— *v.* Paramore ..	222, 225
——— *v.* Rowbotham ..	.. 271
——— *v.* Smallwood ..	.. 451
——— *v.* Thomas	.. 116
——— *v.* Twisden ..	210, 211, 233
——— *v.* Wells	.. 378
——— *v.* Williams ..	.. 189
——— *v.* Wynne	193, 235
Hugill *v.* Wilkinson	114, 149, 161, 177, 195
Huish's Charity, Re ..	.. 269
Hull & Co. *v.* N. E. R. Co.	.. 192
—— and Barnsley R. Co., Re	.. 448, 479
—— and Hornsea R. Co., Re	.. 479
—— and Selby R. Co., The	.. 86
—— *v.* Horner	.. 112
Hulls *v.* Estcourt	.. 35

	PAGE
Hulme, Re	505, 536
Hulton *v.* Hamboro	63
Humble *v.* Humble ..	177, 238
Hume, Re	521
Humfrey *v.* Gery	186
Humphreys *v.* Jones	745
Humphry, Re	518
Hunt *v.* Bateman	181
—— *v.* Bishop	490
—— *v.* Bourne	146
—— *v.* Coles	447
—— *v.* Hunt (34 L. J. Ch. 289) ..	327
—— *v.* —— (L. R. 1 P. & M. 209)	436
—— *v.* Parry, Re Alford	609
—— *v.* Remnant	490
—— *v.* Wenham, Re Wenham ..	236
Hunt-Foulston *v.* Furber ..	299
Huntley *v.* Clutterbuck	526
Hunter *v.* Baxter	236
—— *v.* Gibbons	214
—— *v.* Nockolds 186, 187,	199
—— *v.* Young	553
Hunting *v.* Sheldrake	368
Hurdman *v.* N. E. R. Co. ..	81
Hurle, Re 648, 649, 650,	658
Hurry *v.* Hurry	744
Hurst, Re	514
—— *v.* Hurst 175,	299
Hutchins *v.* Osborne	429
—— *v.* O'Sullivan	237
Hutchinson & Tenant, Re ..	569
Hutchinson, Ex parte	302
——, Re (16 Q. B. D. 515)	457
——, Re (14 W. R. 473) 647,	654
—— *v.* Barrow	424
—— *v.* Copestake	95
—— *v.* Stephens	511
Hyatt, Re 499, 511,	512
——, Re, Bowles *v.* Hyatt .. 211, 236, 366, 378, 379,	380
Hyde *v.* Benbow 518,	522
—— *v.* Dallaway	160
—— *v.* Graham	48
—— *v.* Hyde	327
—— *v.* Johnson	218
—— *v.* Price .. 192, 203,	216
—— *v.* Warden	106
—— *v.* Watts	125
Hyett *v.* Mekin	742
Ibbetson, Re	420
Ickeringill, Re, Hinsley *v.* Ickeringill	428
Ilchester *v.* Raishleigh .. 82,	86
Ilott *v.* Genge	408
Imperial Association, Re	456
Imperial Gas Co. *v.* Broadbent ..	100
—— *v.* London Gas Co.	214
Ince, Re	421
Incorporated Society *v.* Richards .. 117, 140, 141,	167
Ind Coope & Emmerson	171
Ingilby *v.* Amcotts 355, 356,	403
Ingle *v.* Richards	237
Ingleby, Re	600
Inglesant *v.* Inglesant	408
Ingoldby *v.* Ingoldby	410
Ingram *v.* Morecraft	64
Insole *v.* James	70
International Co. *v.* Hawes 382,	384
Irish, &c. Society & O'Keefe, Re.	569
Irish Land Commission *v.* Grant 102, 103, 109, 113, 114, 121,	164
Irvin *v.* Ironmonger	381
Irving *v.* Veitch 214,	226
Isaac, Re, Jacob *v.* Isaac ..	327
Isaacson *v.* Harwood	385
Isenberg *v.* East India House Estate Co.	98
Isis, The	17
Isle of Wight Ferry Co.	479
Ivatt *v.* Mann	31
Iven *v.* Elwes	215
Ives, Re, Bailey *v.* Holmes ..	652
Iveson *v.* Moore	54, 57
—— *v.* Pearman	251
Ivimey *v.* Stocker	26, 72
Jack *v.* Walsh	117
Jackson & Oakshott, Re	570
—— & Woodburn, Re, 569,	570, 571
——, Re 517,	601, 602
——, Re, Jackson *v.* Talbot .. 608,	656
——, Re, Shiers *v.* Ashworth ..	434
——, Re, Smith *v.* Sibthorpe ..	616
—— *v.* Innes	260
—— *v.* Jackson	269
—— *v.* Lomas	744
—— *v.* Newcastle	97
—— *v.* N. E. R. Co.	385
—— *v.* Ogg 210,	213
—— *v.* Pesked	66
—— *v.* Stacey 57,	64
—— *v.* Talbot, Re Jackson 608,	656
—— *v.* Woolley	230
Jacob *v.* Dalton	90
—— *v.* Isaac, Re Isaac	327
—— *v.* Kirk	546
Jacobs *v.* Hind, Re Rowe ..	199
—— *v.* McSheehan	98
—— *v.* Seward	138
Jacomb *v.* Knight 93,	96, 97
Jacques *v.* Harrison	588
Jacquet *v.* Jacquet	151
Jakeman, Re	292
James, Re (5 Eq. 334)	662
——, Re (51 L. T. 596) 704, 710, 711,	712
—— *v.* Barraud	326
—— *v.* Bright	183
—— *v.* Dearmer, Re Dearmer .	318
—— *v.* Dodds	60
—— *v.* Hayward	95
—— *v.* Holmes	235
—— *v.* James, Re Bowen 326,	405
—— *v.* Plant .. 5, 29, 50,	65
—— *v.* Salter ..108, 113, 122,	186
—— *v.* Shrimpton .. 417,	421
Jamieson *v.* Coulter	61
Jarman *v.* Vyse	431

PAGE

Jay *v.* Robinson .. 328, 334, 337
Jayne *v.* Hughes 140
—— *v.* Price 134
Jeakes *v.* White 361, 362
Jeffery, Re, Burt *v.* Arnold .. 609
Jeffreson *v.* Morton 366
Jeffreys *v.* Reynolds 456
Jeffrys *v.* Drysdale 500
Jenkins *v.* Briant 367
——— *v.* Jackson 100
——— *v.* Jones 490
——— *v.* Pritchard 362
Jenkyns *v.* Gaisford 407
Jenner *v.* Ffinch 409, 416
Jennings *v.* Foster 745
——— *v.* Rigby .. 382, 473
Jepson *v.* Key 423
Jersey, Re 647
——— *v.* Briton Ferry Co. .. 179
——— *v.* Deane 267
——— *v.* Uxbridge Authority .. 448
Jervis *v.* Berridge 465
—— *v.* Wolferstan 553
Jesse *v.* Lloyd 656
Jesser *v.* Gifford 77, 95
Jesson *v.* Wright 296
Jessopp *v.* Watson 362
Jewson *v.* Moulson 257
Johns *v.* Whitley 125
Johnson, Re (2 Curt. 341) .. 412
———, Re (1869, W. N. 87) 662, 663
———, Re, Moore *v.* Johnson .. 313, 314
———, Re, Sly *v.* Blake 181, 182, 183
——— & Tustin, Re .. 571, 576
——— *v.* Barnes 3, 32, 35, 42
——— *v.* Bloomfield 38
——— *v.* Burgess .. 460, 479
——— *v.* Evans 450
——— *v.* Gallagher 297
——— *v.* Holdsworth 453
——— *v.* Johnson 173, 320, 433
——— *v.* Kennett 391
——— *v.* Mounsey, Re Alison .. 151, 160, 161, 167, 168
——— *v.* Smiley 281
——— *v.* Wild 138
——— *v.* Wyatt .. 97, 99
Johnstone, Re 677
——— *v.* Baker 740
——— *v.* Browne 327
——— *v.* Huddlestone 133
——— *v.* Royal Courts .. 98
Jolliffe *v.* Wallasey Board .. 84
Jones & Co., Re 499
——, Re (1877, W. N. 10) 407, 437
——, Re (13 W. R. 414) 436
——, Re (2 D. F. & J. 554) .. 504
——, Re (2 Ch. Div. 70) 501
——, Re (33 Ch. Div. 414) 500, 509
——, Re (22 W. R. 837) 503
——, Re (1889, W. N. 196) 525, 526
——, Re (3 Drew. 680) 551
——, Re (26 Ch. Div. 733) .. 676, 677, 704, 710, 711
——, Re, Bullis *v.* Jones .. 700
——, Re, Calver *v.* Laxton .. 384

PAGE

Jones, Re, Greene *v.* Gordon .. 428
—— *v.* Bailey 454
—— *v.* Chappell 100
—— *v.* Davies 350
—— *v.* Dorothea Co. 70
—— *v.* Ellis 91
—— *v.* Foley 119
—— *v.* Foxall 193
—— *v.* Frost 257, 259
—— *v.* Harding 418
—— *v.* Harris 597
—— *v.* Hensler, Re Hensler .. 434
—— *v.* Hughes 226
—— *v.* Jones (1 H. & C. 1) .. 44
—— *v.* —— (2 C. & J. 601) .. 170
—— *v.* —— (16 M. & W. 712) .. 138
—— *v.* —— (4 K. & J. 361) .. 346
—— *v.* Lewis 522
—— *v.* Noyes 379, 384
—— *v.* Ogle 443, 445
—— *v.* Price (3 Bing. N. C. 52) .. 4, 13
—— *v.* —— (11 Sim. 557) .. 391
—— *v.* Richard 33
—— *v.* Ricketts 350
—— *v.* Robin 34
—— *v.* Roe 402
—— *v.* Ryder 220, 226
—— *v.* Simes 96, 202
—— *v.* Southall 406, 429
—— *v.* Tanner 173
—— *v.* Turberville 180
—— *v.* Watts 6, 58, 567
—— *v.* Williams (1 Coll. 156) .. 387
———— (2 M. & W. 326) 85, 120
———— (8 M. & W. 349) 455, 461
————, Re Williams 382, 383
—— *v.* Winwood 297
Jope *v.* Morshead 486
Joplis *v.* Baker 177
Jordan, Re, Kino *v.* Picard .. 606
——— *v.* Attwood 60
——— *v.* Jones 300
——— *v.* Young 187, 234
Jortin *v.* South Eastern R. Co. .. 185
Joyce, Re 499, 505
Joys, Re 430
Judge *v.* Lowe 13
Judkin, Re 609
Jull *v.* Jacobs 414
Jumpsen *v.* Pitchers .. 123, 144
Jupp, Re, Jupp *v.* Buckwell .. 326

Kane, Re 699
Kannreuther *v.* Geiselbrecht, Re Kloebe 382, 401
Kavanagh *v.* Coal Mining Co. .. 58
Kay, Re, Littlehales *v.* Lightfoot . 526
—— *v.* Oxley 59
Kealy *v.* Bodkin 177
Keane, Re, Lumley *v.* Desborough 606
Kearley and Clayton, Re 570
Keay, Re 178, 207
Keech *v.* Hall 129
Keefe *v.* Kirby 163

PAGE

Keeler, Re 507
Keeley, Re.. .. 511, 524, 533
Keen *v.* Keen 418
Keene *v.* Deardon.. 152
——— *v.* Johnstone 297
——— *v.* Riley 372
Keer *v.* Brown 262, 264
Keigwin *v.* Keigwin 408
Keillor, Re.. 443
Kelk *v.* Pearson 96, 97, 98
Kelland *v.* Fulford 742
Kellett *v.* Kellett 189, 434
Kelly, Re, West *v.* Turner .. 457
—— *v.* Kelly 386
Kelsall *v.* Kelsall 373
Kelsey, Re 305
——— *v.* Dodd 489
——— *v.* Kelsey 107
Kemeys-Tynte Re, Kemeys-Tynte *v.* Kemeys-Tynte .. 683, 721
Kemp, Re 699, 701
——— *v.* Haynes, Re Haynes .. 707
——— *v.* Parry 464
——— *v.* Waddingham .. 382, 473
Kempe *v.* Gibbon 205
Kemys *v.* Ruscomb 178
Kenlis *v.* Hodgson, Re Hodson .. 502, 518, 531
Kennaway, Re 699
Kennedy *v.* Lyell 196, 490
——— *v.* Whaley 178
Kennet and Avon Navigation Co. *v.* Witherington.. 82
Kennett, Re 418
——— *v.* Milbank 223
Kenrick *v.* Taylor 91
——— *v.* Wood 298, 606
Kensington, Re, Bacon *v.* Ford .. 462
——— Station Act, Re .. 214
——— *v.* Bouverie 180
Kensit *v.* G. E. R. Co. 77
Kentish Town estate, Re.. .. 655
——— *v.* Kentish 385
Kernaghan *v.* McNally 343
Kerr's policy, Re 193
Kershaw, Re 555
———, Drake *v.* Kershaw 392, 398
Kettlewell *v.* Watson 179
Kevil *v.* Lynch 407
Keymer *v.* Summers 61
Keyse *v.* Powell 121
Kidd *v.* Boone 385
—— *v.* Tallentire 479
Kiddill *v.* Farnell 551
Kidgill *v.* Moor 66
Kidney *v.* Cousmaker 369
Kightley *v.* Kightley 387
Kilmorey, Re 654, 662
Kinderley *v.* Jervis 379, 453, 457, 552
King *v.* Chick, Re Talbot .. 194
—— *v.* Denison 262
—— *v.* Lucas 297, 298
—— *v.* Melling 296
—— *v.* Voss, Re Voss 320
Kingdon, Re, Wilkins *v.* Pryer .. 430
Kingsley, Re 320
Kingsman *v.* Kingsman 312

PAGE

Kingsmill *v.* Millard 40
Kingston, Re 178, 207
Kingston's case 487
Kinloch *v.* Neville.. .. 9, 10, 17
Kino *v.* Picard, Re Jordan .. 606
—— *v.* Rudkin 97
Kinsman *v.* Kinsman 465
——— *v.* Rouse 141, 160, 161, 198
Kipling *v.* Todd 178
Kirby, Re 479
Kirk *v.* Todd 202
Kirkwood *v.* Lloyd 178
Kirwan, Re .. 268, 411, 438
Klœbe, Re, Kannreuther *v.* Geiselbrecht 382, 401
Knapp *v.* Burnaby 193
——— *v.* Willesden 89
Knapping *v.* Tomlinson 293
Knatchbull, Re ..688, 693, 704, 719
——— *v.* Fernhead 156
Knight's case 545
Knight, Re.. ..518, 529, 530, 602
——— *v.* Bowyer .. 152, 189, 459
——— *v.* Frampton 344
——— *v.* King 23, 31
——— *v.* Knight 516, 533
Knowles, Re (27 Ch. D. 707) 676, 699
———, Re (18 L. T. 809) .. 555
——— *v.* Richardson 99
Knox *v.* Gye .. 210, 213, 233
Kong Magnus, The 192
Kooystra *v.* Lucas 58
Krehl *v.* Burrell 67, 98
Kynaston *v.* Clarke 271
Kynnaird *v.* Leslie .. 360, 363

Lacey *v.* Hill ..343, 346, 348, 402
Lacroix, Re 438
Lacy *v.* Ingle 179
Lade *v.* Shepherd 52, 54
Ladyman *v.* Grave 12
Lafond *v.* Ruddock 217
Laing, Re 644
Laird *v.* Birkenhead R. Co. .. 48
—— *v.* Briggs 18, 21
Lake, Re 161, 199, 234
—— *v.* Bell, Re Bell .. 209, 235
—— *v.* Currie 427, 429
—— *v.* Plaxton 40
Lakin *v.* Lakin 143
Lamb, Re 502, 518, 521
——— *v.* Newbiggin 38
——— *v.* Walker 211
Lambe *v.* Jones 461
Lambert, Re, Stanton *v.* Lambert 326, 407
——— *v.* Taylor 111
Lamont, Re 249
Lamotte, Re 531, 537
Lampet's case 257
Lampon *v.* Corke 179, 259
Lancashire Co. *v.* Fitzhugh .. 450
——— *v.* Manchester .. 6
Lancaster *v.* Eve 6
Lancefield *v.* Iggulden .. 381, 424
Lander & Bagley, Re .. 570, *Add.*

PAGE

Lander *v.* Elsmore 430
Landfield, Re, Landfield *v.* Landfield 606
Landowners Co. *v.* Ashford .. 459
Landrock *v.* Metropolitan R. Co... 55
Lane, Re, Luard *v.* Lane.. .. 423
——, Re 219, 224, 448
—— and Irving, Re 515
—— *v.* Bennett 145, 208
—— *v.* Capsey 44, 66, 95
—— *v.* Hone 18
—— *v.* Newdigate 78
—— *v.* Oakes 320
Lanfranchi *v.* Mackenzie 11, 46, 94, 97
Langdale, Re 555, 741
——— *v.* Briggs 424, 425, 435
Langford *v.* Little.. .. 422, 434
——— *v.* Selmes .. 106, 258
Langley *v.* Fisher.. 155
——— *v.* Hammond 59
——— *v.* Sneyd 357, 359
Langridge *v.* Levey 194
Langston *v.* Blackmore 269
Langton *v.* Horton 454
Lanyon *v.* Carne 104
Laporte *v.* Cortick.. 318
Large's case 299
Larken, Re.. 554
Larkins *v.* Phipps.. 182
Lascelles *v.* Onslow .. 39, 40
Latham *v.* Latham .. 605, 606
Lathbury *v.* Arnold 47
Latimer *v.* Harrison 384
Latter *v.* Dashwood 152
Lavery and Kirk, Re 570
Law, Re 649
—— *v.* Bagwell 153
—— *v.* Stoney 744
Law Guarantee Society *v.* Bank of England 520, 602
Lawes *v.* Gibson 443
Lawley *v.* Hooper.. 163
Lawrance *v.* Norreys .. 154, 157
Lawrence *v.* Austin .. 78, 98
——— *v.* Galsworthy 499
——— *v.* Hitch.. .. 26, 27
——— *v.* Horton 98
——— *v.* Jenkins 26
——— *v.* Lawrence .. 347, 443
——— *v.* Obee 95
——— *v.* Willcocks .. 191, 194
Lawrie *v.* Lees 575
Lawson *v.* Langley .. 2, 10
Lawton *v.* Ford 181
——— *v.* Ward 65, 66
Lay, Re 413
Leach, Re 417
——— *v.* Westall 745
Leadbitter, Re 656
Leak *v.* Driffield 328
Leavesley, Re .. 452, 456, 457
Lechmere *v.* Brasier 372
——— *v.* Brotheridge 297
——— *v.* Clamp.. 505, 516, 526
——— *v.* Fletcher 220
Leconfield *v.* Londsdale 6, 38, 71, 84
Lee, Re 409, 508

PAGE

Lee *v.* Brown 180
—— *v.* Dangar 448
—— *v.* Green 462
—— *v.* Nuttall 384
—— *v.* Smith 487
—— *v.* Stevenson 73
—— *v.* Willock 143
—— *v.* Wilmot 221
—— Conservators *v.* Button .. 85
Leech *v.* Bates 409
—— *v.* Schweder 92, 97
Leeds Banking Co., Re 460
—— *v.* Amherst .. 149, 156, 234
—— Co. *v.* Shepherd 210
Lees, Re 555
—— *v.* Coulton 516, 517, 522, 526, 743
Leese, Re 413
—— *v.* Martin 456
Legg *v.* Evans 450
—— *v.* Mackrell 519
Legge, Re (15 C. B. 364) .. 302
———, Re (6 W. R. 20) 654
Leggot *v.* Western 457
Lehmann, Re 459
Leifchilds, Re 259
Leigh, Re 656
——— *v.* Dickeson .. 137, 138
——— *v.* Jack 55, 120
——— *v.* Leigh 313, 314
——— *v.* Winter 296
Leighton *v.* Price, Re Price 677, 699, 711, 712
——— *v.* Theed.. 128
Leland *v.* Murphy.. 222
Lemage *v.* Goodban .. 415, 416
Le Maître *v.* Davies 7
Leman *v.* Newnham 177
Lemann, Re 518, 602
Lemon *v.* Simmons 333
Leon, Re 502, 520, 539
Leonino *v.* Leonino 395
Leslie, Re 555
Lessenbury *v.* Evans 488
Letchford, Re 646
Lethbridge *v.* Kirkman 169
——— *v.* Winter 50
Letton *v.* Goodden 87
Leventhorpe *v.* Ashbie 242
Le Veux *v.* Berkeley 217
Lewes' trusts, Re (6 Ch. 356) .. 142
Lewin *v.* Wilson .. 162, 174, 182
Lewis, Re (24 W. R. 103) 300, 654, 663
———, Re (31 L. J. Prob. 153).. 408
———, Re (1 Mac. & G. 23) .. 501
——— Bowles' case 405
——— *v.* Duncombe 189, 447, 453
——— *v.* Lewis 392, 397
——— *v.* Nobbs 555
——— *v.* Thomas.. 155
——— *v.* Willis 258
Ley *v.* Ley 547
—— *v.* Peter 128, 139
Liddell *v.* Liddell 607, 644
Liddiard, Re 520
Lidiard, Re 114, 569
Life Association of Scotland *v.* Siddal 151, 157, 244, 249

PAGE

Liford's case 60
Liggins *v.* Inge 48, 68, 74
Lightbody, Re .. 520, 522, 602
Lightbown *v.* McMyle 382
Lilford *v.* A.-G. 253
——— *v.* Keck (30 Beav. 300) .. 424
——— *v.* Powys Keck (L. R., 1 Eq. 347) 381
Lillingston *v.* Pares, Re Pares 253, 260, 742, 744
Lillingston's case 467
Lillwall, Re 606, 620
Lillywhite *v.* Trimmer 79
Lincoln Chapel, Re 527
Lindsay *v.* Lindsay 413
——— Petroleum Co. *v.* Hurd .. 158
Lindsell *v.* Phillips, Re Powers 199, 230
Line *v.* Stephenson 488
Lingwood *v.* Stowmarket Co. .. 79
Linley *v.* Taylor 346
Linsell *v.* Bonsor .. 182, 222, 226
Lippard *v.* Ricketts .. 193, 459
Lipscomb *v.* Lipscomb 395
Lisburne *v.* Davies 40
Lister *v.* Lister 62
—— *v.* Mahony 340
—— *v.* Pickford 152
—— *v.* Stubbs 235
Little, Re 503
——— Re, Harrison *v.* Harrison 269, 605, 606, 614
——— Re, Re Harrison .. 605, 606
——— *v.* Wingfield 38
Littlehales *v.* Lightfoot, Re Kay 526
Liverpool, &c. Association, Re .. 215
——— *v.* Chorley Waterworks Co. 81, 82
Livett *v.* Wilson 45, 46, 61
Llewellin, Re, Llewellin *v.* Williams 549, 689, 697, 703, 707, 708
Llewellyn *v.* Mackworth 153
Lloyd, Re (9 P. D. 65) .. 657, 742
———, Re (1888, W. N. 20) 564, 602
——— Re, Edwards *v.* Lloyd 690, 699
——— *v.* Davies 448
——— *v.* Harris 461
——— *v.* Jackson 430
——— *v.* Jones 37, 745
——— *v.* Lloyd .. 259, 270, 344, 423
——— *v.* Nicholas 249
——— *v.* Powis 42
Loaring, Ex parte 179
Loch *v.* Bagley 299
Lock *v.* Pearce 588
Locke *v.* Matthews 127
—— *v.* Southwood 358
Lockey *v.* Lockey 190
Locking *v.* Parker 151, 159
Lockington *v.* Shipley 249
Lockwood *v.* Wood .. 23, 27
Loftus *v.* Smith 177
——— *v.* Swift 162
Logan *v.* Bell 415
——— *v.* Birkett 297
——— *v.* Burton 66
Londesborough *v.* Mowatt .. 192
L. C. & D. R. Co. *v.* S. E. R. Co. 191, 192

PAGE

L. & S. W. R. *v.* Bridger .. 530
L. & N. W. R. Co. Ex parte, Re Smith 689
L. N. & W. R. Co. *v.* Boulton .. 583
London *v.* Lowe 26, 27
——— *v.* Pewterers' Co. 13
——— *v.* Rigg 60
——— *v.* St. Sepulchre 27
London Bank *v.* Bogle .. 322, 323
——————— *v.* Clancarty .. 194
London Chartered Bank *v.* Lemprière 297, 381
London and County Co. *v.* Dover 380
London Wharfing Co., Re .. 459
London, Tilbury &c. R. Co., Re .. 96
London (City of) Brewery Co. *v.* Tennant 96, 97, 98, 99
Long, Re 554, 555
—— *v.* Gardner, Re Gardner ..*Add.*
—— *v.* Greville 224
—— *v.* Myles 363
—— *v.* Rankin 296
—— *v.* Storie 453
Longford *v.* Eyre 409
Longuet *v.* Scawen 163
Lonsley *v.* Hayward and another 89
Loomes *v.* Stotherd 384
Lord Adv. *v.* Blantyre .. 84, 85, 87
Lord *v.* Lord 189
—— *v.* Sydney City 85
Lorentz, Re 554
Lovell *v.* Forester, Re Ballard 209, 237
—— *v.* Newton 318
—— *v.* Smith 65
Low *v.* Barron 243, 340
—— Moor Co. *v.* Stanley Coal Co. 121, 126
Lowe *v.* Carpenter .. 14, 46
—— *v.* Fox .. 141, 196, 205, 216, 326
—— *v.* Govett 86
Lowndes *v.* The Garnett, &c. Co. 219, 223
Lowry, Re 496, 499, 503
——— *v.* Crothers .. 3, 17
Lowther *v.* Heaver 487
Loxley *v.* Heath 433
Luard *v.* Lane, Re Lane 423
Lucas *v.* Denison 160
Ludlam, Re, Ludlam *v.* Ludlam 182, 406, 428
Lumley *v.* Desborough, Re Keane 606
Luscombe *v.* Steer 100
Lush *v.* Wilkinson 366
Lushington *v.* Onslow 419
Luttrell's case 36, 65, 75
Lyall *v.* Fluker 184
Lyatt *v.* Stafford Co. 179
Lyde *v.* Mynn 257
Lyell *v.* Kennedy 118, 131, 168, 174, 361
Lynch *v.* Nelson 242
——— *v.* Paraguay 401
Lynn Regis *v.* Taylor 23
Lyon *v.* Fishmongers' Co. .. 57, 67, 82, 83
—— *v.* Read 258, 487
Lys *v.* Lys 741
Lysaght *v.* Edwards 499
Lyster *v.* Dolland 450

PAGE

Lyster *v.* Mahony 344, 359
Lytton's Will, Re 692, 693
Maber *v.* Maber 225
Maberley, Re, Maberley *v.* Maberley 688, 697
——— *v.* Dowson 12
Maberly, Re 520
Macclesfield *v.* Chapman 26
——— *v.* Pedley 26
Macdonald *v.* Lambe 174
Macdougall *v.* Purrier 112
Mace, Re 518, 521
—— *v.* Philcox 86
MacGlone *v.* Smith 77
MacGregor, Re 410
Machel *v.* Clark 243
MacHenry *v.* Davies 327
Macher *v.* The Foundling Hospital 124
Machu, Re 299
Mackensie, Re .. 677, 688, 697
Mackenzie *v.* Mackenzie 512
——— *v.* Sligo and Shannon R. Co. 461
Mackey *v.* Scottish Widows' Co...94, 98
Mackintosh *v.* Great Western R. Co. 192
Mackreth *v.* Symmons .. 178, 179
Maclaren *v.* Stainton 193
Macleay, Re 299
MacManus *v.* Cooke .. 48, 92
Macnicoll *v.* Parnell 477
Macpherson *v.* Scottish Society .. 51
McAlpine *v.* Moore, Re Moore .. 499, 519, 521
McAra *v.* McCay 416
M'Carthy *v.* Daunt 180
M'Clintock, Re 314
McCormack, Ex parte 330
M'Cullock *v.* Dawes 219
M'Donnell *v.* M'Kinty 120, 121, 122
——— *v.* White 233
M'Mahon *v.* Burchell 138
——— *v.* M'Elroy 142
M'Murdo, Re 405, 413
M'Murray *v.* Spicer .. 504, 505
M'Queen *v.* Farquhar 269
M'Vicar, Re 415
Maddever, Re, Three Towns Co. *v.* Maddever 158, 232
Maddick *v.* Marks, Re Clark .. 429
Maddock, Re 408
——— *v.* Mallett 204
Magdalen College case 164
——— ——— *v.* A.-Gen. .. 109
Magdalen Hospital *v.* Knotts .. 113, 123, 125, 131, 153
Maggi, Re, Winehouse *v.* Winehouse 382, 383
Magnesi *v.* Hazelton 417
Magor *v.* Chadwick .. 72, 73, 79
——— *v.* Lansley 297
——— *v.* Williams 421
Maguire *v.* Grattan 97
Mahon *v.* Dawson 372
Main, Re 143
Mainland *v.* Cave, Re Cave *Add.*
Mainwaring, Re 511

PAGE

Mainwaring *v.* Giles 90
Mais, Re 517, 518
Malcolmson *v.* Malcolmson .. 430
——— *v.* O'Dea .. 37, 38
Maley, Re 417
Malins *v.* Freeman 125
Mallack *v.* Galton 373
Mallin, Re 649, 650
Mallon *v.* Fitzgerald 124
Maltby *v.* Russell 383
Man *v.* Ricketts 411
Manbridge *v.* Plummer 359
Manby *v.* Bewicke 155
——— *v.* Manby 175
——— *v.* Scott 384
Manchester and Southport R. Co., Re 422
——— ——— Banking Co. *v.* Parkinson 477
——— ——— *v.* Lyons 27
Mander *v.* Harris, Re March .. 326
Mandeville's case 360
Manifold *v.* Pennington 18
Manisty *v.* Churchill 382
Mann *v.* Brodie 50
Mannall *v.* Fisher 38
Manners (Lord) *v.* Johnson .. 81
Manning, Re 522
——— *v.* Phelps .. 102, 203
——— *v.* Purcell 420
——— *v.* Wasdale 6
Mannox *v.* Greener 430
Mansel, Re 680, 706
Mansfield *v.* Mansfield, Re Cuno .. 325, 326, 406
——— *v.* Ogle .. 189, 192, 193, 460
Mantell *v.* Mantell 363
March, Re, Mander *v.* Harris .. 326
——— *v.* Russell 157
Margary *v.* Robinson 408, 409, 417, 436
Marker *v.* Marker 156
Markwell *v.* Markwell 382
Markwell's case 553
Markwick *v.* Hardingham 160, 168
Marlborough, Re, Marlborough *v.* Marjoribanks .. 688, 690, 697, 698, 707
——— ——— *v.* Godolphin 243, 268
——— ——— *v.* Sartoris 678, 702, 703
Marriage Settlement, A, Re .. 606
Marriott, Re 520
Marryat *v.* Marryat 385
Marsden, Re 269
——— Re, Bowden *v.* Layland 236
——— Re, Withington *v.* Newmann 459
Marsh and Granville, Re .. 567, 570
——— Re, Mason *v.* Thorne .. 427
Marshall, Re .. 407, 655, 662
——— *v.* Gingell .. 387, 433
——— *v.* Hicks 448
——— *v.* Smith 114, 185, 343
——— *v.* Ulleswater Co. 38, 84
Marsham *v.* Hunter 42
Marshfield, Re, Marshfield *v.* Hutchins 188

	PAGE
Martin Pye, Re	518, 521
———, Re (6 Not. Cas. 694)	.. 408
———, Re (1 Rob. 712) ..	.. 420
———, Re (34 Ch. Div. 618)	.. 499, 500, 518, 522, 530
———, Re, Martin *v.* Martin	.. 430
——— *v.* Beauchamp ..	181, 216
——— *v.* Goble	94, 97
——— *v.* Headon ..	.. 94
——— *v.* Smith	.. 486
——— *v.* Strachan ..	.. 359
——— *v.* Styles	.. 78
——— *v.* Wilks	.. 448
Martinez, Re ..	519, 523, 524
Martyn, Re	502, 521
——— *v.* Blake	.. 192
Marzetti *v.* Williams ..	.. 43
Maskell *v.* Farrington ..	.. 387
Mason, Re (34 Beav. 494)	.. 433
———, Re (10 Ch. 273) ..	500, 509
———, Re, Mason *v.* Mason (7 Ch. D. 707)	501
——— (1891, 3 Ch. 467) ..	.. 656
——— *v.* Broadbent ..	.. 188
——— *v.* Cæsar	.. 44
——— *v.* Hill	68, 77
——— *v.* Mason	.. 143
——— *v.* Mitchell ..	.. 318
——— *v.* Shrewsbury	7, 10, 71, 73
——— *v.* Thorne, Re Marsh	.. 427
Masonic Co. *v.* Sharpe, Re Sharpe ..	..210, 232, 233, 235
Massey *v.* Parker	.. 298
Massy *v.* Rowen	.. 297
Master *v.* Hansard ..	.. 93
Masters *v.* Pollie	.. 57
—— *v.* Stanly	.. 450
Mathew *v.* Blackmore ..	.. 488
——— *v.* Brise	.. 190
Mathews *v.* Gardiner ..	.. 432
——— *v.* Keble	.. 193
Matthew *v.* Bowler ..	.. 179
Matthewman, Re	.. 319
Matthews, Re	517, 523
——— *v.* Jones ..	369, 379
——— *v.* Matthews ..	.. 426
——— *v.* Whittle ..	.. 323
Mattingley, Re	.. 427
Maundrell *v.* Maundrell ..	243, 342
Maxwell *v.* Hyslop ..	.. 394
May, Re, Crawford *v.* May	329, 383, 384
—— *v.* Gilbert	.. 90
—— *v.* Roper	.. 293
Mayd *v.* Field	.. 381
Maynard, Re	.. 503
Mead *v.* Bashford	.. 209
Medley *v.* Horton	.. 298
Medlicott *v.* O'Donnell ..	.. 155
Medlock, Re, Raffle *v.* Medlock	.. 609
Medway Navigation Co. *v.* Romney	74, 84
Meek *v.* Chamberlain ..	343, 344
—— *v.* Kettlewell ..	.. 257
Megginson *v.* Harper ..	.. 226
Melbourn, Ex parte ..	.. 211

	PAGE
Melbourne Corporation *v.* Brougham	.. 258
Mellersh *v.* Brown	187, 193, 203, 234
Melling *v.* Leek	128, 130
Mellish *v.* Brooks	102, 187
——— *v.* Vallins	393, 394
Mellor, Re	.. 321
——— *v.* Porter	373, 516
——— *v.* Spateman ..	32, 35
——— *v.* Watkin	.. 49
Mennard *v.* Welford ..	.. 518
Menteath *v.* Campbell, Re Wilson	406
Menzies *v.* Breadalbane ..	.. 70
Mercer *v.* Woodgate ..	.. 52
Mercers' Co. *v.* Auction Mart Co.	95
Merchant Banking Co. *v.* London, &c.	597, 598
——— *v.* Maude ..	194
Merchant Taylors' Co. *v.* Truscott.	28
Meredith *v.* Gilpin ..	.. 135
——— *v.* Leslie	.. 253
Merest *v.* James	.. 271
Merrill *v.* Frame	.. 488
Merritt, Re	.. 430
Merry, Re	.. 652
Merryweather *v.* Jones ..	.. 313
Messer *v.* Boyle	.. 454
Metcalf *v.* York	.. 453
Metcalfe *v.* Metcalfe ..	.. 299
Metropolitan Association, &c. *v.* Petch	.. 95
Metropolitan Asylum District *v.* Hill	.. 81
Metropolitan Bank and Jones, Re	570
——— *v.* Heiron	210, 235
Metropolitan Board *v.* L. & N. W. R. Co.	74, 75
——— of Works *v.* McCarthy	.. 53
Metropolitan Counties Assurance Co. *v.* Brown	.. 129
Mette *v.* Mette	.. 415
Mewburn, Re	.. 653
Mexborough *v.* Bower ..	.. 78
Meyerhoff *v.* Froehlick ..	.. 224
Meyrick, Re	.. 508
Miall *v.* Brain	.. 346
Michell, Re, Moore *v.* Moore	340, 344
——— *v.* Michell	.. 299
Micklethwait *v.* Newlay Co.	55, 85
——— *v.* Vincent	33
Middleton *v.* Clarence ..	.. 6
——— *v.* Lambert	28
——— *v.* Melton	208
Midgley *v.* Richardson ..	.. 63
Mid Kent R. Co., Re ..	.. 431
Midland Co. *v.* Potteries R. Co.	.. 450
—— R. Co., Re	.. 424
Mildmay *v.* Methuen ..	.. 192
——— *v.* Quicke	742, 744, 745
Mildred *v.* Austin	452, 478
Mileham, Re	.. 143
Miles *v.* Burton	.. 328
—— *v.* Jarvis	.. 748
—— *v.* Miles	.. 423
—— *v.* Rose	.. 82
Milfield, Re	.. 375

PAGE

Milford Haven Co. *v.* Mowatt .. 577
Mill *v.* New Forest 4, 7
Millar *v.* Horton 369
Miller *v.* Cook 193, 738
——— *v.* Dell 212
——— *v.* Little 37
——— *v.* Marriott 745
——— *v.* Miller 210
Milligan, Re 412
Millington *v.* Griffiths .. 28, 72, 75
——— ——— *v.* Thompson 185
Mills, Re (37 Ch. D. 312) 503, 507, 508
——, Re (34 Ch. Div. 33) .. 530
——, Re (40 Ch. Div. 14) 533, 600
——, Re Mills *v.* Mills 427
——— *v.* Borthwick 207
——— *v.* Capel 148
——— *v.* Cobb 547
——— *v.* Colchester 9, 24
——— *v.* Fowkes 224, 226
——— *v.* Fox .. 275, 290, 312, 313
——— *v.* Goff 133
——— *v.* Milward 418
Milner, Re 606
——— *v.* Harewood 312
Milnes *v.* Foden 411, 433
——— *v.* Slater 381
Milward, Re 649
Minchin, Re 508
Miner *v.* Gilmour 68
Minet *v.* Leman 41
——— *v.* Morgan 45
Mirehouse *v.* Scaife 424
Mitchell's claim 221, 222
Mitchell *v.* Cantrill .. 12, 13
Mitchison *v.* Thomson 589
Moase *v.* White 426
Mockett, Re 554, 555
Moert *v.* Moessard 173
Mogridge *v.* Clapp 686, 702, 710
Mold *v.* Wheatcroft .. 48, 67
Mole *v.* Smith 342
Moloney *v.* Brooke, Re Wells 383, 384
Molyneux, Re 516
Moncton and Gilzean, Re 570, 571
Monk *v.* Butler 47
Monmouthshire Canal Co. *v.* Harford 9, 10, 17
Montagu's case 124
Montague *v.* Montague 435
——— *v.* Perkins 214
Montefiore *v.* Behrens 457
Montford *v.* Cadogan 385
Montgomery *v.* Southwell .. 189
Montmorency *v.* Walsh 118
Montressor *v.* Williams 180
Moodie *v.* Bannister 205, 218, 219, 236
Moody and Yates, Re .. 575, 576
Moody *v.* King 340
——— *v.* Moody 251
——— *v.* Steggles 6
Moor *v.* Raisbeck 421, 422
Moorcock (The) 84
Moore, Re, McAlpine *v.* Moore 499, 519, 521
Moore *v.* Blake 155
——— *v.* Doherty 118
——— *v.* Greg 209

PAGE

Moore *v.* Hall 94, 97
——— *v.* Hawkins 402
——— *v.* Johnson, Re Johnson 313, 314
——— *v.* Knight .. 210, 214, 232, 233
——— *v.* Madden 424
——— *v.* Marriott .. 232, 382
——— *v.* Moore, Re Michell 340, 344
——— *v.* Moore (2 Ves. sen. 596) 277
——— *v.* ——— (1 Coll. 54) .. 298
——— *v.* ——— (1 D. J. & S. 602) 394
——— *v.* ——— (I. R., 6 Eq. 166) 419
——— *v.* Morris 298
——— *v.* Rawson .. 29, 65, 92, 95
——— *v.* Shepherd 239
——— *v.* Simkin 359, 360
——— *v.* Webb 79
——— *v.* Webster 350
Morant *v.* Chamberlin 52
Moravian Society, Re 518
Mordaunt *v.* Benwell 743
——— *v.* Thorold 185
Mordy and Cowman, Re 570
More, Re 434
Moreland *v.* Richardson 48
Moreton *v.* Holt 464
Morewood *v.* Wood 34
Morgan, Ex parte, Re Simpson .. 259
——, Re (22 Q. B. Div. 592) 492
——, Re (Seton, 4th ed. 516) 534
——, Re (9 Eq. 578) .. 644, 657
——, Re (49 L. J. Ch. 577) .. 644
——, Re (24 Ch. D. 114) 699, 704, 710, 712
——, Re, Pillgrem *v.* Pillgrem 451
——— *v.* Curtis 88, 91
——— *v.* Hatchell 405
——— *v.* Morgan (10 Eq. 99) 148, 190, 431
——— *v.* ——— (2 Dick. 643) .. 238
——— *v.* ——— (5 Madd. 408) 350
——— *v.* Ravey 202
——— *v.* Rowlands 224
——— *v.* Rutson 296
——— *v.* Swansea Authority .. 567
——— *v.* Thomas 125
Mority *v.* Stephan 456
Morley *v.* Clifford 32, 33
——— *v.* Finney 215, 225
——— *v.* Morley .. 179, 208, 370
——— *v.* Saunders 236
Morrell *v.* Frith 139, 140, 219, 222
——— *v.* Morrell 407, 412
Morris, Re 525
——— *v.* Dixon 220
——— *v.* Egginton 41
——— *v.* Manesty 455
——— *v.* Morris (6 W. R. 427) 149, 234
——— *v.* ——— (I. R., 6 C. L. 73) 243
——— *v.* ——— (10 Ch. 68) .. 384
——— *v.* ——— (17 Beav. 198) .. 432
——— *v.* Richards 214
Morritt *v.* Douglas 408
Morrough *v.* Power 185
Morse *v.* Faulkner 259
——— *v.* Royal 155, 157
——— *v.* Tucker 367, 379

	PAGE
Morton and Hallett, Re	570
———, Ex parte	370
Morton, Re..	417
——— *v.* Woods	258
Moscrop *v.* Sandeman	547
Moseley *v.* Walker	26
Mosley *v.* Ward	289
Moss, Re 521, 522, 525, 630	
—— *v.* Harter	429
Moth *v.* Atwood	155
Mott *v.* Shoolbred	66
Moulton *v.* Edmonds .. 144, 169	
Mounsey *v.* Ismay .. 5, 7, 25, 46	
Mount, Re 512, 535	
Mower *v.* Orr	433
Moxon *v.* Bright	209
Mucklow *v.* Fuller	555
Muggeridge, Re	554
———, Re, Muggeridge *v.* Sharp 203, 385, 553	
Muggleton *v.* Barnett	356
Muir *v.* Jolly	179
Mulliner *v.* Midland R. Co. .. 7, 51, 58	
Mulville *v.* Fallon..	65
Mumford *v.* Oxford	28
Munday *v.* Pigott	464
Mundell, Re .. 498, 507, 523	
Munderston *v.* Robertson ..	229
Mundy, Re.. 676, 677, 688, 692, 697	
——— *v.* Watkins .. 142, 196	
Municipal Society *v.* Smith ..	586
Munns *v.* Burn, Re Crosley 214, 233, 237	
——— *v.* Isle of Wight R. Co. ..	179
Munt *v.* Glynes	298
Murgatroyd *v.* Robinson .. 7, 72	
Murphy, Re	304
——— *v.* Murphy..	137
Murray and Heggarty, Re 569, 575	
———, Re (W. N. 1867, p. 190)	211
———, Re (W. N. 1868, p. 195)	555
——— *v.* Clarke	178
——— *v.* East India Co... 102, 216	
——— *v.* Hall	138
——— *v.* Watkins.. .. 142, 196	
Muschamp's case	299
Musgrave *v.* Emerson	106
——— *v.* Sandeman .. 605, 606	
Musgrove *v.* Cave	33
Mutlow *v.* Bigg 151, 179	
Mutter *v.* Chauvel..	166
Myers *v.* Catterson 13, 92, 93, 98	

	PAGE
Nagle *v.* O'Donnell	322
Nairn *v.* Prowse	178
Nanney *v.* Williams	190
Nanson *v.* Barnes	358
Nash, Re 502, 521, 530	
—— *v.* Allen	448
—— *v.* Hill	223
—— *v.* Hodgson	225
National etc. Co. *v.* Prudential etc. Co. 94, 98	
National Bank *v.* Gourley ..	376
National Manure Co. *v.* Donald	7, 29
Naylor and Spendla, Re 569, 571, 686	
Neal *v.* Wilding	255
Neale *v.* Mackenzie	546
—— *v.* Postlethwaite	460
Neate *v.* Marlborough	478
Neill *v.* Devonshire 29, 37, 38, 47, 84	
Nelson *v.* Agnew	272
——— *v.* Duncombe	384
——— *v.* Page 393, 396	
——— *v.* Stocker	312
Nepean *v.* Doe 115, 116, 117, 142	
Nesbit *v.* Rishton	170
Nesbitt, Re..	521
——— *v.* Lawder	393
Ness, Ex parte	462
Neve *v.* Flood	453
—— *v.* Hollands	226
Nevill, Re, Robinson *v.* Nevill ..	397
——— *v.* Snelling..	738
Neville, Re	412
Newbegin, Re, Eggleton *v.* Newbegin	238
Newbould *v.* Smith 162, 182, 205, 225	
Newbury *v.* Marten	373
Newby *v.* Harrison	48
Newcastle, Re	708
———, Re, (8 Eq. 700) 447, 450, 452, 479	
———, Re (24 Ch. D. 129) 682, 685, 697, 708, 709, 711	
———, Re (1883, W. N. 99) ..	697
——— *v.* Clark..	80
Newcomen *v.* Coulson .. 62, 64	
Newman, Re 276, 656	
——— *v.* Newman	208
——— *v.* Warner	522
——— *v.* Wilson	394
Newmarch *v.* Brandling	67
——— *v.* Storr .. 395, 397	
Newport *v.* Saunders	28
New River Co. *v.* Graves.. ..	78
——— *v.* Johnson ..	69
Newson *v.* Pender 94, 97	
Newton, Re (23 Ch. D. 187) .. 243, 292	
———, Re (61 L. T. 787) 692, 719	
——— *v.* Ayscough	156
——— *v.* Clarke	409
——— *v.* Conyngham	459
——— *v.* Cubitt	87
——— *v.* Harland..	119
——— *v.* Newton 421, 602	
——— *v.* Nock	192
——— *v.* Sherry	553
New Windsor *v.* Stovell .. 74, 75	
New Zealand Trust Co., Re	*Add.*
Nicholl, Re..	500
——— *v.* Jones	293
Nicholls *v.* Baker, Re Baker 236, 383	
——— *v.* Chapman	33
——— *v.* Hawkes..	430
——— *v.* How	467
——— *v.* Mitford	40
——— *v.* Parker	50

	PAGE
Nicholls *v.* Rosewarne	455
——— *v.* Wilson	215
Nichols *to* Nixey	297, 569
——— *v.* Marsland	81
——— *v.* Morgan	327
Nicholson, Re ..	499, 501, 509
——— *v.* Wordsworth	294
Nicholson's trusts, Re	522
Nickells *v.* Atherstone	257
Nicol *v.* Beaumont ..	25, 56
Nield *v.* L. & N. W. R. Co.	69, 70
Nitro-Phosphate Co. *v.* London	26, 70, 84
Nixon, Re	479
—— *v.* Cameron, Re Cameron ..	387
Noble *v.* Phelps	406, 435
—— *v.* Willock	405
Noding *v.* Alliston	409
Noel *v.* Bewley	257
—— *v.* Weston	385
Norbury *v.* Kitchin ..	74, 77
——— *v.* Meade	29, 65
Norcop, Re	289
Norfolk *v.* Arbuthnot	11, 12, 46, 90
——— *v.* Wixman	49
Norris, Re (1 Sw. & T. 6) ..	143
———, Re (14 W. R. 348) ..	410
———, Re (1883, W. N. 65) ..	740
———, Re, Allen *v.* Norris ..	602
——— *v.* Chambers	363
——— *v.* Stuart	465
Nortcliffe *v.* Warburton	462
Northam *v.* Bowden	48
——— *v.* Hurley	73
North London Co. *v.* Jacques	588, 589
North Shore Rail. Co. *v.* Pion ..	82
North Staffordshire R. Co., Re	290
Northumberland *v.* Houghton ..	38
Northwich *v.* Stanway	39
Norton, Ex parte	*Add.*
——— *v.* Bazett	409
——— *v.* Compton, Re Compton	384
——— *v.* Elam	213
——— *v.* Frecker	236
——— *v.* Johnstone	707
——— *v.* L. & N. W. R. Co. ..	56, 92, 120, 121
Norway *v.* Rowe	45
Nottingham Co. *v.* Butler ..	575
——— *v.* Lambert	27
Nouaille *v.* Greenwood	251
Noy, Re, 306	306
Noyes, Re	663
——— *v.* Crawley	174, 210
Nugent and Riley, Re	592
Nuneaton *v.* General Sewage Co.	81
Nuttall *v.* Bracewell ..	68, 70
——— *v.* Whitaker, Re Hartley	*Add.*
Oakley *v.* Adamson	58
——— *v.* Smith	262
Oastler *v.* Henderson	258
O'Beirne, Re	432
O'Brien *v.* Enright	72
——— *v.* Osborne	215
O'Connor *v.* Haslam	236
O'Donel *v.* Browne	238
O'Donnell, Re	533
Offley *v.* Clay	318
Ogilvie, Re	479
——— *v.* Blything	72
O'Halloran *v.* King, Re Bown ..	298
O'Hara *v.* Creagh	180
O'Hare *v.* Fahy	33
O'Keefe *v.* Jones	357
O'Kelly *v.* Bodkin	237
Oldham *v.* Stringer	597
Olding, Re	407
Olivant *v.* Wright	431
Oliver *v.* Richardson	185
Olney *v.* Bates	434
Onley *v.* Gardiner ..	9, 17, 21, 46
Onslow, Re	457
———, Re, Plowden *v.* Gayford	329, 337
Opera Limited, Re	450
Oppenheim *v.* Henry	420
Orange and Wright, Re	570
——— *v.* Pickford	411
Ord, Re (3 W. R. 386)	504
——, Re, Dickinson *v.* Dickinson	424
Orde, Re (24 Ch. Div. 271)	519, 520, 521, 602
Orger *v.* Sparke	516
Oriental Bank, Re	382
——— Corporation, Ex parte ..	459
Original Hartlepool Co. *v.* Gibb ..	54, 67, 82, 83
Ormerod, Re ..	510, 518, 698, 724
——— *v.* Thompson	78
——— *v.* Todmorden Co.	68, 70, 74, 77
O'Rorke *v.* Bolingbroke	738
——— *v.* O'Rorke	342
Orrell *v.* Maddox	134
Orr-Ewing *v.* Colquhoun	68, 77, 82, 84
Osborn, Re	499, 505
——— *v.* Marlborough	255
——— *v.* Osborn	745
——— *v.* Wise	62, 63, 64
Osborne to Rowlett ..	570, 571
Osbrey *v.* Bury	243
O'Sullivan *v.* M'Sweeney ..	141
——— *v.* M'Swiney	137
Oswald *v.* Legh	208
O'Toole *v.* Browne ..	422, 423
Oulds *v.* Sansom	606
Outram *v.* Maude	76
——— *v.* Moorewood	50
Outwin, Re	326, 524
Owen, Re	518, 537
——— *v.* De Beauvoir	105, 121, 142, 169
Owens, Re	605
Oxenham, Re	522
——— *v.* Esdaile	179
Oxford Society, Re	235
——— *v.* Richardson	38

	PAGE
Packe *v.* Mee	41, 56
Packer, Re	.. 663
Packman and Moss, Re ..	.. 569
Paddon *v.* Bartlett ..	186, 203
Pagani, Re..	499, 539
Page *v.* Adam	388, 391
—— *v.* Cooper	.. 389
—— *v.* Donovan	.. 436
—— *v.* Selby	.. 138
Paget, Re 704, 707, 710, 723	
——— *v.* Anglesey ..	.. 443
——— *v.* Foley 114, 180, 186, 187, 203	
Paglar *v.* Tongue	.. 406
Paine, Re	521, 630
——— *v.* Jones	.. 119
——— *v.* Ryder	.. 41
——— *v.* Slater	.. 464
Palk *v.* Skinner	.. 20
Palliser *v.* Gurney ..	.. 328
Palmer, Re..	.. 737
——— *v.* Fletcher ..	.. 93
——— *v.* Graves	: 387
——— *v.* Keblethwaite ..	.. 77
——— *v.* Locke	.. 269
——— *v.* Newell	.. 429
——— *v.* Peat	.. 416
——— *v.* Trevor	: 320
——— *v.* Wheeler ..	.. 269
Papendick *v.* Bridgwater..	4, 50
Paramour *v.* Yardley ..	.. 173
Pardo *v.* Bingham 211, 228, 377, 381, 382	
Pares, Re, Lillingston *v.* Pares .. 253, 260, 742, 744	
Pargeter *v.* Harris.. ..	.. 258
Parke *v.* M'Loughlin ..	.. 124
Parker and Beech, Re ..	.. 570
——— Ex parte	.. 179
———, Re	433, 501, 521
——— *v.* Carter	.. 351
——— *v.* Clarke	.. 358
——— *v.* Downing ..	.. 347
——— *v.* First Avenue Hotel Co. 94, 97, 98	
——— *v.* Fuller	.. 379
——— *v.* Gage	.. 105
——— *v.* Leach	.. 89
——— *v.* Mitchell ..	14, 46
——— *v.* Ringham ..	.. 382
——— *v.* Smith	.. 96
——— *v.* Sowerby ..	.. 346
——— *v.* Taswell	.. 487
——— *v.* Trigg	741, 745
Parker's trusts, Re ..	.. 518
Parkes *v.* White	.. 298
Parkin, Re	381, *Add.*
Parkinson *v.* Lucas ..	238, 750
Parmenter *v.* Webber ..	.. 106
Parmeter *v.* A. G. ..	.. 112
Parmiter *v.* Parmiter ..	220, 223
Parrett Co. *v.* Robins ..	.. 82
Parrott, Re	520, 522
———, Re, Walter *v.* Parrott .. 299	
——— *v.* Palmer	.. 191
——— *v.* Sweetland ..	.. 178
Parry, Re	654, 710
——— *v.* Jones	.. 448

	PAGE
Parry *v.* Thomas	.. 35
Parsons, Re, Stockley *v.* Parsons . 330	
——— *v.* Miller, Re Stokes	*Add.*
——— *v.* Parsons ..	.. 296
Partridge *v.* Bere	.. 129
——— *v.* Foster ..	.. 454
Pascoe *v.* Swan	137, 190
Pass *v.* Dundas	.. 556
Patch *v.* Shore	.. 429
Patching *v.* Barnett ..	.. 443
——— *v.* Bull	.. 575
Paterson *v.* Mills	.. 356
——— *v.* Paterson ..	.. 514
Patman *v.* Harland ..	.. 567
Paton *v.* Ormerod	.. 416
Patrick *v.* Colerich ..	.. 49
——— *v.* Simpson ..	.. 151
——— *v.* Stubbs	.. 40
Patten to Edmonton ..	.. 570
Pattison *v.* Hawkesworth ..	157
Paulter *v.* Cornhill ..	.. 350
Pawsey *v.* Barnes	.. 179
Paxton *v.* Popham ..	.. 269
Payne *v.* Esdaile	103, 109
—— *v.* Mortimer	.. 383
—— *v.* Rogers	.. 80
—— *v.* Shedden	.. 14
—— *v.* Trappes	.. 421
Peace and Waller, Re ..	.. 327
Peacock, Re (10 Ch. D. 490) .. 297	
———, Re (14 Ch. Div. 212) .. 502, 513, 523	
———, Re (15 W. R. 100) 649, 657	
——— *v.* Eastland ..	253, 272
——— *v.* Monk	.. 297
——— *v.* Peacock ..	.. 128
Peake, Ex parte	.. 179
Peal *v.* Watts	.. 744
Pearce, Ex parte	.. 501
——— *v.* Graham.. ..	.. 434
Peardon *v.* Underhill ..	.. 35
Peareth *v.* Marriott ..	.. 314
Pearmain *v.* Twiss ..	.. 424
Pearn, Re	.. 437
Pears *v.* Laing .. 182, 183, 206	
Pearson, Re (5 Ch. Div. 982) 500, 519	
———, Re (21 W. R. 401) .. 555	
——— *v.* Pearson ..	.. 408
——— *v.* Spencer ..	.. 60
Peat, Re	174, 211, 234
Pechell *v.* Hilderley ..	.. 438
Pedder *v.* Hunt	174, 196
Peek *v.* Gurney	.. 233
Peers *v.* Lacy	.. 38
Peillau *v.* Brooking ..	.. 299
Peircey *v.* Gardner ..	.. 114
Pelham's case	.. 267
Pelham *v.* Pickersgill ..	.. 27
Pell *v.* Towers	.. 28
Pelly *v.* Bascombe 117, 141, 190	
Pelton *v.* Harrison 297, 327, 328	
Pemberton *v.* Barnes ..	740, 741
Pembroke's case	.. 37
Pembroke *v.* Friend ..	393, 394
Pendarves *v.* Monro ..	.. 94
Pendleton *v.* Booth ..	160, 168
Pennant's case	.. 124

PAGE

Pennant *v.* Kingscote 409
Pennefather *v.* Pennefather 143, 342
Penney *v.* Todd 150
Pennington *v.* Brinsop Co. 79, 98
——— *v.* Dalbiac 742
——— *v.* Payne, Re Wilson 389, 390
Penny and S. E. R. Co., Re .. 99
—— *v.* Allen .. 148, 190, 251
—— *v.* Avison 193
—— *v.* Brice 215
—— *v.* Pretor 374
Penruddock's case 95
Penryn *v.* Best 26
Pepper *v.* Barnard 90
Peppercorn *v.* Wayman 294
Peppin *v.* Shakespear .. 35, 39
Percival, Re, Boote *v.* Dalton .. 416
Percy *v.* Ashford Union 27
Perham *v.* Raynall 230
Perkins *v.* Sewell 255
——— *v.* Slater 95
Perks *v.* Mylrea 327
Perrin, Re 305
Perry *v.* Eames .. 7, 12, 13, 30, 109, 110
—— *v.* Fitzhowe .. 44, 47, 95, 119
—— *v.* Jackson 217
—— *v.* Jenkins 216, 238
—— *v.* Phelips 384
—— *v.* Regina 433
Petchell, Re 416
Peter *v.* Daniel 77
Peters *v.* Bacon 744
——— *v.* Cowie 338
Petre *v.* Duncombe 275
—— *v.* Petre 150, 154
Pettinger *v.* Ambler 429
Pettiward *v.* Prescot 191
Petty *v.* Anderson 318
Peyton, Re (25 Beav. 317) .. 511
———, Re (30 Beav. 252) .. 555
———, Re (7 Eq. 463) 555
——— *v.* M'Dermot 186
Pharmaceutical Society *v.* London Association 520
Phelps, Re 518
Phene's Trusts, Re 142
Pheysey *v.* Vicary .. 59, 61, 76
Philips *v.* Parry 381
——— *v.* Philips 219, 235
Phillips, Re 501
———, Re (4 Ch. 629) 501
———, Re (34 Ch. D. 467) 313, 314
———, Re, Robinson *v.* Burke 427
——— *v.* Andrews .. 746, 747
——— *v.* Beale 236
——— *v.* Broadley 214
——— *v.* Cayley 427
——— *v.* Fothergill 175
——— *v.* Homfray 192, 202, 235
——— *v.* Hudson 44
——— *v.* Jones 383
——— *v.* Low 93, 424
——— *v.* Munnings 181
——— *v.* Phillips 171, 336
——— *v.* Treeby 67

PAGE

Phillipson *v.* Gibbon 120
Phipps, Re 412
——— *v.* Hale 409
Picard *v.* Hine 327
Pickard, Re, Turner *v.* Nicholson 742, 743
Pickard *v.* Wheater, Re Robinson 380
Pickering *v.* Ilfracombe R. Co. .. 457
——— *v.* Stamford 112, 155, 156, 180
Pickersgill *v.* Grey .. 242, 491
——— *v.* Rodger 433
Pickett *v.* Loggan 191
Pickwell *v.* Spencer 430
Pierce *v.* A.-G. 423
——— *v.* Falconberge 85
Piercy, Re 409
Piers, Re 273, 291
Pierson *v.* Shore 363
Piggott and G. W. R. Co., Re .. 570
——— *v.* Jefferson 180, 182, 235
——— *v.* Stratton 99
——— *v.* Waller 251
Pigott *v.* Bayley 18
Pike *v.* Fitzgibbon 297—299, 381
Pilkington *v.* Bagshaw 277
——— *v.* Cooke 448
——— *v.* Stanhop 277
Pillgrem *v.* Pillgrem, Re Morgan 451
Pilling, Re 522, 523, 600
Pim *v.* Currell 87
Pimm *v.* Insall 313, 370
Pindar *v.* Robinson, Re Robinson 327
——— *v.* Wadsworth 43
Pinede, Re 428
Pinhorn *v.* Souster 128
Pinnington *v.* Galland 60
Piper *v.* Piper 392, 393
Pipkins *v.* Birmingham Gas Co. .. 82
Pitcher *v.* Roberts 459
Pitt, Re 517
—— *v.* Dacre 174, 180
—— *v.* Jackson 350
—— *v.* Jones 740, 741
—— *v.* Shew 450
—— *v.* White 744
Pittam *v.* Foster 226
Pitts, Re, Collins *v.* Pitts .. 609
—— *v.* Kingsbridge Highway Board 24
Place *v.* Fagg 450
—— *v.* Jackson 40
Plant *v.* Cotterell 212
—— *v.* James 46
—— *v.* Pearman 465
—— *v.* Taylor 494
Plasket *v.* Beeby 372
Plasterers' Co. *v.* Parish Clerks' Co. 13, 15
Platt, Re 500
—— *v.* Platt 748
—— *v.* Powles 255
Playfair *v.* Cooper .. 181, 189, 200
——— *v.* Musgrove 450
Playne *v.* Scriven 408
Plenty *v.* West .. 415, 416, 520
Plimmer *v.* Wellington .. 174, *Add.*
Plomley *v.* Felton 260

	PAGE
Plowden *v.* Gayford, Re Onslow	329, 337
——— *v.* Hyde	422
——— *v.* Thorpe	149
Plumstead *v.* British Land Co. ..	55
Plunket *v.* Penson 357, 369, 447,	448
——— *v.* Reilly	404
Plyer, Re 505,	523
Poinons, Re, Sutton *v.* Martin ..	326
Polden *v.* Bastard	6, 59
Pole *v.* Leask	184
Pollexfen *v.* Moore	178
Polley *v.* Polley	358
Pollock *v.* Pollock	443
——— *v.* Stacey	487
Pomfret *v.* Perring	429
——— *v.* Kicroft	64, 80
——— *v.* Windsor ..	130, 152
Ponsford *v.* Hartley	380
Poole, Re (6 Ch. D. 739)	318
——, Re (50 L. T. 585) 648, 649, 678, 680, 708,	711
——— *v.* Bursell	286
——— *v.* Griffith	120
——— *v.* Huskinson .. 50, 52,	55
——— *v.* Poole .. 237, 743,	745
——— *v.* Shergold	467
——— *v.* Whitt	448
Pooley, Re	414
——— *v.* Bosanquet	465
Poore *v.* Clark	67
Pope, Re 477,	478
——— *v.* Garland	131
——— *v.* Whitcombe	257
Pople, Re	143
Popple and Barratt, Re .. 569,	570
——— *v.* Sylvester .. 192,	459
Porcher *v.* Wilson 394,	395
Portal and Lamb, Re	424
Porter, Re 413, 518,	521
——— *v.* Fry	124
——— *v.* Lopes .. 741, 743,	745
——— *v.* Porter	748
Portland *v.* Hill	39
Portlock *v.* Gardner	156
Portsmouth Banking Co., Re 203,	204
Postlethwaite *v.* Rickman ..	235
Pott *v.* Clegg	209
Potter, Re 313,	699
——— *v.* North 30,	33
Potteries, &c. R. Co., Re ..	479
Pottinger, Ex parte	383
Potts *v.* Smith 11, 92,	99
Poulter *v.* Shackel, Re Briant ..	316
Powdrell *v.* Jones	343
Powell, Re (10 Hare, 134) ..	192
———, Re (18 W. R. 228) ..	427
———, Re (4 K. & J. 338) ..	504
———, Re (13 W. R. 696) ..	437
———, Re, Allaway *v.* Oakeley .. 682, 685, 703, 711,	715
——— *v.* Butler	72
——— *v.* Matthews 268, 273, 499,	503
——— *v.* Powell .. 417, 421,	744
——— *v.* Rees	202
——— *v.* Robins	372
Power *v.* Barham	219

	PAGE
Power *v.* Power	393
——— *v.* Sheil	342
Powers, Re, Lindsell *v.* Phillips 199,	230
——— *v.* Bathurst	51
Powis *v.* Corbet	368
Poynder, Re, Dickson-Poynder *v.* Cook	650
Pragnell *v.* Batten, Re Hardiman 744,	746
Prance *v.* Sympson	220
Pratt, Re .. 519, 523, 525,	*Add.*
—— *v.* Bull	453
—— *v.* Swaine 126,	216
Prescott *v.* Barker	426
——— *v.* Boucher	107
——— *v.* Phillips	71
Presland *v.* Bingham .. 12,	15
Price, Re (17 C. B. 708)	302
——, Re (13 C. B., N. S. 286) ..	305
——, Re (12 P. D. 137)	406
——, Re (6 Eq. 460)	521
——, Re (1883, W. N. 202) 496, 510,	513, 520
——, Re, Leighton *v.* Price 677, 699,	711, 712
——, Re, Stafford *v.* Stafford .. 297, 325, 326,	406
—— *v.* Berrington	155
—— *v.* Carver 372,	373
—— *v.* Copner	160
—— *v.* Evans	368
—— *v.* Parker	406
—— *v.* Powell	417
—— *v.* Price .. 379, 380,	465
—— *v.* Watkins	249
Prichard *v.* Powell	34
Pride *v.* Bubb 293,	297
Primrose, Re	529
Pring, Re	529
Pringle *v.* Wernham	96
Prior *v.* Horniblow	180
Procter *v.* Hodgson .. 60,	61
Prole *v.* Wiggins	259
Propert, Re	505
Proud *v.* Proud 151,	182
Provident Clerks' Association *v.* Lewis	*Add.*
Prowse *v.* Spurgin	236
Prudential Co. *v.* Edmonds ..	142
Prynne, Re	327
Pryor *v.* Pryor .. 51, 268,	740
Pryse, Re	737
Puddephatt, Re	409
Pudsey Co. *v.* Bradford	82
Pugh *v.* Heath 113,	161
Pullan *v.* Roughfort	73
Pullin *v.* Deffel 50, 53,	57
Pultney *v.* Warren	238
Punnett, Ex parte	258
Punsany and Leader's case ..	31
Purcell *v.* Blennerhassett	149
——— *v.* Macnamara .. 155,	156
Purdew *v.* Jackson	315
Purnell *v.* Wolverhampton Co. ..	82
Pursglove, Re	414
Purvis *v.* Abraham	522
Putnam *v.* Bates	227

	PAGE
Puxley, Ex parte	651, 655
Pybus *v.* Mitford	.. 357
Pye *v.* Daubuz	.. 284
—— *v.* Mumford	6, 17
Pyer *v.* Carter ..	60, 73, 74, 76
Pyke *v.* Bath and Wells ..	.. 171
Pym *v.* Harrison	63, 430
Pyman *v.* Burt	.. 459
Pyrah *v.* Woodcock ..	.. 151
Quarm *v.* Quarm	.. 431
Queade, Re	.. 337
Queen's College *v.* Hallett	.. 77
Quihampton *v.* Going ..	.. 411
Quilter *v.* Mapleson ..	588, 589
Quincey *v.* Sharpe ..	.. 221
Quinlan, Re	.. 508
Quinn *v.* Butler	.. 416
Quinton *v.* Frith	117, 190
R. *v.* Barr	.. 51
— *v.* Bedford	.. 27
— *v.* Bliss	4, 50, 51
— *v.* Bradfield	.. 52
— *v.* Bradford Navigation	.. 77
— *v.* Bristol Dock Co. ..	.. 77
— *v.* Brittledon	.. 335
— *v.* Broke	.. 50
— *v.* Budd	386, 467
— *v.* Calow	.. 14
— *v.* Cambridge	.. 104
— *v.* Carnatic R. Co. ..	319, *Add.*
— *v.* Casswell	.. 27
— *v.* Chambers	.. 466
— *v.* Chester	.. 166
— *v.* Chorley ..	29, 57, 64, 65
— *v.* Coggan	.. 170
— *v.* Coombes	.. 467
— *v.* Cricklade	.. 53
— *v.* Cuddington	.. 117
— *v.* Dalby	.. 25
— *v.* Darlington School ..	.. 130
— *v.* Day	.. 35
— *v.* Deane	.. 450
— *v.* East Mark	51, 55
— *v.* Edge Lane	.. 52
— *v.* Edmonton	.. 55
— *v.* Ellis	37, 243, 466
— *v.* Essex	.. 26
— *v.* Essex County Court	.. 459
— *v.* Eton College ..	.. 166
— *v.* Exeter	112, 171
— *v.* Fernandes	.. 467
— *v.* Garland	.. 402
— *v.* Gaskin	.. 130
— *v.* Geddington	.. 48
— *v.* Green	.. 25
— *v.* Greenhow	.. 53
— *v.* Grosvenor and others	.. 83
— *v.* Hagworthingham ..	.. 48
— *v.* Harbourne	.. 142
— *v.* Harrald	.. 322
— *v.* Harris	.. 30
— *v.* Hastings	.. 29

	PAGE
R. *v.* Hatfield	52, 55, 66
— *v.* Havering	.. 29
— *v.* Hay, Dr.	.. 143
— *v.* Hermitage	.. 42
— *v.* Hollier	.. 467
— *v.* Hornchurch	.. 39
— *v.* Hornden-on-the-Hill	.. 48
— *v.* Hornsea	.. 53
— *v.* Horsley	.. 126
— *v.* Hudson	22, 51
— *v.* Ingleton	.. 280
— *v.* Joliffe	22, 25
— *v.* Kerrison	.. 80
— *v.* Lamb	.. 467
— *v.* Land Registry ..	.. 481
— *v.* Lane	.. 47
— *v.* Leake	.. 52
— *v.* Lee	.. 467
— *v.* Leeke	.. 52
— *v.* Lloyd	49, 51
— *v.* London	165, 333
— *v.* Longton Gas Co. ..	53, 54
— *v.* Lopen	.. 343
— *v.* Lumley	.. 142
— *v.* Matthews	.. 87
— *v.* Mellor	.. 52
— *v.* Mersey Navigation ..	54, 85
— *v.* Metropolitan Board of Works	.. 69
— *v.* Montague	53, 83
— *v.* Morrall	.. 111
— *v.* Newlands	.. 119
— *v.* Northamptonshire ..	.. 52
— *v.* Pedly	.. 80
— *v.* Petrie	.. 51
— *v.* Poulter	.. 96
— *v.* Pratt	.. 55
— *v.* Rawlings	.. 467
— *v.* Robinson	.. 322
— *v.* Rollett	.. 25
— *v.* Rosewell	.. 95
— *v.* St. Benedict	52, 53
— *v.* St. John	.. 467
— *v.* Sarum	.. 467
— *v.* Saunderson	.. 467
— *v.* Smith	.. 467
— *v.* Staines	.. 72
— *v.* Standon	.. 48
— *v.* Stoughton	.. 53
— *v.* Strand Board	.. 55
— *v.* Talbot	.. 26
— *v.* Thomas	54, 85
— *v.* Thornton	.. 132
— *v.* Tippett	.. 53
— *v.* Trafford	.. 70
— *v.* Train	.. 53
— *v.* Twyning	.. 142
— *v.* U. K. Electric Telegraph Co.	50, 53
— *v.* Venn	.. 25
— *v.* Wandsworth	49
— *v.* Warblington	48
— *v.* Warwick	.. 89
— *v.* Weedon-Beck	277
— *v.* Westmark	29, 52
— *v.* Wharton	.. 85
— *v.* Whixley	.. 30
— *v.* Wilby	.. 39

	PAGE
R. *v.* Willshire	142
— *v.* Wilson	119, 294
— *v.* Woburn	117
— *v.* Wrangham	467
— *v.* Wright	51, 55, 109
— *v.* Yarborough	86
Race *v.* Ward ..	3, 6, 23, 25, 53
Rackham *v.* Marriott	222
Rackstraw, Re	523
Radcliff *v.* Salmon	454
Radcliffe, Re, Radcliffe *v.* Bewes.	269, 613, 614
——— *v.* Eccles	253, 275, 374
——— *v.* Portland	97
Radford *v.* Willis	425
Radnor, Re ..	698, 704, 707
——— *v.* Rotherham	171
——— *v.* Vandebendy	342
Raffety *v.* King	160
Raffle *v.* Medlock, Re Medlock ..	609
Raine *v.* Alderson	95
Rains *v.* Buxton ..	120, 121, 154
Rainsdon, Re	320
Rakestraw *v.* Bruyer	160
Rameshur *v.* Koonj	72
Ramsay *v.* Blair	6
Ramsbottom *v.* Buckhurst ..	448
Ramsey *v.* Rawson	47
Ramuz *v.* Southend Board	*Add.*
Randall, Re	511
——— *v.* Errington	157
——— *v.* Hall	58
——— *v.* Stevens	127
Randfield *v.* Randfield ..	414, 434
Rangeley *v.* Midland R. Co.	5, 53
Rann *v.* Hughes	173
Raphael, Re	521
Rathbone, Re	523
Rathmines, Re	689, 696
Ravenscroft *v.* Frisby ..	180, 182
Rawlin's case	257
Rawlins, Re	646
Rawlinson *v.* Miller	143, 361, 744, 745
Rawstron *v.* Taylor ..	69, 73
Ray, Re (47 L. T. 500) ..	502, 521
——, Re (25 Ch. D. 464) ..	702, 713
—— *v.* Pung	243
Rayner, Re	653
Read *v.* Farr	125
—— *v.* Morpeth	358
Reade *v.* Reade	190
Reading *v.* Rawsterne	116
——— *v.* Royston	357
Reay *v.* Rawlinson	430
Redgrave *v.* Hurd	155, 210, 233
Reece *v.* Miller	38
Reech *v.* Kennegal	173
Reed *v.* Brookman ..	45, 46
—— *v.* Fenn	181
—— *v.* Royal Exchange Assurance Co.	321
Rees *v.* King	136
Rees River Co. *v.* Atwell	366
Reeves, Re	304
Reeves *v.* Butcher	212
——— *v.* Neville	519
Reid, Re	439

	PAGE
Reid *v.* Reid	330
Reilly *v.* Booth	63
——— *v.* Reilly	552
Reinhardt *v.* Mentasti	100
Ren *v.* Bulkeley	296
Rennington *v.* Stevens	209
Renshaw *v.* Bean	95
Reveley, Re	645
Rew *v.* Pettet	226
Reynard *v.* Spence ..	345, 347
Reynault, Re	521
Reynolds, Re (3 Ch. Div. 61)	289, 657
———, Re (L. R. 3 P. & M. 35)	421
——— *v.* Clarke	72
——— *v.* Edwardes ..	57, 60
——— *v.* Jones	152
——— *v.* Monkton	87
——— *v.* Wright	404
Rhodes, Re, Rhodes *v.* Rhodes ..	384
——— *v.* Rhodes (7 App. Cas. 192)	407
——— *v.* ——— (36 Ch. D. 586)	142
——— *v.* ——— (Johns. 653) ..	191
——— *v.* Smethurst	215
Rhymney R. Co. *v.* Rhymney Iron Co.	192
Rice *v.* Rice	179
Rich *v.* Cockell	297
—— *v.* Johnson	121
Richard *v.* Squibb	33
Richards, Re (5 De G. & Sm. 636)	522
———, Re (L. R., 8 Eq. 119) ..	189
——— *v.* Easto	239
——— *v.* Fry	4, 9, 13, 46
——— *v.* Macclesfield	171
——— *v.* Peake	39
——— *v.* Revitt	81
——— *v.* Richards	356
Richardson, Re	563
——— *v.* Barry	223
——— *v.* Feary ..	741, 745
——— *v.* Horton	370
——— *v.* Jenkins ..	378, 385
——— *v.* Langridge ..	127, 128
——— *v.* Smallwood ..	366
——— *v.* Webb	448
——— *v.* Younge	161
Richmond *v.* White	384
Rickard *v.* Barrett	381
Rickards *v.* Patterson	460
Ricket *v.* Metropolitan R. Co. ..	53
Ricketts and Avent, Re	571
——— *v.* Ricketts (64 L. T. 263)	299
——— *v.* ——— (1891, W. N. 29)	457
——— *v.* Salway	18
Riddell *v.* Errington	326, 329, 662
——— *v.* Jenner	343
——— *v.* Strathmore	154
Rider *v.* Smith	64
—— *v.* Wood	356
Ridge, Re, Hellard *v.* Moody	682, 714
Ridley, Re, Buckton *v.* Hay ..	298
Rigby *v.* Bennett	93
Rigg *v.* Lonsdale	30
Right *v.* Beard	128
—— *v.* Bucknell	258, 259
—— *v.* Darby	133
Riley, Re	648

	PAGE
Riley to Streatfield	570
Rimington *v.* Cannon	120
——— *v.* Hartley	748
Ringer to Thompson	569
Ripley *v.* Sawyer	744
Ripon *v.* Dawding	296
Rippon, Re	438
Risely *v.* Ryle	451
Rishton *v.* Grissell	193
Rivers *v.* Adams	3, 24, 37
Rives *v.* Rives	534
Rivett Carnac, Re 242,	677, 678, 698
Riviere *v.* Bower	93
Rivis *v.* Watson	106, 740
Roach *v.* Trood	269
Roadley *v.* Dixon	346
Robbins *v.* Jones	52
Roberts, Re (14 Ch. Div. 49)	192, 193
———, Re (10 Ch. Div. 110)	.. 492
——— *v.* Carr	50, 52
——— *v.* Clarke	100
——— *v.* Cooper ..	300, 308, 316
——— *v.* Davey	124
——— *v.* Hunt	52
——— *v.* Macord	11, 99
——— *v.* Richards	69
——— *v.* Rose	77
——— *v.* Smith	347
Robertson *v.* Gauntlett	64
——— *v.* Hartopp 32,	39, 40, 41, 44
——— *v.* Richardson	299
Robinson's Executor's case ..	203
Robinson, Ex parte	305
———, Re	413
———, Re, Pickard *v.* Wheater	380
———, Re, Pindar *v.* Robinson	327
——— *v.* Alexander	210
——— *v.* Bristol	165
——— *v.* Burbidge	456
——— *v.* Burke, Re Phillips ..	427
——— *v.* Byron	78
——— *v.* Cummings	271
——— *v.* Currey	204
——— *v.* Duleep Singh	32, 40
——— *v.* Grave..	93
——— *v.* Kilvert ..	100, 488
——— *v.* Lowater ..	388, 390
——— *v.* Nesbitt	457
——— *v.* Nevill, Re Nevill ..	397
——— *v.* Peace ..	450, 456
——— *v.* Purday	186
——— *v.* Tongue	448
——— *v.* Trevor	568
——— *v.* Wheelwright ..	299
——— *v.* Woodward	461
Robson, In re	111
——— *v.* Whittingham	97
Roch *v.* Callen	109, 187
Rochdale Canal Co. *v.* King ..	81
——————— *v.* Radcliffe	7, 73
Rochfort *v.* Dawes	395
——— *v.* Fitzmaurice	254
Rock *v.* Cooke	238
Roddam *v.* Morley 179,	205, 206
Rodger *v.* Comptoir d'Escompte	194, 459
Rodham *v.* Berry	107

	PAGE
Rodhouse *v.* Mold	395
Rodney *v.* Rodney	380
Roe *v.* Baldwin	359
—— *v.* Birch, Re Birch ..	233, 236
—— *v.* Griffith	357
—— *v.* Griffiths	402
—— *v.* Ireland	112
—— *v.* Jeffrey	277
—— *v.* Jones	402
—— *v.* Lees	131
—— *v.* Lowe	277
—— *v.* Siddons	57, 58, 59
Roebuck *v.* Chadebet	740
Roffey *v.* Bent	457
——— *v.* Henderson	47
Rogers, Re (1 Dr. & Sm. 338) ..	555
———, Re (L. R. 1 C. P. 47)	305, 316
——— *v.* Acaster	315
——— *v.* Allen	37, 38
——— *v.* Brenton ..	23, 25, 26
——— *v.* Brookes	90
——— *v.* Goodenough ..	410, 421
——— *v.* Holloway	456
——— *v.* Kennay	450
——— *v.* Pitcher	119, 448
——— *v.* Rice	588, 589
——— *v.* Soutten	173
——— *v.* Taylor	6, 25
——— *v.* Wynne	39
Rolfe *v.* Chester	188, 378
—— *v.* Gregory	233
—— *v.* Perry ..	343, 393, 435
Rolland *v.* Hart	453
Rollason *v.* Leon	486
——— *v.* Rollason	450
Rolle *v.* Whyte ..	6, 15, 38, 71, 84
Rolleston *v.* Morton	453
Rolls Hoare, Re ..	502, 518, 537
Rolls *v.* St. George's Vestry ..	55
Ronalds *v.* Feltham	385
Rooke *v.* Rooke	427
Roper *v.* Doncaster	328, 329, 381
—— *v.* Halifax	267
—— *v.* Holland	173
—— *v.* Roper	107, 348
Rose *v.* Bartlett	426
—— *v.* Gould	237
—— *v.* Groves	53, 54, 83
—— *v.* Miles	54, 83
—— *v.* Savory	173
Roseingrave *v.* Burke	443
Rosewell *v.* Prior	93, 96
Rosher *v.* Rosher	299
Roskell, Re	519
Ross, Re	298
—— *v.* Fadden	81
—— *v.* Ross	299
Rossiter *v.* Rossiter	397
Rotherham *v.* Green	42
Rothery *v.* Munnings	215
Roughton *v.* Gibson	741
Round *v.* Bell	187, 189
—— *v.* Turner	688
Rous *v.* Jackson	244
Routledge *v.* Ramsay ..	184, 222
Row, Re	289
—— *v.* Power	251

	PAGE
Rowe, Re, Jacobs *v.* Hind	199
—— *v.* Gray	741
—— *v.* Hasland	143
—— *v.* London School Board	6, 58
Rowland *v.* Cuthbertson	346, 348
Rowley, Re	501
——— *v.* Adams	499, 524, 533
Rowntree *v.* Jacob	259
Rowsell *v.* Morris	379
Rowson *v.* Harrison	394
Royal Bank of Australia, Re	455
—— Society and Thompson, Re	570
Ruckmaboye *v.* Mottichund	145, 211
Rudd, Re	689
Rudge *v.* Winnall	314
Ruding, Re	429
Rugby Charity *v.* Merryweather	49, 51
Rule *v.* Jewell	233
Runcorn *v.* Cooper	164
——— *v.* Doe	115
Rush, Re	452, 477
Russel *v.* Russel	261
Russell's case	553
Russell, Ex parte	512
———, Re (15 P. D. 111)	415
———, Re (35 L. J. Ch. 461)	499
———, Re (1866, W. N. 125)	503
———, Re (22 W. R. 399)	648
———, Re, Russell *v.* Chell	422, 424
——— *v.* East Anglican R. Co.	451
——— *v.* Harford	9, 48
——— *v.* M'Culloch	453
——— *v.* Russell	427
——— *v.* Shenton	80
——— *v.* Watts	93
Rust *v.* Baker	143
Rustomjee *v.* The Queen	110
Rutherford, Re, Brown *v.* Rutherford	214
Rutland, Re	689, 696
——— *v.* Bowler	68
Ruttledge *v.* Whelan	588
Ryan, Re	496, 511
—— *v.* Cambie	178, 181
Rycroft *v.* Christy	294
Ryder *v.* Bickerton	157
Rylands *v.* Fletcher	81
Rylar, Re	653, 654
Rylatt *v.* Marfleet	39
Ryle *v.* Haggie	259
Sabin, Re	681
——— *v.* Heape	388, 389
Sacheverell *v.* Porter	41
Sackville *v.* Smyth	395, 397
Sadgrove *v.* Kirby	41, 44
St. Helen's Smelting Co. *v.* Tipping	99, 100
St. John *v.* Boughton	184
St. Mary, Newington *v.* Jacobs	55
St. Saviour's, Re	569
Salaman *v.* Glover	93
Salisbury, Re	571, 662
——— *v.* Gladstone	24, 35, 39
——— *v.* Great Northern R. Co.	54, 55
Salkeld *v.* Johnston	103
Sallery, Re	432
Salmon *v.* Gibbs	268
——— *v.* Swann	271
Salt *v.* Cooper	447, 477
Saltash *v.* Goodman	38
Salter *v.* Cavanagh	151
—— *v.* Kidgly	489
Salters' Co. *v.* Jay	13, 28
Salvin *v.* North Brancepeth Co.	100
——— *v.* Thornton	251
Samborn *v.* Harilo	41
Sambourne *v.* Barry	342
Sampson and Wall, Re	313, 314
——— *v.* Hoddinott	68, 70, 72, 74, 77
Sams *v.* Cronin	313
Samuel *v.* Samuel	299
Sandbach and Edmondson, Re	569, 570
Sanders *v.* Coward	204
——— *v.* Horner	534
——— *v.* Manley	9, 100
——— *v.* Meredith	208
——— *v.* Sanders	131, 137, 140, 168
Sandilands, Re	302
Sands to Thompson	129, 130, 151, 167, 194, 234
Sandwich *v.* G. N. R. Co.	74
Sanger *v.* Sanger	322
Sankey, Re, Sankey *v.* Clarke	389
Sargent, Re	450
Sartoris *v.* Sartoris	299
Saul *v.* Pattinson	296, 597, 613
Saumarez, Re	501
Saunders, Re	412, 413
——— *v.* Benson	209
——— *v.* Kent	614
——— *v.* Merryweather	545
——— *v.* Milsome	385
——— *v.* Musgrove	128
——— *v.* Newman	68, 75
Saundeys *v.* Oliff	59
Savage, Re	418, 522
——— *v.* Aldred	214
Savile *v.* Cowper	630
—— *v.* Kilner	100
—— *v.* Sweeney	318
Saville *v.* Blacket	296
Sawyer and Baring, Re	570
Saxby *v.* Manchester R. Co.	77
Saxton *v.* Bartley	741
——— *v.* Saxton	422, 423
Sayers *v.* Collyer	54, 78, 98
Scales *v.* Jacob	222
—— *v.* Pickering	54
Scamon *v.* Maw	303
Scarle *v.* Colt	162
Scarlett *v.* Hanson	450
Scarth, Re	646
——— *v.* Cotton	372
Scawen *v.* Blunt	402
Schiff, Re	306
Schofield, Re	531
——— *v.* Solomon	465
Scholefield *v.* Heafield	372, 373
——— *v.* Redfern	443
Scholes *v.* Chadwick	4
——— *v.* Hargraves	33

	PAGE
Scholey *v.* Walton..	219, 225, 230
Schroder *v.* Schroder ..	190, 191
Schultze *v.* Schultze ..	.. 321
Schwinge *v.* Dowell ..	.. 51
Scoones *v.* Morrell.. ..	.. 56
Scott, Re, Scott *v.* Hanbury	313, 314
—— *v.* Brown	.. 588
—— *v.* Hastings	.. 457
—— *v.* Heisch	649, 651
—— *v.* Jones ..	181, 220, 235
—— *v.* Kettlewell ..	.. 170
—— *v.* Morley	298, 327
—— *v.* Nixon ..	140, 141, 169
—— *v.* Pape ..	.. 11, 12, 94
—— *v.* Scholey	450, 467
—— *v.* Scott (Ambler 388)	.. 358
—— *v.* —— (4 H. L. C. 1065)	117, 122, 153
Scratton *v.* Brown.. ..	.. 86
Scriven *v.* Sandom.. ..	.. 429
Scrutton *v.* Pattillo ..	.. 143
Seager *v.* Aston	.. 183
Seagram *v.* Knight	149, 215, 234
——— *v.* Tuck	.. 235
Seaman, Re	.. 411
——— *v.* Vawdrey ..	.. 121
Searby *v.* Tottenham R. Co.	56, 120
Searle *v.* Cooke	170, 611
Seaton *v.* Seaton	313, 316
Sebright, Re 678, 686, 688, 704, 706, 707, 723	
——— *v.* Thornton	703, 704, 707
Seddon *v.* Bank of Bolton	.. 15
——— *v.* Smith	.. 121
Sedgwick *v.* Thomas ..	.. 606
Segrave, Re	.. 606
Selby *v.* Alston	271, 359
—— *v.* Nettlefold	.. 64
—— *v.* Robinson	.. 36
Selsey *v.* Rhodes	.. 156
Selwin *v.* Selwin	.. 402
Selwyn, In bonis	.. 143
Senhouse *v.* Christian ..	.. 62
Senior *v.* Hereford ..	.. 744
—— *v.* Pawson	.. 98
Serff *v.* Acton	.. 60
Seroka *v.* Kattenburg ..	326, 334
Seton *v.* Lafone	.. 258
Severance *v.* Civil Service Association	326, 327
Sewers *v.* Glasse	.. 3
Sexton Barnes, Re	652, 656, 657
Seymour *v.* Lucas.. ..	.. 453
Seymour's case	243, 412
Seyton, Re, Seyton *v.* Satterthwaite	321
Shackelton *v.* Sutcliffe ..	.. 81
Shadwell *v.* Hutchinson ..	13, 95
Shafto, Re	517, 601, 602
——— *v.* Butler	.. 298
Shakespear, Re, Deakin *v.* Lakin	328
——— *v.* Peppin ..	.. 40
Shannon *v.* Hodder ..	.. 103
Shapland *v.* Smith ..	.. 250
Sharington *v.* Shrotton ..	.. 138
Sharman, Re	.. 414
Sharp *v.* Lowther	.. 23
—— *v.* St. Sauveur ..	.. 402

	PAGE
Sharp *v.* Sharp	.. 294
Sharpe, Re, Masonic Co. *v.* Sharpe	210, 232, 233, 235
——— *v.* Foy	.. 313
——— *v.* Hancock ..	.. 75
Shaw, Re (12 Eq. 124) ..	.. 555
—— *v.* Borrer	.. 388
—— *v.* Foster	.. 499
—— *v.* Gould	.. 360
—— *v.* Hudson	.. 457
—— *v.* Johnson ..	187, 189, 493
—— *v.* Keighron	.. 135
—— *v.* Neale	460, 462
Shea *v.* Boschetti	.. 420
Sheaf *v.* Cave	343, 345
Shearn, Re..	.. 420
Sheffield, Re	.. 649
——— *v.* Ratcliffe ..	.. 363
Shelburn *v.* Biddulph ..	270, 271
Sheldon *v.* Sheldon ..	.. 410
Shelley's case	.. 358
Shelmerdine, Re	.. 518
Shephard, Re, Atkins *v.* Shephard	477
Shepheard, Re ..	644, 649, 658
Shepherd, Re	.. 318
——— *v.* Churchill ..	.. 516
——— *v.* Hodsman ..	.. 487
——— *v.* Payne.. ..	.. 26
Sheppard, Re (4 D. F. & J. 423)	519, 524
———, Re (1888, W. N. 231)..	602
——— *v.* Duke	.. 180
Shepperd *v.* Hills	.. 203
Sherard, Re	498, 516
Sherriff *v.* Hastings ..	.. 382
Sherwin *v.* Selkirk ..	.. 383
Shetelworth *v.* Neville ..	.. 370
Shewen *v.* Vanderhorst ..	.. 236
Shields *v.* Rice	.. 180
Shiers *v.* Ashworth, Re Jackson	434
Shiphard *v.* Lutwidge ..	369, 387
Shipperdson, Re	.. 521
——— *v.* Tower ..	.. 442
Shirley, Ex parte	.. 305
——— *v.* Fisher	.. 614
Shirton *v.* Richardson ..	.. 138
Shoppee *v.* Nathan ..	.. 448
Short *v.* M'Carthy ..	211, 212
Shotts Iron Co. *v.* Inglis ..	.. 100
Shurbrook *v.* Tufnell ..	.. 59
Shury *v.* Pigott	.. 76
Shute *v.* Shute	.. 171
Shuttleworth, Ex parte ..	.. 305
——— *v.* Cocker ..	.. 78
——— *v.* Le Fleming	2, 6, 37
Sidney *v.* Sidney ..	424, 435, 453
Sidgreaves *v.* Brewer, Re Fleetwood	414, 416
Sibbering *v.* Balcarras ..	.. 158
Sibthorp, Re	.. 410
Sidwell *v.* Mason	.. 221
Silk *v.* Eyre	.. 457
—— *v.* Prime	377, 387
Sillick *v.* Booth	.. 142
Silver *v.* Udall	.. 744
Simmons *v.* Rudall ..	237, 419
——— *v.* Simmons ..	.. 297
Simons *v.* Wintz	.. 463

PAGE
Simper *v.* Foley .. 11, 12, 95, 96
Simpkin *v.* Ashurst 132
Simpson, Re, Ex parte Morgan .. 259
———, Re 555
——— *v.* Bathurst 296
——— *v.* Dendy 56
——— *v.* Denny 743
——— *v.* Gutteridge .. 112, 342
——— *v.* Jones 313
——— *v.* Morley 462
——— *v.* Ritchie 745
——— *v.* Scales 53
——— *v.* Simpson (4 Bing. 333) 271, 277
——— *v.* ——— (3 L. R. Ir. 314) 234
——— *v.* Wells 25
Sims *v.* Brutton 224
Sinclair *v.* Great Eastern R. Co. .. 459
——— *v.* Jackson 149, 177, 186, 187, 188
Singleton *v.* Hopkins 503
——— *v.* Tomlinson 410
Sirdefield *v.* Price 238
Skeats, Re, Skeats *v.* Evans .. 602
Skeet *v.* Lindsay 221
Skerrett, Re 253
Skinner *v.* Ogle 435
Skinners' Co. *v.* Knight .. 588, *Add.*
Skitter, Re 504, 508
Skull *v.* Glenister 58, 65
Skynner *v.* Pelichet .. 503, 535
Slade *v.* Pattison 243
Sladen *v.* Sladen 358
Slaney *v.* Piggott 72
Slark, Re 653, 654
Slater, Re 188
——— *v.* Dangerfield 253
——— *v.* Lawson 229, 230
Slattery *v.* Ball, Re Ball 432
Sleeman, Re 342, 493
Slimm, Re 411
Sloan *v.* Holliday 62, 64, 66
Sloane *v.* Flood 135
Sloper, Re 521
——— *v.* Oliver, Re Batchelor .. 316
Sly *v.* Blake, Re Johnson 181, 182, 183
Small *v.* Hedgely, Re Hedgely 322, 370
Smalley *v.* Hardinge 492
Smallpiece *v.* Dawes 318
Smalpage *v.* Tonge 175
Smart *v.* Jones 47
—— *v.* Prujean 410
—— *v.* Tranter 326, 407
Smartt's case 410
Smethurst *v.* Longworth 374
Smirthwaite, Re 519, 522
Smith, Ex parte 314
———, Re (I. R., 4 Eq. 180) 511, 531
———, Re (10 C. B., N. S., 344) 302
———, Re (20 W. R. 695) .. 554
———, Re (1878 W. N. 196) .. 651
———, Re (40 Ch. Div. 391) .. 656
———, Re (1891, 3 Ch. 65) 689, 704, 705, 708
———, Re (43 L. T. 438) .. 301
———, Re (15 P. D. 2) 414
——— and Stott, Re .. 570, 618

PAGE
Smith, Re, Bilke *v.* Roper 406, 407, 421, 435
———, Re, Clements *v.* Ward .. 326
———, Re, Ex parte L. & N. W. R. Co. 689
———, Re, Henderson-Roe *v.* Hitchins .. .. 609, *Add.*
———, Re, Hannington *v.* True 395, 397
——— *v.* Adams 343
——— *v.* Adkins 411
——— *v.* Andrews .. 37, 38, 85
——— *v.* Baker 257
——— *v.* Bennett 118
——— *v.* Boucher 505, 516
——— *v.* Brownlow 44
——— *v.* Clay 149, 155
——— *v.* Clifford 253, 267
——— *v.* Conder 411
——— *v.* Cork and Bandon R. Co. 235
——— *v.* Cowell 477
——— *v.* Day 97, 98
——— *v.* Death 296
——— *v.* Evans 179
——— *v.* Forty 226
——— *v.* Fox 211, 232
——— *v.* Gateward 23
——— *v.* Gill 525
——— *v.* Gue, Re Gue .. *Add.*
——— *v.* Hibbard 178
——— *v.* Hill .. 187, 217, 234
——— *v.* Houblon 614
——— *v.* Hurst 454
——— *v.* Kendrick 80
——— *v.* King 118, 152
——— *v.* Lloyd 120, 121
——— *v.* Lomas 425
——— *v.* Lucas 313
——— *v.* Marwood 294
——— *v.* Matthews 350
——— *v.* Morgan 382
——— *v.* Moreton 393, 395
——— *v.* O'Grady 237
——— *v.* Owen 99
——— *v.* Packhurst 265
——— *v.* Parkhurst 134
——— *v.* Pierce 130
——— *v.* Pococke 210
——— *v.* Roberts 407
——— *v.* Robinson .. 550, 575
——— *v.* Sibthorpe, Re Jackson 616
——— *v.* Smith (1 Dr. & Sm. 384) 552
——— *v.* ——— (3 Drew, 72) 505, 523
——— *v.* ——— (20 Eq. 503) .. 98
——— *v.* ——— (3 Giff. 263) 393, 394
——— *v.* ——— (L. R. 1 P. & M. 143) .. 408, 437
——— *v.* ———, Re Benton .. 298
——— *v.* Spencer 340, 345
——— *v.* Stocks 120
——— *v.* Tebbitt 402
——— *v.* Thorne 220, 222
——— *v.* Wheeler 294
——— *v.* Whitlock .. 337, 456
Smyth, Re (2 De G. & Sm. 781) 513, 522

PAGE

Smyth, Re (4 De G. & S. 499) .. 523, 535
———, Re, (28 L. J. Prob. 1) .. 143
———, Re (55 L. T. 37) 518, 531, 537
——— *v.* Farnaby 254
——— *v.* Tyndall 172
Smythe, Re 289
Snape *v.* Turton 243
Snell, Re 655
Sneyd, Re 459
Snow *v.* Booth 189
—— *v.* Boycott 271
Soames *v.* Robinson 369
Sollory *v.* Leaver 107
Solme *v.* Bullock 35, 41
Solomon *v.* Meagher 558, 562, 563, 621
——— *v.* Solomon 392
Soltau *v.* De Held 53, 100
Somerset, Re 518
———, Re, Thynne *v.* St. Maur 326
——— *v.* Fogwell .. 38, 47
Somerville, Re 289
Sopwith *v.* Maughan 347
Sotheran *v.* Dening .. 415, 430
Souch *v.* East London R. Co. .. 49
Soulby, Re 517, 601
Soutar, Re 321, 333
Souter *v.* Drake 128
South, Re 448
S.-E. R. Co. *v.* Wharton 258
South Kensington Co-operative Stores, Re 443
South Metropolitan Co. *v.* Eden .. 62
South Shields Co. *v.* Cookson .. 69
South Western Bank *v.* Turner .. 598
South Western Co. *v.* Robertson 456, 457
Southampton *v.* Browne 489
——— *v.* Graves 173
Southcot *v.* Stowell 360
Sowdon *v.* Marriott 552
Sowerby *v.* Coleman 25
Sowry *v.* Sowry 289
Spackman *v.* Evans 158
——— *v.* Foster 212
——— *v.* Timbrell .. 370, 552
Sparkes *v.* Restall 226
Sparks, Re 501, 524
Sparling *v.* Clarson .. 97, 98
Sparrow, Ex parte 306
———, Re .. 276, 517, 607, 644
Spartali *v.* Constantinidi 192
Spawforth, Re 512
Spears *v.* The Lord Advocate .. 467
Spedding *v.* Fitzpatrick .. 18, 50, 66
Speer, Re 656
Speight *v.* Gaunt 556
Spencer, Re, Thomas *v.* Spencer 298
Sperling, Re 408
——— *v.* Rochfort, Re Van Hagan 428
——— *v.* Trevor 271
Spettigue, Re 529
Spickernell *v.* Hotham 203, 206, 219, 222, 380

PAGE

Spokes *v.* Banbury 79
Spooner, Re 428
Spong *v.* Spong 387
Spoor *v.* Green 204
Spratt *v.* Sherlock 124
Sprigge *v.* Sprigge 418
Springett *v.* Jenings 426
Spry *v.* Flood 87, 88
Spyer *v.* Hyatt 346, 378
Spurway, Re 649, 654
Squire *v.* Campbell 99
——— *v.* Huetson 450
Squires, Re 305
Stables, Re 293
Stace *v.* Gage 743
Stacey *v.* Elph 294
Stackhouse *v.* Barnston 108
Stafford *v.* Buckley 242
——— *v.* Coyney 52, 57
——— *v.* Stafford, Re Price 297, 325, 326, 406
Staffordshire Canal Co. *v.* Birmingham Canal Co. 7, 9
Stagg *v.* Wyatt 132
Stahlschmidt *v.* Lett 236, 348, 383
Staight *v.* Burn 95, 97
Staley *v.* Barrett 183
Stamford, Re 676, 688, 689, 691, 692, 707, 709
Stamford Banking Co. *v.* Ball .. 297
——— *v.* Smith 219, 224, 226
——— *v.* Dunbar .. 17, 18, 46
Stamper, Re, Stamper *v.* Stamper 500, 532
Standen *v.* Standen 427
Standering *v.* Hall .. 293, 742
Standish, Re 663
Stanford, Ex parte, Re Barber .. 583
Stanford's case 125
Stanley, Re 653, 663
——— *v.* Bond 456
——— *v.* Shrewsbury 98
——— *v.* Stanley 299, 456
——— *v.* White 56
Stansfield *v.* Hobson .. 160, 168
——— *v.* Stansfield 434
Stanton *v.* Hall 297
——— *v.* Lambert, Re Lambert 326, 407
Stanwix's case 143
Staple *v.* Haydon 58
Stapleton *v.* Stapleton 270
Starr-Bowkett Society and Sibun, Re 571
Stead, Re 114, 188
——— *v.* Banks 454
——— *v.* Hardacre 381
——— *v.* Platt 350
Stedham, Re 421
Stedman, Re, Coombe *v.* Vincent 743, 744
——— *v.* Hart .. 215 238, 384
Steedman *v.* Poole 298
Steel *v.* Prickett 56
Steele, Re 410, 421
——— *v.* Phillips 447

PAGE

Stephens, Re, Warburton *v.* Stephens 181, 199, 200, 220, 235, 238, 553
——— *v.* Taprill 418
Sterndale *v.* Hankinson 237
Stevens *v.* Austin 33
——— *v.* Thompson, Re Thompson 327
——— *v.* Tyrrell 303
——— *v.* Whistler 54
Stevenson *v.* Lambard 546
Steward *v.* North Metropolitan Co. 175
Stewart, Re (2 D. F. & J. 1) .. 503
———, Re (8 W. R. 297) 502, 518, 521, 522
——— *v.* Connick 226
——— *v.* Fletcher 606
Stiffe *v.* Everitt 316
Stillman *v.* Weedon 429
Stilwell *v.* Ashley 504
Stockley *v.* Parsons, Re Parsons .. 330
Stockport Co. *v.* Potter .. 70, 79
Stocks *v.* Booth 88, 91
Stogdon *v.* Lee .. 297, 298, 328
Stokes, Re 436, 521
———, Re, Parsons *v.* Miller *Add.*
——— *v.* Berry 117
——— *v.* City Offices 97
——— *v.* Salomons 423
——— *v.* Trumper 215
Stokoe *v.* Cowan 450
——— *v.* Singers 95
Stone, Ex parte 305
——, Re (I. R. 8 Eq. 621) .. 297
——, Re (1874, W. N. 4) 555
—— *v.* Godfrey 118
—— *v.* Parker 394
—— *v.* Stone (5 Ch. 74) 204, 206, 234
—— *v.* —— (3 Jur. N. S. 708) .. 534
Stonor, Re 337
Storie *v.* Winchester .. 166, 171
Stormont *v.* Wickens 343
Story *v.* Fry 217, 379
—— Tonge 316
—— *v.* Walsh 388
Stoughton *v.* Leigh ..28, 340, 346
Stracey *v.* Nelson 80
Strachan *v.* Thomas 108, 187, 203
Strangways, Re, Hickley *v.* Strangways ..677, 703, 704, 710
Stranks *v.* St. John .. 487, 488
Stratfield *v.* Dover 255
Strathmore *v.* Vane, Re Bowes .. 236
Stratton *v.* Pettit 486
Streatley, Re 409
Strevens *v.* Bailey 423
Strickland *v.* Strickland 358
Stringer, Re 118, 119
——— *v.* Harper 395
——— *v.* New 359
Strithorst *v.* Græme 217
Strong, Re 313
——— *v.* Stringer 589
Stroud, Re 513
Stroughill *v.* Anstey .. 389, 391
——— *v.* Buck 258
Strugnell *v.* Strugnell 744
Struthers *v.* Struthers .. 422, 423

PAGE

Strutt, Re 654
Stuart, Re 501
——— *v.* Ferguson 178
Stubbs, Re 302
Sturge and G. W. R. Co., Re .. 569
Sturges *v.* Bridgman .. 7, 9, 100
Sturgis *v.* Corp 297, 298
——— *v.* Darell 215
——— *v.* Morse 151, 154, 190, 243, 284
Sturt *v.* Mellish 141
Styant *v.* Staker 42
Sudeley, Re 688, 719
Suffield *v.* Brown 74
Sugden *v.* St. Leonards 407, 410, 418
Summers, Re, Boswell *v.* Gurney. 194
Sumners, Re 408
Sunderland, Re 410
Supple *v.* Raymond 141
Surman *v.* Wharton .. 326, 338
Surrey Canal Co. *v.* Hall 51
Sutcliffe, Ex parte 305
——— *v.* Booth 69
Sutherland *v.* Heathcote 48
Sutton *v.* Martin, Re Poinons .. 326
——— *v.* Sutton .. 187, 199, 203
——— *v.* Wilders 556
Swain, Re, Swain *v.* Bringeman 199, 232
——— *v.* Ayres 487, 589
Swaine *v.* Burton 358
——— *v.* Denby 740
——— *v.* Grt. Northern R. Co. .. 99
Swainson *v.* Swainson 392
Swannock *v.* Lifford 342
Swansborough *v.* Coventry .. 93
Swansea Bank *v.* Thomas 443, 444
——— *v.* Thomas 546
Swanton *v.* Raven 156
Sweeny *v.* Fleming 447
Sweetland *v.* Sweetland .. 409, 436
Swift *v.* Winterbotham 218
Swindell *v.* Bulkeley .. 215, 216
Swindon Co. *v.* Wilts Co. .. 74
Swinford, Re 408
Sykes, Re 298, 419
—— *v.* Birkett 132
—— *v.* Schofield 744
—— *v.* Sykes 451
Symes *v.* Appelbe 410
Symonds *v.* Cudmore 270, 271, 359
——— *v.* Hallett 326
Symons *v.* Leaker 21
Symson *v.* Turner 254

T., Re 555
Taitt, Re 530
Talbot, Re, King *v.* Chick .. 194
——— *v.* Braddyl 163
——— *v.* Frere 384
——— *v.* Shrewsbury 384
Tallatire, Re 518, 602
Taltarum's case 245
Tamplin *v.* Miller 606
Tanlintine *v.* Denton 108

PAGE

Tanner, Re 319
——— *v.* Smart .. 219, 220, 22
Tanqueray-Willaume, Re 387, 388, 389, 570
Tapling *v.* Jones .. 6, 11, 46, 95, 99
Tarrant, Re 427
Tarry *v.* Ashton 65
Tatam *v.* Williams 237
Tate *v.* Rolls, Re Griffiths .. 553
Tatton *v.* Hammersley 59
Taunton *v.* Costar 119
Taverner, Ex parte 273
Taws *v.* Knowles 59
Taylor, Ex parte 305
———, Re (L. R. 14 Eq. 557) .. 663
———, Re (49 L. T. 420) 699, 713
———, Re (28 W. R. 594) .. 657
———, Re (1866, W. N. 5) 499, 504
———, Re (1881, W. N. 12) .. 555
———, Re (63 L. T. 230) .. 417
——— *v.* A. G. 111
——— *v.* Cole 119, 450
——— *v.* Colt 192
——— *v.* Diplock 143
——— *v.* Grange 740
——— *v.* Horde .. 116, 134, 147, 251
——— *v.* Meads .. 297, 405, 411
——— *v.* Needham 258
——— *v.* Northrop 521
——— *v.* Parry 121
——— *v.* Phillips 259, 303
——— *v.* Poncia .. 768, 703, 709, 715
——— *v.* St. Helens 73
——— *v.* Taylor (1 Ch. D. 432) .. 645, 651, 654
——— *v.* ——— (6 Sim. 247) .. 387
——— *v.* ——— (10 Eq. 477) .. 553
——— *v.* ——— (20 Eq. 297) .. 661
——— *v.* Turnbull .. 455, 456
——— *v.* Whitehead 64
Teasdale *v.* Sanderson 138
Tebbutt *v.* Selby 66
Teeby *v.* Manchester R. Co. .. 57
Teed *v.* Beere 235
Teevan *v.* Smith 573, 589
Tempest, Re 518, 519
——— *v.* Camoys 520
——— *v.* Tempest 414
Templer, Re 505
Tenant *v.* Goldwin .. 80, 93
Tench, Re 330
Tenham *v.* Herbert 44
Tennant, Re .. 656, 677, 688, 697
——— *v.* Welch .. 300, 308
Tenney, Re .. 405, 416, 430
Tetley *v.* Griffith 328
Teulon *v.* Curtis 163
Thacker, Re 443
Thackrah *v.* Seymour 53
Tharp, Re 276, 406
Tharpe *v.* Stallwood 125
Thatcher, Re 609
Theed *v.* Debenham .. 94, 97
Thomas, Ex parte 305
———, Re 501
———, Re, Thomas *v.* Howell .. 348
——— *v.* Britnell 387
——— *v.* Cook 258

PAGE

Thomas *v.* Cross 453
——— *v.* Fredericks 47
——— *v.* Gwynne 374
——— *v.* Howell, Re Thomas .. 348
——— *v.* Jones .. 403, 405, 406, 429
——— *v.* Sorrell 47
——— *v.* Spencer, Re Spencer .. 298
——— *v.* Sylvester .. 107, 170
——— *v.* Thomas (22 Beav. 341) .. 188, 378
——— *v.* ——— (2 Cr. M. & R. 34) 72
——— *v.* ——— (2 K. & J. 79) .. 117, 141, 190
——— *v.* ——— (19 L. J., Ex. 175; 14 Jur. 180) .. 138
——— *v.* Walker .. 519, 525, 529
——— *v.* Williams 678
Thomlinson *v.* Brown 96
Thompson & Curzon, Re 570
——— & Holt, Re 594
———, Ex parte 606
———, Re .. 649, 707, 723
———, Re, Stevens *v.* Thompson 327
——— *v.* Bennett .. 377, 383
——— *v.* Bowyer 161
——— *v.* Burra 347
——— *v.* Drew 193
——— *v.* Eastwood 95
——— *v.* Gibson 78
——— *v.* Hall 407
——— *v.* Maberly 132
——— *v.* Ringer 571
——— *v.* Simpson .. 153, 429
——— *v.* Waithman 230
——— *v.* Watts 342
Thomson *v.* Eastwood .. 151, 189
——— *v.* Leach 294
——— *v.* Waterlow 59
Thorne, Re (4 Sw. & Tr. 36) .. 412
———, Re (20 W. R. 587) .. 662
——— *v.* Kerr 211
——— *v.* Woolcombe 492
Thornel *v.* Lassels 33
Thornhill *v.* Milbank .. 289, 657
Thornton, Ex parte 465
———, Re .. 417, 517, 530
——— *v.* Finch .. 447, 478
Thorp, Re 654
——— *v.* Facey 127, 162
——— *v.* Owen 358
Thorpe *v.* Bestwick 414
——— *v.* Boothe 213
——— *v.* Brumfitt .. 63, 67
——— *v.* Holdsworth 180
Three Towns Co. *v.* Maddever, Re Maddever 158, 232
Threlfall *v.* Wilson 327
Thrustout *v.* Cunningham .. 357
Thunder *v.* Belcher 129
Thwaites *v.* M'Donough 183
Thynne *v.* St. Maur, Re Somerset 326
Tibbett, Re 662
Tibbs, Re 555
Tickle *v.* Brown 9, 10, 17
Tidball *v.* James 137
Tidd *v.* Lister 385
Tideswell, Re 329

	PAGE
Tilbury *v.* Silva ..	3, 15, 24, 37, 85
Tillett *v.* Nixon	593, 596
—— *v.* Pearson	477
Tilley *v.* Bridger	185
Times Assurance Cos.	193
Timmons *v.* Hewitt ..	9, 61
Tindall, Re	143
Tinney *v.* Tinney	342
Tippett & Newbold, Re ..	298, 571, 605, 606
Tippetts *v.* Heane	224
Tipping *v.* Eckersley	81
——— *v.* St. Helens Smelting Co.,	99, 100
Tobacco Pipe Makers *v.* Loder ..	209
Todd *v.* Flight	77
Toft *v.* Stephenson ..	151, 178, 182, 184, 188, 237
Toler *v.* Slater	293
Tolson *v.* Kaye	102, 115
Tomkins *v.* Lawrence	132
Tomline, Ex parte	86
Tomlinson *v.* Day	546
——— *v.* Dighton	296
Tone *v.* Preston	6, 10
Tonge, Re	419
Topham *v.* Booth	162, 180
——— *v.* Braddick	213
——— *v.* Burgoyne	743
——— *v.* Morecraft	173
——— *v.* Portland	269
Topping, Ex parte ..	220, 224
Torre, Re	409
Tottenham *v.* Byrne	120
Totton *v.* Vincent	249
Tourle *v.* Rand	270
Townley *v.* Watson ..	418, 420
Towns *v.* Mead	217
Townsend, Re	501
——— *v.* Deacon	217
Townshend *v.* Townshend	150, 152, 153, 234
Townson *v.* Tickell	294
Trafford *v.* Boehm	157
Trash *v.* White	177
—— *v.* Wood	355
Trattle *v.* King	126
Travel *v.* Travel	296
Treacy *v.* Corcoran	443
Treeby, Re	420
Treharne *v.* Layton	432
Treloar *v.* Lean	417
Trenery, Ex parte	305
Trent *v.* Hunt	106
Trentham *v.* Deverill ..	224, 225
Trees *v.* Savage	487
Trestrail *v.* Mason	395
Trethway *v.* Helyar	381
Trevanion, Re	408
Trevilian *v.* Lane	172
Trevivian *v.* Lawrence	257
Trevylyan, Re	293
Tribe *v.* Tribe	409
Trimmell *v.* Fell	406
Trimmer *v.* Bayne	380
Trinder *v.* Trinder	423
Tristram *v.* Harte	185

	PAGE
Tritton, Re	594
Trott *v.* Trott	409
Trotter *v.* Harris	87
——— *v.* Maclean	211
Trowell *v.* Shenton	312
Trubee, Re	513, *Add.*
Trulock *v.* Robey	161, 184
Truman *v.* L. B. & S. C. R. Co.	81, 100
Truro, Re	410
—— *v.* Reynolds	28
Truscott *v.* Merchant Taylors Co.	12, 13, 46
Trustees' Co. *v.* Short	120, 169, 174
Tubby *v.* Tubby	380
Tuck, Re	554
Tucker, Re, Emmanuel *v.* Parfitt.	330
——— *v.* Linger	25
——— *v.* Newman	71
——— *v.* Sanger	156
Tuckey *v.* Hawkins ..	178, 201
Tuer *v.* Turner	292
Tuff, Re	329
Tufnell *v.* Borrell	262
Tullett *v.* Armstrong	298
Tulloch *v.* Dunn	210
Tunstall, Ex parte	526
——— Re	659
Turbutt, Re ..	653, 662, 663
Turnbull *v.* Forman	328
Turner and Skelton, Re	570
——— Re (3 C. B. 166)	304
——— Re (11 Ir. Ch. Rep. N. S. 304)	114
——— Re (12 W. R. 337)	464, 472
——— Re (28 Ch. D. 205) ..	269
——— Re (64 L. T. 805) ..	421
——— Re (L. R. 2 P. & M. 403).	418
——— Re, Turner *v.* Fitzroy	*Add.*
——— *v.* Burkinshaw	193
——— *v.* Crush	29, 66
——— *v.* Doe	127
——— *v.* Fitzroy, Re Turner	*Add.*
——— *v.* Meymott	119
——— *v.* Mirfield ..	70, 99
——— *v.* Mullineux	530
——— *v.* Nicholson, Re Pickard	742, 743
——— *v.* Ringwood Board	50, 56
——— *v.* Sargent	299
——— *v.* Sheffield, &c. R. Co. ..	96
——— *v.* Spooner	94, 99
——— *v.* Turner	242, 663
——— *v.* Waller	382
——— *v.* Walsh	51
——— *v.* West Bromwich Union.	105
Turney *v.* Dodwell	226
Turquand *v.* Fearon	17
Tuthill *v.* Rogers	110, 169
Tweddell *v.* Tweddell	268
Tweedale, Re	412
Tweedy, Re (9 W. R. 398) ..	503
——— Re (28 Ch. Div. 529)	498, 518, 524, 525, 585
Twigg, Re	*Add.*
Twisden, Re	249
Twiss *v.* Noblett	135
Twycross *v.* Grant	202

	PAGE
Twynam *v.* Pickard	546
Tylden, Re..	289
Tyler, Re	519
—— *v.* Bennett	78
—— *v.* Merchant Taylors Co. ..	410, 419
—— *v.* Thomas	465
—— *v.* Wilkinson..	67
—— *v.* Yates	193, 738
Tyne Improvement Commissioners *v.* General Steam Co.	194
Tynte, Ex parte	199
—— *v.* The Queen	207
Tyrrell *v.* Clark	445
—— *v.* Marsh	267
Tyrringham's case ..	31, 33, 34
Tyrwhitt *v.* Wynne	39
Tyson, Ex parte	527
—— Re	527
—— *v.* Jackson	181
—— *v.* Smith	24, 25
Umfreville *v.* Johnson	100
Underwood, Re	499, 507
—— *v.* Stevens	157
Union Bank *v.* Ingram ..	597, 598
United Club Co., Re	443
United Land Co. *v.* G. E. R. Co...	62
Unsworth, Re	193
Uppington *v.* Tarrant ..	109, 186
Upton *v.* Hardman	431
—— *v.* Townend	492
Urch *v.* Walker	294
Usher, Ex parte	466
Vadala *v.* Lawes	464
Valentine *v.* Penny	35
Van Breda *v.* Silberbauer ..	69
Van Cutsem, Re	421
Van Gheluive *v.* Nerinckx ..	382
Van Hagan, Re, Sperling *v.* Rochfort	428
Van Ufford, Re	302
Vane *v.* Rigden	383
—— *v.* Vane	154, 155
Vansittart *v.* Vansittart	328
Varley *v.* Coppard	544
—— *v.* Leigh	107, 170
Vaughan *v.* Atkins	343
—— *v.* Vanderstegen ..	415
Venner, Re..	662
Venour, Re, Venour *v.* Sellon ..	320
Vernon's case	341
Vernon *v.* St. James ..	49, 50, 81
—— *v.* Vawdry..	384
—— *v.* Wright	360
Verrall *v.* Cathcart	742
Vicat, Re	501, 509, 519
Vick *v.* Edwards	257
Vickers, Re	518
Villars *v.* Beaumont	254
Vincent *v.* Going ..186, 187,	188, 189
—— *v.* Willington ..	185, 186
Vine *v.* Raleigh ..645, 647,	651, 656, 661, 692
Viney *v.* Chaplin	583
Vinnicombe *v.* Butler	409
Violett *v.* Simpson	212
Vivian *v.* Moat	136
Von Straubenzee *v.* Monck ..	410
Vooght *v.* Winch	82, 83
Voss, Re, King *v.* Voss	320
Vowles *v.* Miller	56
Wacher, Re	502, 512
Wade *v.* Hopkinson	510
—— *v.* Paget	271, 359
—— *v.* Wilson	597, 598
—— *v.* Wilson, Re Bentley	699, 702, 711, 712
Waddell, Re	570
—— *v.* Wolfe	575
Waddington *v.* Naylor ..	6, 120
Wadsworth, Re	737
Wagstaff *v.* Wagstaff	424
Wainford *v.* Heyl	297
Wainman *v.* Kynman	224
Wainwright's case	192
Wainwright, Re ..	262, 267, 306
Waite *v.* Bingley	740, 744
Wake *v.* Hall	26
—— *v.* Redfearn	26
—— *v.* Wake ..	507, 515, 532
Wakefield *v.* Child	185
Walker and Hughes, Re..	569, 602
—— Re, Ex parte Gould ..	589
—— Re (2 Sw. & Tr. 354) ..	437
—— Re (3 Ch. D. 209)	499, 505
—— Re (Cr. & Ph. 147) ..	500
—— Re (7 Ch. 120) ..	142, 180, 189, 238
—— *v.* Armstrong ..	417, 422
—— *v.* Aston	375
—— *v.* Bartlett	488
—— *v.* Butler	225
—— *v.* Clement..	209
—— *v.* Giles	129
—— *v.* Symonds	157
Wall *v.* Hall	657
—— *v.* Nixon	71
—— *v.* Stanwick ..	117, 141, 190
—— *v.* Walsh	177
Wallace, Re	645, 647
—— *v.* Greenwood	293, 742, 743, 748
—— *v.* McCann	456
Wallasey Board *v.* Gracey	53, 54
Waller *v.* Barrett	552
—— *v.* Lacy	220
Wallis *v.* Harrison	48
—— *v.* Morris	471
—— *v.* Sheffield	460
Walmsley *v.* Milne	129
Walsall *v.* Heath	448
Walsh, Re	658
—— *v.* Lonsdale	487
—— *v.* Studdert	242

PAGE

Walsh *v.* Trevanion 372
Walter *v.* Gunner 88
——— *v.* Meredith 193
——— *v.* Parrott, Re Parrott .. 299
——— *v.* Selfe 100
Walters *v.* Walters 378, 383, 384
——— *v.* Webb 114, 122
Wandsworth *v.* United Telephone Co. 54, 55
Warburton *v.* Farn 296
——— *v.* Hill 456
——— *v.* Parke 3
——— *v.* Stephens, Re Stephens 181, 199, 200, 220, 235, 238, ... 553
Warbutton *v.* Warbutton .. 346
Ward, Re 554
—— *v.* Arch 181, 189
—— *v.* Carttar 118, 160
—— *v.* Cresswell 38
—— *v.* Docker 460
—— *v.* Eyre 192
—— *v.* Robins 13
—— *v.* Shakeshaft .. 455, 460
—— *v.* Ward (21 L. J., Exch. 334) 65
—— *v.* Ward (6 Ch 789) 137
Warde *v.* Warde 342
Warden *v.* Jones 297
Wardle *v.* Brocklehurst .. 41, 59, 73
Ware, Re 554
—— Re, Cumberlege *v.* Cumberlege-Ware 243
—— *v.* Regent's Canal Co. .. 82
Waring *v.* Dewberry 126
——— *v.* Waring 185
Warner, Re .. 569, 571, 651
——— *v.* Macbride 93
Warrant Finance Co.'s case .. 193
Warren, Re 605, 606
——— Re, Weadon *v.* Reading .. 605
——— *v.* Davis 387
——— *v.* Stawell 367
Warreander *v.* Foster 533
Warrick *v.* Queen's College 15, 23, 25, ... 31, 32, 35, 44, 45
Warter *v.* Warter 415
Warwick Co. *v.* Burman .. 79, 80
Wasney *v.* Earnshaw 173
Wasse *v.* Heslington 387
Wastneys *v.* Chappell 243
Waterman *v.* Soper 57
Waters, Re 189
——— *v.* Thanet 222
——— *v.* Tomkins .. 213, 224
Watkins, Re (9 Dowl. P. C. 58) .. 249
——— Re (13 Ch. Div. 252) .. 477
——— Re (L. R., 1 P. & M. 19) 410
——— *v.* Cheek 391
——— *v.* Great Northern R. Co. 66
——— *v.* Lewis 254
Watson, Re (19 Ch. D. 384) 500, 502, 521
——— Re (58 L. T. 509) .. 500, 516
——— *v.* Birch 177, 238
——— *v.* England 142

PAGE

Watson *v.* Gray 138
——— *v.* King 551
——— *v.* Saul 181
——— *v.* Woodman 209, 219, 230
Watt *v.* Leach 748
Watters *v.* Lidwill 177
Watts, Re 505, 518, 523
——— *v.* Jefferyes 450, 457
——— *v.* Kelson .. 62, 73, 74, 76
——— *v.* Porter 457
——— *v.* Watts 422
——— *v.* Wilson 59
Waugh *v.* Cope 224
Way *v.* Bassett 230
Weadon *v.* Reading, Re Warren .. 605
Weale *v.* Lower 257
Weall Re, Andrews *v.* Weall .. 556
Wearmouth Co., Re 443
Weatherall *v.* Geering .. 544, 545
Weatherley *v.* Ross 95
Weaver, Re 211, 238
Webb, Re 409
—— *v.* Bird 7, 99
—— *v.* Byng 423
—— *v.* Herne Bay Commissioners 259
—— *v.* Jiggs 107
—— *v.* Russell 492
Webber, Ex parte 308
——— *v.* Sparkes 54
Webster to Carline 301
——— *v.* Birchmore 142
——— *v.* British & Co. .. 192
——— *v.* Cook 738
——— *v.* Kirk 214
——— *v.* Rickards 330
——— *v.* Southey 113
——— *v.* Webster 216
——— *v.* Whewall 98
Weddall *v.* Capes 133
Wedderburn, Re 555
——— *v.* Wedderburn .. 234
Wedgewood *v.* Denton 423
Wedmore *v.* Bristol 54
Weeding, Re 530
Weeks *v.* Evans 379
——— *v.* Heward 70
——— *v.* Peach 254
Welby *v.* Rutland 44
Welch *v.* Colt, Re Brace 429
Welchman *v.* Sturgis 125
Welcome *v.* Upton, 4, 15, 18, 29, 30, 46
Weld *v.* Hornby 39, 83
Weldhen *v.* Scattergood 327
Weldon *v.* De Bathe .. 326, 333
——— *v.* Neal .. 141, 175, 196, 205, .. 216, 326
——— *v.* Winslow 326
Welland R. Co. *v.* Blake 203
Weller *v.* Ker 296
——— *v.* Smeaton 78
Wellesley *v.* Mornington 269
——— *v.* Wellesley .. 342, 516
Wells, Re 699, 711, 712
——, Re, Hardisty *v.* Wells .. 415, 423, 429, 430
——, Re, Moloney *v.* Brooke 383, 384

	PAGE
Wells, Re, Wells *v.* Wells	609
—— *v.* Doddington	149
—— *v.* Gibbs	462
—— *v.* Kilpin	447, 477
—— *v.* London and Tilbury R. Co.	53
—— *v.* Ody	96
—— *v.* Pearcy	34
—— *v.* Rowe	388
—— *v.* Watling	43
Welsh, Re	520
Welsh Flannel Co., Re	193
Wenham, Re, Hunt *v.* Wenham	236
Wentworth *v.* Tubb	384
—— *v.* Wright	165
West, Re	436
—— *v.* Andrews	18
—— *v.* Berney	296
—— *v.* Dobb	544
—— *v.* Lascelles	546
—— *v.* Ray	411
—— *v.* Turner, Re Kelly	457
West Cumberland Co. *v.* Kenyon	80
West London Bank, Re	467
West of England Bank *v.* Murch,	521, 602, 605
Westbrook *v.* Blythe	453, 461
Western *v.* Macdermott	99
Westfaling *v.* Westfaling	367
Westhead *v.* Sale	529
Westminster Co. *v.* Clayton	78
Weston, Re	417
—— *v.* Davidson	597, 598
—— *v.* Filer	515
Westwick *v.* Wyer	173
Westwood, Re	534
Wethered *v.* Wethered	257, 347
Whaley *v.* Laing	79
Whalley *v.* Lancashire & Yorkshire R. Co.	70, 81
—— *v.* Thompson	59
—— *v.* Whalley	155
Whateley *v.* Spooner	411
Wheeldon *v.* Burrows	73, 93
Wheeler, Re	501, 524
—— *v.* Howell	186, 187, 188
—— *v.* Montefiore	129
—— *v.* Thomas	425
—— *v.* Tootel	655
Wheelwright *v.* Walker	676, 678, 679, 699, 701, 702, 707, 724
Whelan *v.* Palmer	269
Whicker *v.* Hume	439
Whippy *v.* Hillary	184, 223
Whistler, Re	389, 570
Whitaker, Re	382
——, Re, Christian *v.* Whitaker	337
—— *v.* Forbes	107, 170
Whitby *v.* Mitchell	244
Whitchurch *v.* Hyde	44
Whitcomb *v.* Whiting	227, 229, 230
White & Hindle, Re	569
White, Ex parte	302
——, Re (1881, W. N. 115)	508
White, Re (2 Not. Cas. 461)	408
——, Re (5 Ch. 698)	496, 502, 511, 512
—— *v.* Bass	93
—— *v.* British Museum	408
—— *v.* Cordwell	237
—— *v.* Driver	303
—— *v.* Herrick	293
—— *v.* Hill	56
—— *v.* Hillacre	183
—— *v.* James	108
—— *v.* Jameson	96, 100
—— *v.* Leeson	62
—— *v.* O'Grady	456
—— *v.* Parnther	178
—— *v.* Phillips	84
—— *v.* Randolf, Re Gibbes	430
—— *v.* Reeves	66
—— *v.* Repton	412
—— *v.* Sealey	193
—— *v.* Wakefield	179
Whitehead, Re	297
—— *v.* Harrison	386
—— *v.* Lord	215
—— *v.* Parks	71
—— *v.* Walker	214
—— *v.* Whitehead	443
Whiteley, Re	655
——, Re, Whiteley *v.* Learoyd	460
—— *v.* King	418
Whitelock *v.* Hutchinson	32
Whiting to Loomes	569
Whitley *v.* Lowe	205
Whitmore *v.* Humphries	40, 118, 127
Whitstable *v.* Gann	22
Whittaker *v.* Kershaw	326, 327
—— *v.* Whittaker	318
Whittle *v.* Henning	316
Whitton *v.* Peacock	259
Whitwell, Re	741
Whitworth *v.* Gaugain	448, 454
Wickens *v.* Windus	249
Wickham *v.* Hawker	3, 37, 57
—— *v.* Wing	297
Widowson *v.* Harrington	170
Wigan *v.* Rowland	414
Wiggery *v.* Tepper	455
Wigram *v.* Fryer	96
Wilby *v.* Elgee	221
Wilcock, Re	699
Wild's case	33
Wild *v.* Holt	121
—— *v.* Reynolds	433
Wilday *v.* Barnett	428
Wilde *v.* Fort	467, 468
Wilder *v.* Pigott	293
Wilding *v.* Bolder	520
Wilkins *v.* Hogg	555, 556
—— *v.* Lynch	171
—— *v.* Pryor, Re Kingdon	430
Wilkinson, Re (4 Ch. 587)	428
——, Re (9 Eq. 71)	655
——, Re (13 Eq. 634)	737
——, Re (12 W. R. 522)	499, 507

PAGE

Wilkinson, Re (21 W. R. 537) .. 651, 655
———, Re (6 P. D. 100) .. 420
——— *v.* Hall 162
——— *v.* Haygarth 43
——— *v.* Joberns 741, 742, 745
——— *v.* Proud 28
——— *v.* Schneider 429
——— *v.* Verity .. 212, 214
——— *v.* Wilkinson 238
Wilks *v.* Groom 504, 510
—— *v.* Hungerford Market Co... 53
—— *v.* Wood 192, 194
Willan, Re 503, 555, 698
Willaume *v.* Gorges 178
Willcock *v.* Terrell 477
Willesford's case 410
Willett & Argenti, Re .. 569, 575
Willey, Re 499, 521
Williams, Re (5 De G. & Sm. 515) 498, 503
———, Re (8 W. R. 678) .. 314
———, Re (L. R. 1 P. & M. 4) .. 436
———, Re (1 M. & G. 881) .. 306
———, Re (20 W. R. 967) .. 644, 651
———, Re, Foulkes *v.* Williams 427
———, Re, Jones *v.* Williams. 383
———, Re, Williams *v.* Williams (15 Eq, 270) 382, 473
——— *v.* Ashton 419
——— *v.* Bolland 463
——— *v.* Chitty 342
——— *v.* Cooke 243, 292
——— *v.* Earle 544
——— *v.* Early 395
——— *v.* Games 741
——— *v.* Griffiths 210, 223, 225
——— *v.* Hayward 106
——— *v.* James 64
——— *v.* Jenkins 379
——— *v.* Jersey 100
——— *v.* Jones 217, 464
——— *v.* Lambe 171
——— *v.* Mason 218
——— *v.* Mayne 315
——— *v.* Mitchell, Re Byron .. 427
——— *v.* Morland .. 45, 68, 77
——— *v.* Morris 49
——— *v.* Owen 424, 597
——— *v.* Port 118, 135
——— *v.* Stiven 107
——— *v.* Thomas 116
——— *v.* Trench, Re Edwards, 191, 192
——— *v.* Tyley 417
——— *v.* Walker 293
——— *v.* Waters 297
——— *v.* Welch .. 177, 183
——— *v.* Wentworth 384
——— *v.* Wilcox .. 66, 84
——— *v.* Williams (2 Ch. 294) .. 137
——— *v.* ——— (36 Ch. D. 231) 519, 523
——— *v.* ——— (15 Ves. 419) 255
——— *v.* ——— (9 W. R. 888) 651

PAGE

Williams *v.* Williams, Re Williams (15 Eq. 270) 382, 473
Williamson *v.* Barbour 233
——— *v.* Gordon 373
——— *v.* Nayler 235
——— *v.* Williamson .. 193
Willingale *v.* Maitland .. 24, 37
Willins *v.* Smith 219
Willion *v.* Berkeley 242
Willis, Re 530
——— *v.* Howe 155, 181
——— *v.* Ward 32
——— *v.* Willis .. 343, 743, 744
Willock *v.* Noble 406
Willoughby-Osborn *v.* Holyoake 428
Willoughby *v.* Willoughby .. 342
Wills *v.* Palmer 358, 360
Willway, Re 736
Wilson, Re (L. R. 1 P. & M. 269) 409
———, Re (1 L. T. 25) 655
———, Re (31 Ch. Div. 522) .. 522
———, Re, Menteath *v.* Campbell 406
———, Re, Pennington *v.* Payne 389, 390
——— *v.* Barnes 24
——— *v.* Bragg 36
——— *v.* Coxwell 384
——— *v.* Dundas 456
——— *v.* Dunsany .. 382, 384
——— *v.* Eden 426
——— *v.* Jackson 203
——— *v.* Keating 259
——— *v.* Knubley 367
——— *v.* Leonard 227, 379
——— *v.* Peto 96
——— *v.* Queen's Club .. 93, 592
——— *v.* Stanley 9
——— *v.* Townend 96
——— *v.* Willes 35
Wilts Co. *v.* Swindon Co. 77
Wimbledon Conservators *v.* Dixon 64
Winch *v.* Thames Conservators .. 85
Winchester's case 251
Winchester *v.* Paine 465
Wind *v.* Jekyl 257
Winder, Ex parte 169
Windsor *v.* Gover 108
Winehouse *v.* Winehouse, Re Maggi 382, 383
Wing *v.* Angrave 143
—— *v.* Tottenham, &c. R. Co. .. 179
Winkley *v.* Winkley 743
Winn *v.* Ingilby 450
Winship *v.* Hudspeth 9
Winstanley, Re 688
Winter *v.* Anson 178, 179
——— *v.* Brockwell 48
——— *v.* Easum 315
——— *v.* Innes 230
——— *v.* Perrott 360
——— *v.* Winter 433, 435
Winterbottom *v.* Derby .. 51, 53
Winteringham, Re .. 525, 533
Winterscheim *v.* Carlisle 214
Wintle *v.* Freeman 451
Wisden *v.* Wisden 430, 433

PAGE

Wise, Ex parte 284
——, Re 508, 525
Wiseman, Re 530
Witcher *v.* Cheslam 90
Witham *v.* Lynch 455
Witherby *v.* Rackham 316
Withers *v.* Purchase 68, 69, 77, 78
Withington *v.* Neumann, Re Marsden 459
Witton *v.* Peacock 123
Wivel's case 257
Wollaston *v.* Berkeley 143
Wolmershausen, Re 199, 226, 230
Wolverhampton Co. *v.* George .. 373
Wood, Re (3 D. F. & J. 125) 499, 502
——, Re (20 Eq. 372) .. 289, 657
——, Re (3 M. & Cr. 266) .. 276
——, Re, Wood *v.* Kimber .. 605
—— *v.* Beard 487
—— *v.* Beetlestone 373, 509, 515, 526
—— *v.* Dixie 450
—— *v.* Gregory 744
—— *v.* Hardisty 385
—— *v.* Harrogate 81
—— *v.* Kimber, Re Wood .. 605
—— *v.* Lambirth 303
—— *v.* Leadbitter 47, 48, 49
—— *v.* Manley 49
—— *v.* Saunders 62, 74, 75
—— *v.* Shirley 341
—— *v.* Stourbridge R. Co. .. 62
—— *v.* Sutcliffe 79
—— *v.* Veal 45, 51
—— *v.* Waud 9, 70, 72, 73, 74, 79
—— *v.* Wedgewood 54
—— *v.* Weightman 554
—— *v.* Wood .. 296, 336, 416, 450
Woodcock, Re (1 C. B. 437) .. 305
——, Re (3 Ch. 229) 662
——, Re (13 Eq. 183) .. 659
—— *v.* Titterton .. 122, 164
Woodfall *v.* Arbuthnot 523
Woodgate, Re 518
Woodham, Re 450
Woodhouse *v.* Balfour 409
—— *v.* Walker 202
—— *v.* Woodhouse .. 235
Woodley, Re 437
Woodman, Ex parte 230
—— *v.* Robinson 91
Woodmeston *v.* Walker 298
Woodroffe *v.* Doe 137, 148
Woodward, Re 417
—— *v.* Dowse 343
—— *v.* Woodward 297
Woodyer *v.* Hadden 49
Woolford *v.* Levy 448
Woolley *v.* Clark 125
—— *v.* Colman 597, 598
Woolstencroft *v.* Woolstencroft 393, 394
Wootley *v.* Gregory 492
Wooton *v.* Shirt 448
Wootton, Re 689
Wormsley, Re, Hill *v.* Wormsley 392
Worraker *v.* Pryer 380
Worrall *v.* Jacob 296
Worrall Waterworks Co. *v.* Lloyd 448

PAGE

Worsley *v.* Scarborough 465
Worssam *v.* Vandenbrande 120, 136
Worthington, Re (20 W. R. 260) 415
—— *v.* Gimson 59
—— *v.* Grimsditch .. 225
Wotton, Re 437
Wragg, Re 524
Wright and Marshall, Re 253, 296, 570
——, Re (4 Sw. & T. 35) .. 436
——, Re (15 L. R. Ir. 331) .. 606
——, Re (24 Ch. D. 662) 689, 696, 699
—— *v.* Burroughes 546
—— *v.* Cadogan 296
—— *v.* Chard 190
—— *v.* Goff 269
—— *v.* Howard 67, 81
—— *v.* Netherwood 143
—— *v.* Rogers 409
—— *v.* Smythies 112
—— *v.* Wakeford 548
—— *v.* Williams 4, 6, 7, 13, 19, 20, 21, 72
—— *v.* Wright 257, 298
Wrightson *v.* Macauley 360
Wrigley *v.* Sykes .. 387, 388, 389
Wrixon *v.* Vize 149, 150, 162, 177, 185
Wrout *v.* Dawes 179
Wryghte's case 215
Wyatt *v.* Hodson 224, 230
Wycombe Union *v.* Eton Union .. 224
Wylde, Re 501
Wynch *v.* Grant 385
Wynn, Re 736, 737
—— *v.* Williams 342
Wynne *v.* Hughes 510
—— *v.* Styan 162
Wynstanley *v.* Lee 13

Yard *v.* Ford 27, 451
Yardley *v.* Holland .. 151, 422
Yarrow *v.* Knightley 430
Yarmouth *v.* Groom 27
—— *v.* Simmons .. 29, 53
Yarnall, Ex parte 305
Yate *v.* Moseley 155
Yates, Re, Batchelor *v.* Yates .. 593
—— *v.* Hambly 163
—— *v.* Jack 94, 97
Yelland *v.* Ficlis 243
Yem *v.* Edwards 118
Yescombe *v.* Landor 454
Yielding and Westbrook, Re 570, 571
Yockey, Re 410
York *v.* Pilkington 44
—— *v.* Twiner 450
Young, Re 298
Young and Harston, Re 570
—— *v.* Davies 414
—— *v.* Harris .. 117, 151, 153
—— *v.* Lambert 450
—— *v.* Spencer 66, 95
—— *v.* Waterpark 181
Younge *v.* Shaper 97
Younghusband *v.* Gisborne .. 453

Zouch *v.* Dalbiac 105, 168

TABLE OF STATUTES,

WHETHER PRINTED AT LENGTH OR MERELY CITED IN THE FOLLOWING PAGES.

An asterisk has been affixed to the page at which any section occurs at length.

	PAGE
20 Hen. 3, c. 4	40
3 Edw. 1 (Westm. 1), c. 39	21
13 Edw. 1 (Westm. 2)	
c. 1	242, 245, 271, 277
st. 1, c. 5	110
s. 2	164
c. 18	447, 453
c. 32	245
c. 34	343
34 Edw. 3, c. 16	244
1 Rich. 3, c. 7	244
4 Hen. 7, c. 24	115, 163, 244
11 Hen. 7, c. 20	254
21 Hen. 8, c. 13	166
27 Hen. 8,	
c. 10	253, 272, 341, 345, 613
ss. 6, 9	341
c. 13	273
32 Hen. 8,	
c. 1	399
c. 2	28, 114, 115, 153, 164
s. 4	108
c. 9	490
c. 28	108, 295
c. 33	172
c. 34	546
c. 36	244
33 Hen. 8, c. 39	466, 467
34 & 35 Hen. 8,	
c. 5	400
c. 20	255, 664
c. 22	295
37 Hen. 8, c. 12	103, 109
1 Mary, sess. 4, c. 5	164
2 & 3 Ph. & M. c. 23	255
13 Eliz.	
c. 4	466, 467
s. 5	467
c. 5	232, 366
c. 20	89
14 Eliz. c. 8	255
29 Eliz. c. 4, s. 1	448
31 Eliz. c. 7	32
43 Eliz.	
c. 4	153
c. 6, s. 2	78

	PAGE
1 Jac. 1, c. 11, s. 2	142
3 Jac. 1, c. 5, ss. 18, 19, 20	166
21 Jac. 1,	
c. 2	110
c. 14, s. 1	111*
c. 16	45, 114, 116, 126, 136, 138, 147, 149, 150, 153, 167, 190, 203, 208, 218, 233, 234, 384
s. 1	115, 145
s. 2	115, 142, 196
s. 3	208*, 186, 217, 228, 229, 232
s. 4	216*, 215
s. 7	216*, 141, 205, 326
10 Car. 1, sess. 2,	
c. 2, Ir.	400
c. 6, Ir.	108, 115, 208, 217
12 Car. 2,	
c. 24	399
s. 8	405
14 & 15 Car. 2, Ir.	399
16 & 17 Car. 2, c. 5	454
19 Car. 2, c. 6	142
29 Car. 2,	
c. 3	133, 236, 384, 410, 412, 486
s. 1	133, 486
s. 2	486
s. 3	487
s. 4	49
c. 3, s. 10	447
ss. 5, 6, 12, 19—22	400
1 Jac. 2, s. 7	362
1 Will. & M. c. 26, s. 2	166
3 & 4 Will. & M.	
c. 14	365, 366, 369, 379, 385
s. 2	367
s. 3	367, 368
s. 4	369
s. 6	371
4 & 5 Will. & M. c. 20	461, 472
6 & 7 Will. 3, c. 14	365
7 & 8 Will. 3,	
c. 12, Ir.	400
c. 36, s. 3	461

	PAGE
1 Anne, sess. 1, c. 7	255
2 Anne, c. 11	104
4 Anne,	
c. 5, Ir.	365, 366
c. 16	229
s. 9	106
s. 12	178
s. 14	136, 400
s. 17	228
s. 19 ..	208, 216, 217
s. 27	138
5 Anne,	
c. 3	255
c. 4	255
c. 24	104
6 Anne,	
c. 10, Ir.	400
c. 27	104
c. 35	568
c. 62, s. 30	488
7 Anne,	
c. 18	164
c. 20, ss. 1, 8	568
8 Anne,	
c. 14, s. 1	451
c. 17	126
c. 18, s. 6	107
13 Anne, c. 13, s. 1	166
1 Geo. 1, st. 2, c. 10	104
ss. 6, 14 ..	166
3 Geo. 1,	
c. 15, s. 16	448
c. 20	104
8 Geo. 1, c. 25, s. 5	448
4 Geo. 2, c. 28, s. 5 ..	106, 107
8 Geo. 2, c. 6	568
s. 35	488
9 Geo. 2, c. 36	153, 273
11 Geo. 2,	
c. 17, s. 5	166
c. 19	287, 442
14 Geo. 2, c. 20	251
s. 9	400
17 Geo. 2, c. 38, s. 3	382
25 Geo. 2, c. 6	400
c. 11, Ir	400
29 Geo. 2, c. 36	40
31 Geo. 2, c. 41	40
33 Geo. 2, c. 14, s. 3, Ir. ..	375
5 Geo. 3, c. 17	108
9 Geo. 3, c. 16	30, 110
11 & 12 Geo. 3, c. 8, Ir.	288
15 Geo, 3, c. 32	32
25 Geo. 3, c. 35	467
32 Geo. 3, c. 58	30
34 Geo. 3, c. 75	255
39 & 40 Geo. 3,	
c. 86	255
c. 88	255
s. 10	402
41 Geo. 3,	
c. 59, s. 6	255
c. 109	29, 40, 50
s. 9	52
s. 10	52, 66
s. 11	52, 54, 66
42 Geo. 3, c. 113, s. 6	255

	PAGE
43 Geo. 3, c. 108	326
46 Geo. 3, c. 128	455
47 Geo. 3,	
c. 24	255
c. 74 226, 365, 372, 379, 385,	391
48 Geo. 3,	
c. 47	110, 169
c. 149	278
53 Geo. 3,	
c. 127, s. 5	186, 228
c. 141	469
54 Geo. 3,	
c. 145	363
c. 161, s. 28	255
c. 168	548
55 Geo. 3, c. 192	385, 400
56 Geo. 3, c. 50	450
57 Geo. 3, c. 29, s. 51	382
58 Geo. 3,	
c. 45, ss. 65, 66, 75—79 ..	89
c. 46, Ir.	289
59 Geo. 3, c. 134, ss. 26, 32 ..	89
1 & 2 Geo. 4,	
c. 23..	41
c. 121, s. 10	469
3 Geo. 4,	
c. 126, s. 39	27
s. 57	487
6 Geo. 4,	
c. 16.. .. 280, 281, 283,	284
c. 105, s. 13..	467
c. 106, s. 7	467
7 Geo. 4,	
c. 45..	288, 289
c. 46..	455
9 Geo. 4,	
c. 14.. ..	139, 184, 210
s. 1	217*, 229
s. 3	218*, 225
s. 4	218*, 209
s. 8	220, 229
10 Geo. 4,	
c. 24..	318
c. 44..	239
11 Geo. 4 & 1 Will. 4,	
c. 20..	413
c. 47.. ..	365*, 385, 390
ss. 1—10	366,—372*
s. 11 ..	373*, 253, 275, 372, 509, 515
s. 12 ..	374*, 373, 376, 515
s. 13	375*
c. 65, s. 12	295
1 Will. 4,	
c. 60..	511
s. 18	375
c. 65..	646
s. 32	534
1 & 2 Will. 4.	
c. 56.. .. 280, 281, 283,	284
2 & 3 Will. 4,	
c. 71 (Prescription Act) ..	1*, 22, 27, 34, 37, 42, 45, 46, 70—73, 88, 90, 103, 164

2 & 3 Will. 4,	PAGE
c. 71, s. 1 ..	1*, 18—20, 30, 110
s. 2 ..	4*, 14, 18, 20, 30, 73, 110, 149
s. 3 ..	11*, 9, 20, 92, 94, 110, 149
s. 4 ..	13*, 11, 12, 14, 15, 20, 149
s. 5 ..	16*, 8, 9, 22, 61, 149
s. 6 ..	19*, 8, 15, 19
s. 7 ..	.. 19*, 20
s. 8 ..	.. .. 20*
c. 100 ..	2, 46, 103, 110

3 & 4 Will. 4,	
c. 22, ss. 24, 38, 47, 57 ..	80
c. 27 .. 2, 43, 196, 200, 237, 345	
s. 1 ..	101*, 114, 131, 194
s. 2 ..	112*, 102, 103, 105, 108, 128, 135, 141, 142, 147, 149, 159, 161, 162, 177, 181, 186, 194, 200, 232
s. 3 ..	119*, 105, 113, 114, 118, 123, 135, 141, 144, 146, 149, 159, 164, 195, 232
s. 4 ..	123, 135, 141, 149, 232
s. 5 ..	122, 125, 135, 141, 149, 195, 196, 200, 232
s. 6 ..	.. 125*, 141
s. 7 ..	126*, 119, 135, 141, 162, 232
s. 8 ..	130*, 106, 122, 135, 141, 168, 232
s. 9 ..	134*, 108, 114, 141, 232
s. 10 ..	136*, 141, 172
s. 11 ..	136*, 141, 172
s. 12 ..	.. 136*, 141
s. 13 ..	.. 138*, 141
s. 14 ..	138*, 141, 159, 183, 232
s. 15 ..	.. 140*, 232
s. 16 ..	141*, 145, 146, 147, 161, 196, 200, 232
s. 17 ..	144*, 196, 197, 200, 232
s. 18 ..	145*, 200, 229, 232
s. 19 ..	145*, 196, 232
s. 20 ..	145*, 122, 123, 195, 232
s. 21 ..	.. 146*, 232
s. 22 ..	.. 147*, 232
s. 23 ..	147*, 197, 200
s. 24 ..	149*, 109, 177, 232
s. 25 ..	150*, 137, 149, 181, 189, 232, 234
s. 26 ..	.. 154*, 232

3 & 4 Will. 4,	PAGE
c. 27, s. 27 ..	156*, 232, 233
s. 28 ..	158*, 183, 198, 200, 232
s. 29 ..	163*, 103, 150, 232
s. 30 ..	164*, 150, 232
s. 31 ..	.. 165*, 232
s. 32 ..	.. 166*, 232
s. 33 ..	167*, 150, 232
s. 34 ..	167*, 119, 122, 131, 160, 232
s. 35 ..	.. 169*, 121
s. 36 ..	169*, 29, 43
ss. 37, 38 ..	170, 172
s. 39 ..	172*, 150, 244, 252
s. 40 ..	176*, 108, 109, 151, 187, 199, 200, 227, 228, 232, 235
s. 41 ..	185*, 150, 171, 232
s. 42 ..	185*, 102, 103, 105, 108, 109, 139, 150, 151, 153, 179, 183, 184, 185, 199, 200, 201, 203, 228, 232
s. 43 ..	173*, 150, 232
s. 44 ..	.. .. 174*
c. 42 ..	.. 201*, 193
s. 2 ..	.. .. 201*
s. 3 ..	202*, 108, 109, 186, 187, 199, 228, 229
s. 4 ..	.. .. 204*
s. 5 ..	205*, 139, 183, 227
s. 6 ..	.. .. 207*
s. 7 ..	207*, 205, 216, 229
ss. 28, 29 ..	191*, 192
s. 30 ..	 194
ss. 37, 38 ..	.. 107
c. 74 ..	240*, 148, 316, 497, 627
s. 1 ..	240*, 253, 254, 710
s. 2 ..	.. 244*, 243
s. 3 ..	.. .. 245*
s. 4 ..	.. 246*, 306
s. 5 ..	.. 247*, 306
s. 6 ..	.. 248*, 306
ss. 7, 8 ..	.. 249*
ss. 9, 10, 11 ..	250*, 253
s. 12 ..	.. .. 251*
s. 13 ..	.. .. 252*
s. 14 ..	.. 252*, 273
s. 15 ..	.. 252*, 255
ss. 16, 17 ..	.. 254*
s. 18 ..	.. 254*, 245
s. 19 ..	.. .. 256*
s. 20 ..	256* 244, 253
s. 21 ..	.. .. 259*
s. 22 ..	261*, 264, 351
s. 23 ..	.. .. 262*
s. 24 ..	.. 262*, 306
s. 25 ..	.. .. 262*
s. 26 ..	.. .. 263*
s. 27 ..	.. 263*, 264
ss. 28, 29 ..	.. .. 263*
s. 30 ..	.. .. 264*
s. 31 ..	.. 264*, 263
s. 32 ..	.. 265*, 262
s. 33 ..	266*, 261, 306
s. 34 ..	267*, 244, 499

3 & 4 Will. 4, PAGE
c. 74, s. 35 .. .. ..268*
s. 36 .. .. 268*, 244
s. 37 .. .. ..268*
s. 38 .. 269*, 244, 245
s. 39 .. .. 270*, 244
s. 40 .. 271*, 254, 256, 261, 292
s. 41 ..273*, 254, 280, 291
ss. 42—46 .. ..274*
s. 47 .. 274*, 244, 272
s. 48 .. 275*, 261, 267
s. 49 .. .. ..276*
s. 50 ..277*, 242, 260, 306
s. 51 .. .. 277*, 306
s. 52 .. .. 278*, 306
s. 53 .. 279*, 277, 306
s. 54 ..280*, 273, 277, 306
s. 55 .. .. 280*, 288
s. 56 .. 280*, 281, 288
ss. 57, 58 .. 281*, 288
ss. 59—65 ..282*—285*, 281, 288
c. 74, s. 66 .. 286*, 281, 306
s. 67 .. 286*, 281, 288
ss. 68—72 .. 287—290*, 281
s. 74 291
s. 75 291
s. 76 .. .. 291*, 306
s. 77 .. 292*, 257, 296, 489, 490
s. 78 .. 295*, 315, 316
s. 79 .. 299*, 244, 306
s. 80 .. .. 300*, 244
ss. 81, 82 .. 300*, 301*
s. 83 .. 301*, 244, 306
s. 84 ..302*, 244, 308, 309
ss. 85—88 .. 302, 308
s. 89 .. 302*, 244, 308
s. 90 .. .. 303*, 306
s. 91 .. .. 303*, 297
s. 92 .. .. ..306*
c. 84 467
c. 87 41
c. 104 377*, 188, 227, 329, 346, 368, 370, 372, 390
c. 105 .. 340*, 171, 185
s. 1 .. ..340*
s. 2 .. .. 344*, 341
s. 3 .. .. ..345*
ss. 4, 5 .. 346*, 347
ss. 6—14 .. 347—349*
c. 106, s. 1 .. .. 352*, 356
s. 2 .. .. 355*, 353
s. 3 .. .. 357*, 353
s. 4 .. .. 359*, 353
s. 5 .. .. 360*, 353
s. 6 .. 360*, 353, 354
ss. 7, 8 361*, 353, 362
s. 9 362*, 109, 353, 360
s. 10 .. 363*, 109, 353
ss. 11, 12 .. ..364*
4 & 5 Will. 4,
c. 22 442
s. 3 445
c. 23 527
c. 39 171
4 & 5 Will. 4, PAGE
c. 92, Ir. 240, 242, 306, 316, 489, 490, 627
s. 12 .. .. ..253*
s. 16 .. .. ..256*
c. 92, ss. 17, 22 .. ..256*
s. 36 270
ss. 48—61 288
s. 62 289
s. 64 290
s. 66 291
s. 68 .. .. 292, 293
s. 69 295
s. 70 306
s. 73 291
s. 74 306
ss. 75—79 308
5 & 6 Will. 4,
c. 17, Ir. 295
c. 50, s. 23 52
s. 51 39
ss. 72, 82 54
c. 62 .. .. .. 620, 622
c. 74 185
s. 7 35
c. 82 252
6 & 7 Will. 4,
c. 71 442
s. 49 2
c. 103, s. 6 306
c. 115 .. .. 41, 50
1 Vict.
c. 26 .. .. .. 399*, 435
s. 1 .. 399*, 428, 437
s. 2 .. .. ..399*
s. 3 .. 401*, 258, 343
ss. 4—6 .. 403*, 404
s. 7 .. .. 405*, 402
s. 8 .. 405*, 326, 402, 425, 429
s. 9 .. 407*, 436, 438
s. 10 .. 411*, 438, 548
s. 11 .. 512*, 412*, 402, 405
s. 12 .. .. 413*, 402
ss. 13—19 .. 413—415*
s. 20 .. .. 415*, 420
ss. 21—23 .. 419, 421*
s. 24 .. 422*, 405, 406, 427, 429, 430
ss. 25, 26 .. 425*, 426*
s. 27 .. 525*, 426, 405, 406, 425
ss. 28, 29 .. 430*, 431*
ss. 30—32 .. 432*, 433*
s. 33 .. 433*, 349, 435
s. 34 .. .. ..434*
c. 28 .. 159*, 118, 129, 200, 232
c. 55 448
c. 78, s. 23 30
1 & 2 Vict.
c. 106, ss. 1—13, 54, 58 .. 166
c. 109 103
c. 110 .. 446*, 386, 473, 622
s. 11 .. .. 446*, 386
s. 12 .. .. ..449*
s. 13 .. 451*, 393, 447, 462, 477, 478

	PAGE
1 & 2 Vict.	
c. 110, s. 14	454*, 450
s. 15	457*, 456
s. 16	458
s. 17	459*, 188, 192
s. 18	459*, 188, 462, 550
s. 19	461*, 452, 462, 478
ss. 20, 21	462
s. 22	463*
2 & 3 Vict.	
c. 11	462, 473, 622
ss. 1, 2	461
s. 3	461, 463
s. 4	452, 462, 463
s. 5	452, 461, 463
s. 6	
s. 7	464*, 463
s. 8	465, 469
ss. 9, 10	468, 469
s. 14	469
c. 47	239
c. 60	374*, 376
ss. 1, 2	375*
c. 62, s. 13	35
s. 14	33
3 & 4 Vict.	
c. 24	78
c. 31	41
c. 82	462
s. 1	455*
s. 2	452, 462, 463
c. 84	239
c. 105 (Ir.), ss. 26, 27	188
s. 36	208
c. 113, s. 57	164
4 & 5 Vict.	
c. 21	485
c. 35	105
s. 81	42
s. 85	740
ss. 88—90	403
s. 91	39
c. 38, s. 5	300
5 Vict. c. 32	252
5 & 6 Vict. c. 97	237, 238
6 & 7 Vict.	
c. 23	105
c. 32	174
c. 54, s. 3	165
c. 73, s. 43	460
7 & 8 Vict.	
c. 22	204
c. 27	174
c. 70	223
c. 76	124, 485
s. 4	487
c. 90	460
c. 96, s. 67	451
c. 105, ss. 71—88	111
8 & 9 Vict.	
c. 16	203, 209
c. 18	82, 96, 689, 696
s. 69	656, 742
s. 74	697
s. 79	197
s. 119	546

	PAGE
8 & 9 Vict.	
c. 18, s. 132	488
c. 20, s. 16	52
s. 53	66
c. 70, s. 11	89
c. 99, s. 5	545
c. 106	292, 403
s. 1	485
s. 2	485*, 124, 629
s. 3	486*, 133, 450, 680
s. 4	487*, 172
s. 5	488*
s. 6	489*, 257, 258, 499
s. 7	490*, 293
s. 8	490*, 485
s. 9	491*
c. 112	493*, 342
c. 118	29, 41
c. 119	623
c. 127, s. 8	450
9 & 10 Vict.	
c. 59	166
c. 62	28
c. 95, s. 76	175
10 & 11 Vict.	
c. 14	22
c. 17	87
11 & 12 Vict.	
c. 45	215
c. 48 (Ir.), s. 72	547
c. 87	376*, 375
12 & 13 Vict.	
c. 49	546
c. 50	80
c. 109, ss. 17, 18	290
13 & 14 Vict.	
c. 35, s. 17	465
c. 43, s. 15	464
s. 24	460, 462
c. 60	496*, 268, 273, 326, 333, 534, 537, 538, 600—602
s. 1	496*
s. 2	496*, 520, 576
s. 3	500*, 496, 503, 525, 530, 531, 537, 539
ss. 4—6	501—503*, 539
s. 7	503*, 496, 498, 500, 501, 525, 540
s. 8	504*, 540
s. 9	504*, 388, 500
s. 10	505*, 501, 504, 536
ss. 11—14	505*, 506*
s. 15	506*, 496, 498, 499
s. 16	507*
ss. 17, 18	507
s. 19	507*
s. 20	508*, 516, 533, 539
s. 21	510
s. 22	510*, 496, 503, 505

13 & 14 Vict.	PAGE
.. c. 60, s. 23 ...	511*, 525, 533, 534
s. 24	512*, 533
s. 25	512*, 535
s. 26 ...	513*, 502, 539
s. 27	513*, 539
s. 28 ...	514*, 496, 507, 525, 539
s. 29 ..	515*, 373, 374, 532
s. 30 ..	515*, 373, 742
s. 31 ..	517*, 502, 539
s. 32	517*, 523, 525, 536
s. 33	..522*
s. 34 ..	522*, 501, 504, 507, 519, 520
s. 35	523*, 513
ss. 36, 37 ..	..524*
ss. 38, 39 ..	.. 524
s. 40	525*, 522
ss. 41—44 ..	525*, 526*
s. 45	527*, 540
s. 46 ..	527*, 363, 519, 536
s. 47	528*, 363
s. 48	..528*
s. 49	528*, 526
s. 50	..529*
s. 51	529*, 540
s. 52	530*, 500
s. 53	530*, 499
ss. 54—58 ..	530*, 531*
ss. 59, 60 ..	.. 531
c. 97, s. 6	.. 485
14 & 15 Vict.	
c. 25	.. 442
s. 1	.. 443
s. 2	.. 450
15 & 16 Vict.	
c. 24, s. 1 ..	435*, 407, 420
ss. 2—4 ..	..437*
c. 51	.. 105
s. 45	.. 42
c. 55 ..	532*, 326, 333, 527, 742
s. 1 ..	532*, 373, 374, 515, 516
s. 2 ..	532*, 496, 512, 516
s. 3	..533*
s. 4 ..	534*, 512, 526
s. 5	535*, 512
s. 6 ..	535*, 502, 513, 523, 539
s. 7	..535*
s. 8 ..	536*, 519, 528
s. 9	536*, 519
s. 10	536*, 518
s. 11	..537*
ss. 12, 13 ..	..537*
c. 76	.. 170
ss. 128—134 ..	.. 178
ss. 135—138 ..	.. 216
ss. 168—221 ..	.. 171
c. 86, s. 22	.. 301
s. 48	597, 623
s. 55	.. 380

15 & 16 Vict.	PAGE
c. 87, s. 15	.. 267
16 & 17 Vict.	
c. 70, s. 2	.. 267
c. 107, ss. 195, 196	474*, 475
s. 197 ..	..475*
c. 113 (Ir.), s. 3 ..	.. 208
s. 20 ..	177, 188, 228, 229
s. 21 ..	.. 207
s. 23 ..	.. 205
s. 24 ..	218, 229
s. 25 ..	.. 218
s. 26 ..	.. 218
s. 27 ..	220, 229
c. 137, s. 28 ..	.. 527
17 & 18 Vict.	
c. 32	.. 546
c. 75..	.. 308
c. 82, s. 10	.. 464
s. 11	.. 510
c. 97..	.. 546
c. 104, s. 200 ..	.. 412
c. 113	391*, 179, 381, 396, 397, 398, 453
c. 116	.. 546
c. 125	.. 170
s. 93	.. 171
18 & 19 Vict.	
c. 15..	463, 467, 473, 622
s. 1	.. 462
s. 2	460, 462
s. 3	462, 463
s. 4	452, 462
s. 5	452, 462
s. 6	452, 462
s. 7	462, 463
s. 9	462, 463
s. 11	448, 453
s. 12	469*
s. 14	470*
c. 32, s. 9	.. 464
c. 43..	312*, 316
s. 4	314*, 313
c. 91, s. 10	.. 498
c. 120, s. 96	55
19 & 20 Vict.	
c. 9	.. 457
c. 97..	.. 218
s. 1	.. 451
s. 5	.. 183
s. 9	227*, 210
s. 10	228*, 178, 204, 216, 217
s. 11 ..	228*, 205, 217
s. 12	228*, 145, 208, 217
s. 13	229*, 218
s. 14	229*, 183, 199, 206, 226
ss. 16, 17 ..	230*
c. 120 ..	643, 644, 664
s. 1	.. 643
s. 2	.. 645
s. 5	.. 646
s. 10	.. 647
s. 11	.. 649
s. 14	.. 650
ss. 15, 16 ..	.. 651

	PAGE
19 & 20 Vict.	
c. 120, s. 17	652
s. 18	654
s. 19	654
s. 20	655
s. 23	656, 742
s. 24	657, 742
s. 25	742
ss. 26, 28	658
s. 32	661
s. 35	295
ss. 36, 37	662
s. 38	663
20 & 21 Vict.	
c. 57	315*, 292
c. 77, s. 23	173
c. 85	343
s. 21	318, 712
s. 25	320, 712
s. 26	297
c. 157, s. 48	464
21 & 22 Vict.	
c. 27, s. 2	78,* 98
ss. 9, 10, 11	745
c. 42	2, 21
c. 72	660
c. 77	643, 664
s. 1	643
ss. 2, 4	645
s. 5	646
s. 6	663
c. 94	105
ss. 6, 8	712
22 & 23 Vict.	
c. 21	111
c. 35, s. 1	544,* 622
s. 2	545*
s. 3	545,* 443, 586
ss. 4—9	546,* 623
s. 11	547*
s. 12	547,* 411
s. 13	548*
s. 14	386,* 390, 549
ss. 15, 16	389,* 549
s. 17	390*, 549
s. 18	390*, 389, 549
ss. 19, 20	355*, 356, 549
s. 21	549*, 613
s. 22	468, 549
s. 23	390*, 549
s. 24	549*, 557
s. 25	550*
s. 26	550*, 612
s. 27	551*, 553
s. 28	552*
s. 29	553*, 220
s. 30	554*, 557
s. 31	555*, 700, 701
s. 32	556, 557
23 & 24 Vict. c. 34	111
c. 38	452, 462, 478, 622
s. 1	470*, 477, 556
ss. 2—5	471—473*, 556
s. 6	556*, 545
s. 7	556*
s. 8	557, 550
s. 9	726*, 554
ss. 10—12	557

	PAGE
23 & 24 Vict.	
c. 38, s. 13	176*, 181, 232, 557
s. 14	557
s. 15	557*, 471
c. 53	2, 111
c. 83	313
c. 106	696
c. 115	474*, 468, 622
s. 1	474*
s. 2	476*, 465
c. 126, s. 2	623
s. 26	170
s. 27	170
c. 127, s. 27	459
s. 28	606
s. 30	301
c. 145, ss. 1, 2	558*, 559*, 604*, 716
ss. 3—10	559—561*, 716
ss. 11—24	561—564*, 621, 623
s. 25	564, 623
s. 26	564, 609, 623
s. 27	564, 602, 623
s. 28	564, 623
s. 29	390, 391, 564, 623
s. 30	564, 605, 623
s. 31	565*, 706, 716
ss. 32—35	565*, 716
c. 154	442
24 & 25 Vict.	
c. 62	110, 111
ss. 1, 3	110
c. 100, s. 57	142
c. 114	438*, 402, 411
s. 1	438*
ss. 2, 3	439*
ss. 4, 5	439*, 438
c. 121	440*, 402
c. 133	80
s. 35	481
25 & 26 Vict.	
c. 37, s. 10	499, 531
c. 53	563
s. 49	649
c. 67, s. 78	323
c. 89	215
s. 16	203, 385
s. 38	203
s. 75	203, 385
s. 90	134, 203
c. 102, s. 106	80
c. 108	735*, 549, 685
26 & 27 Vict.	
c. 57, s. 4	382
c. 87, s. 14	382
c. 93	82
c. 125	115, 255
27 & 28 Vict.	
c. 45	643, 661
s. 2	648
s. 3	643
c. 112	476*, 462, 471, 482, 622
s. 1	476*, 452, 454, 479
ss. 2, 3	478*

	PAGE
27 & 28 Vict.	
c. 112, s. 4	479*, 478
s. 5	625, 479*
ss. 6, 7	480*
c. 114	705, 719
s. 9	695
s. 55	692
s. 60	688, 719
ss. 17, 18, 21	716
28 & 29 Vict.	
c. 72	412
c. 99, s. 1	745
c. 104, s. 31 et seq.	111, 622
ss. 48, 49	468
s. 52	111
c. 112, s. 1	413
29 & 30 Vict.	
c. 122	41
30 & 31 Vict.	
c. 44, s. 52	557
c. 47, s. 2	465
c. 69	396*, 179, 392, 398
s. 1	396*, 393
s. 2	397*, 393
s. 3	397*
c. 127, s. 4	450
s. 23	479
31 Vict. c. 4	738
31 & 32 Vict.	
c. 40, ss. 1, 2	739*
s. 3	739*, 741, 743, 744
s. 4	740*, 739, 744
s. 5	741*, 739, 740
s. 6	742*
s. 7	742*, 516, 532
s. 8	742*, 657
s. 9	743*, 649, 740
ss. 10; 11, 12	745*
c. 54	464, 622
c. 122, s. 33	338
32 & 33 Vict.	
c. 18	696
c. 42	174
c. 46	378, 380, 382
s. 1	383*, 384
c. 62, s. 5	322, 327
c. 94	89
c. 107	41
33 Vict. c. 14	438
33 & 34 Vict.	
c. 14, s. 2	402, 523
c. 23, s. 1	363, 528
ss. 9, 10, 12—18	528
c. 35, ss. 1—3	442, 444*
s. 4	444*, 443
ss. 5—7	444*, 445*
c. 93	317*, 297, 325, 326, 336, 338, 377
s. 1	317*, 328
ss. 2—9	318*
s. 10	321*, 333
s. 12	322*, 318
ss. 13, 14	312
ss. 15—17	322*
35 & 36 Vict.	
c. 44, s. 6	528
c. 49	89
35 & 36 Vict.	PAGE
c. 58, s. 50	306
c. 86	464
c. 88	51
36 & 37 Vict.	
c. 66, s. 5	500
s. 16	304, 462
s. 17 (3)	500
s. 25	129, 154, 181, 201, 232, 234, 271
s. 34	304, 496, 739
s. 50	571
s. 51	500
37 & 38 Vict.	
c. 33	643, 664
s. 2	653
s. 3	654
c. 35	170, 174, 254, 280, 288
c. 50, s. 1	323*, 322, 325, 338
c. 57	194*, 122, 149, 161, 181, 203, 232
s. 1	194*, 113
s. 2	194*, 122, 123, 125, 146
s. 3	196*, 141
s. 4	196*, 141, 145
s. 5	197*, 144, 196
s. 6	197*, 148
s. 7	197*, 139, 159
s. 8	198*, 102, 108, 139, 177, 186, 187, 200, 203, 230
s. 9	200*, 113, 129, 145, 148, 159, 161, 177, 194, 195, 196, 197, 198, 199
s. 10	200*, 151, 181, 189, 190, 234
s. 11	201*
s. 12	201*
c. 62, s. 2	219
c. 78, s. 1	566*, 144
s. 2	566*, 575, 587, 630
s. 3	567*
s. 4	567*, 600
s. 5	567*, 507, 622
s. 6	567*, 293, 337
s. 7	568*, 622
s. 8	568*
s. 9	568*, 606
c. 96	447, 449, 452, 458, 460, 461
38 & 39 Vict.	
c. 55, s. 68	80
s. 149	55
s. 154	50
s. 257	481
s. 264	80
c. 60, s. 15	382
c. 66	303, 496, 524, 529, 531, 533
c. 77, s. 7	500
s. 10	383*, 378, 382, 384
s. 17	17, 557, 745
s. 21	17
s. 24	557
s. 33	17
c. 87, s. 48	507, 567, 600
s. 129	568

39 & 40 Vict. PAGE
c. 17 532
s. 3 .. .. 746*, 743
s. 4 .. .. ..746*
s. 5 .. .. ..747*
s. 6 ..748*, 293, 740, 742
s. 7 .. .. 748*, 743
c. 30 .. .. .. 643, 664
c. 36, ss. 165—167 467, 475
s. 288 475
c. 37 .. .. .. *Add.*
c. 56 41
c. 59, s. 17 .. 307, 620, 628, 703
c. 75 80
40 & 41 Vict.
c. 18 .. 326, 606, 621, 678, 679, 696, 708, 711
s. 2 .. .. 643*, 676
s. 3 .. .. ..644*
s. 4 .. .. 644*, 682
ss. 5, 6 .. ..646*
s. 7 .. .. 646*, 645
ss. 8—10 .. ..646*
s. 11 .. .. 647*, 646
s. 12 .. 647*, 293, 646
s. 13 .. 647*, 646, 648
ss. 14, 15 .. 648, 646
s. 16 .. .. 648*, 649
s. 17 .. .. 649, 698
s. 18 .. .. 649*, 716
s. 19 .. .. 650*, 649
s. 20 ..650*, 50, 649, 656
s. 21 .. 650*, 649, 656
s. 22 .. 651*, 293, 649
s. 23 .. .. ..651*
s. 24 .. 652*, 649, 657
s. 25 .. .. 652*, 649
s. 26 ..652*, 649, 654, 663, 665, 666, 669, 670
ss. 27, 28 .. 653*, 649
s. 29 .. .. 654*, 649
s. 30 .. .. 654*, 673
s. 31 .. 654*, 657, 674
ss. 32, 33 .. ..655*
s. 34 .. 655*, 688, 689, 692, 697, 742
ss. 35, 36 .. 657*, 742
s. 37 .. .. 657*
s. 38 .. .. 658*, 649
s. 39 .. .. 658*
s. 40 .. 658*, 621, 649
ss. 41—45 658*, 660*
s. 46 .. 660, 295, 351
ss. 47—49 .. 661*
s. 50 .. 662*, 293, 295, 667
s. 51 .. 663*, 293, 667
s. 52 .. .. 663*, 662
ss. 53, 54 .. 663*
s. 55 .. .. 664*, 255
ss. 56—61 .. 664*
c. 33 .. .. .. 491*, 485
c. 34 ..398*, 179, 392, 393, 394, 397
c. 56 .. .. .. 715, 716
c. 57 .. .. 307, 621, 715
ss. 4, 7, 36 660
41 & 42 Vict. c. 19, s. 4 .. 712

41 & 42 Vict. PAGE
c. 23 308
42 & 43 Vict.
c. 11, s. 22 .. .. 303, 557
c. 59, s. 2 .. 459, 462, 463
s. 3 207
c. 78, s. 5 252
s. 29 .. 291, 363, 659
43 & 44 Vict.
c. 19, ss. 74—77, 118, 119 .. 467
s. 88 451
44 & 45 Vict.
c. 41 ..572*, 484, 546, 563, 569, 627, 628, 633
s. 2 .. .. 572*, 602
s. 3 .. 574*, 567, 587
s. 4 ..576*, 496, 499, 503
s. 5 .. .. 576*, 569
s. 6 .. 577*, 41, 58, 73
s. 7 .. .. 578*, 488
s. 8 .. .. ..583*
s. 9 .. .. 583*, 567
s. 10 ..585*, 490, 492, 546
s. 11 .. .. 586*, 546
s. 12 .. 586*, 442, 546
s. 13 ..586*, 567, 575, 630
s. 14 ..587*, 124, 125, 623, 633, 634
s. 15 .. .. 589*, 632
s. 16 .. .. 589*
s. 17 .. .. 590*, 593
s. 18 .. 590*, 129, 586
s. 19 .. .. 592*, 558
s. 20 .. .. 593*, 594
ss. 21—24 .. 593—595*
s. 25 .. 596*, 478, 623
s. 26 .. .. 598*, 623
s. 27 .. .. 599*, 624
s. 28 .. .. 599*
s. 29 .. .. 600*, 625
s. 30 ..600*, 496, 503, 504, 507, 508, 522, 567, 576
s. 31 ..600*, 496, 517, 518, 564, 699, 724, 725
s. 32 .. 602*, 496, 724
s. 33 .. 603*, 496, 522
s. 34 .. .. 603*, 496
s. 35 .. .. 604*, 558
s. 36 ..604*, 390, 391, 564, 700
s. 37 .. .. 604*, 564
s. 38 .. .. 605*
s. 39 .. .. 605*, 299
s. 40 .. .. 606*
s. 41 .. 606*, 644, 646
s. 42 .. .. 607*
s. 43 .. .. 608*, 564
s. 44 ..609*, 106, 107, 722
s. 45 .. .. 611*
s. 46 .. .. 611*, 606
s. 47 .. 612*, 551, 606
s. 48 ..612*, 606, 635, 641
s. 49 .. 613*, 47, 485
s. 50 .. .. 613*, 549
s. 51 .. .. 613*
s. 52 .. 613*, 296, 630
ss. 53—56 .. ..614*

44 & 45 Vict.	PAGE
c. 41, s. 57	615*, 626
s. 58	615*
s. 59	615*, 367, 378
ss. 60, 61	615*, 616*
s. 62	616*, 47, 58
ss. 63, 64	616*, 617*
s. 65	617*, 632
s. 66	618*
s. 67	619*, 593
s. 68	620*, 622
s. 69	620*, 589
s. 70	620*, 658
s. 71	621*, 558, 564, 623
s. 72	621*
s. 73	622*, 567, 568
c. 47	*Add.*
c. 59, s. 3	745
c. 68, s. 19	307, 628, 703
s. 26	301
45 & 46 Vict. c. 31	464
c. 38	674*, 569, 648, 649, 716, 720
s. 2	674*, 699, 706, 721, 724
s. 3	677*, 649
s. 4	679*, 649
s. 5	679*
s. 6	680*, 646, 661
ss. 7, 8	680*, 646
s. 9	681*, 646, 722
s. 10	682*, 646, 711, 726, 728, 719
s. 11	682*, 646, 677, 714
s. 12	683*, 646, 682, 721
s. 13	683*, 646
s. 14	684*, 646
s. 15	684, 722, 725, 728, 729
s. 16	684*, 50, 646, 649
s. 17	685*, 646, 649
s. 18	685*, 677
s. 19	685*
s. 20	685*, 706
s. 21	687*, 656, 699, 707, 719, 726
s. 22	689, 677, 724, 730, 731
ss. 23, 24	690*
s. 25	691*, 688, 724
s. 26	692*, 724, 731, 732
s. 27	693*
s. 28	693*, 719
ss. 29, 30	694*, 695*
s. 31	695*, 630, 677, 732
s. 32	696*, 663, 677, 703
s. 33	696*, 677, 699
s. 34	697*, 677, 688, 725, 732
s. 35	697*, 677, 729
s. 36	697*, 649, 703
s. 37	698*, 677, 697, 704, 729

45 & 46 Vict.	PAGE
c. 38, s. 38	699*, 689, 700, 711, 725, 732
s. 39	700*
s. 40	700*, 699
s. 41	700*
s. 42	700*, 701
s. 43	701*
s. 44	701*, 703, 725, 733
s. 45	701*, 678, 699, 713, 717, 721
s. 46	702*, 689, 701, 705, 707
s. 47	704*, 703
s. 48	611*, 705*
s. 49	705*
s. 50	705*, 613, 630, 652, 677, 678, 721
ss. 51, 52	706*, 707*
s. 53	707*, 678
ss. 54, 55	707*, 708*
s. 56	708*, 389, 711, 715, 717, 733
c. 57	709*
s. 58	709*, 254, 255, 351, 677, 718
s. 59	711*, 607, 646, 677, 734
s. 60	711*, 677, 678, 697, 699, 702, 709, 733
s. 61	712*, 293, 295, 677
s. 62	712*, 254, 677
s. 63	713*, 677, 682, 709, 717, 718
s. 64	715*, 558, 565, 649, 698
s. 65	715*
c. 39, s. 1	633
s. 2	627*, 468, 483, 622, 635, 636—640
s. 3	629*
s. 4	629*, 587, 696
s. 5	630*, 521, 602, 634
s. 6	630*, 296, 613
s. 7	306*, 299, 300, 302, 303, 630
s. 8	630*, 551, 606, 612
s. 9	631*, 551, 606, 612
s. 10	631*
s. 11	632*, 618
s. 12	632*, 589
s. 13	632*
c. 43, s. 9	583
c. 61, ss. 10, 11, 88	214
c. 75	226, 295, 297, 299, 305, 406, 613, 712
s. 1	325*, 141, 196, 205, 216, 293, 317, 321, 333, 377, 405
s. 2	328*, 325
s. 3	329*

45 & 46 Vict.	PAGE
c. 75, s. 4	329*, 326, 377, 381
s. 5	329*, 325, 337
ss. 6—10	330—332*
s. 11	332*, 321
s. 12	333*
s. 13	333*, 322
s. 14	334*, 212, 322
s. 15	335*, 212
s. 16	335*
s. 17	335*, 320
s. 18	336*, 330, 511, 520
s. 19	337*, 327, 330
ss. 20, 21	338*, 322
s. 22	338*, 317, 322
s. 23	338*, 326, 327
s. 24	338*, 328, 520
ss. 25, 26, 27	339*
46 & 47 Vict.	
c. 49	78, 98, 557
c. 52	492
s. 40	383
s. 44	297, 518
s. 45	457
s. 50	286
s. 56	281
ss. 93, 94	460
ss. 100, 117	464
s. 125	383
ss. 146, 168	448
s. 147	518
c. 61, s. 29	481, 688, 692
s. 33	133
47 & 48 Vict.	
c. 14	339*, 335
c. 18, s. 4	717*, 677, 680
s. 5	717*, 702
s. 6	717*, 709, 714, 715
s. 7	717*, 465, 714
s. 8	718*, 710, 734
c. 54, ss. 4, 14	453, 477, 568
s. 51	488
c. 61, s. 14	374, 496, 509, 512, 517, 533
c. 71, s. 3	111
s. 4	109
s. 5	532
48 & 49 Vict. c. 72, s. 11	725
50 & 51 Vict.	
c. 30	719*, 688, 693
s. 2	719*, 694
c. 55, ss. 20, 29	448
c. 57	481
c. 59	186
c. 73, s. 16	611
s. 45	503, 507, 508, 600
51 & 52 Vict.	
c. 51	452, 462, 471
ss. 1—4	480*, 481*
s. 5	481*, 471, 477, 478
s. 6	481*, 471, 477
ss. 7—18	482*—484*
c. 41, s. 11	56
c. 43, s. 67	496, 745
s. 151	464
s. 160	451

51 & 52 Vict.	PAGE
c. 43 s. 184	300
c. 57	186, 244, 303
c. 59	201
s. 1	231*, 150, 181, 189, 234, 235
s. 2	615
s. 6	299, 606
s. 8	231*, 150, 181, 189, 199, 210, 214, 232, 234, 235
s. 9	688
s. 10	558, 560
s. 11	558
s. 12	232*, 150, 181, 189, 234
s. 16	561
52 Vict. c. 7, ss. 12, 14	*Add.*
52 & 53 Vict.	
c. 30	41, 611, 677, 693, 705
c. 32	688
ss. 6, 8	556, 557
c. 36	720*, 681
s. 3	720, 677
c. 47, s. 3	460, 464
s. 8	510
s. 9	527
s. 10	620, 660, 704, 739
c. 49, ss. 1, 12	461
53 Vict.	
c. 5	496, 509, 518, 522
s. 108 (1)	537, 713
s. 110	538*, 531
s. 120	254, 255, 662, 713
s. 122	254, 255
s. 123	253, 742
s. 128	517
s. 129	538*, 517, 523
s. 135	538*, 500, 501, 504, 520
s. 136	539*, 500, 502, 503, 520
s. 137	539*, 500
s. 138	540*, 500, 527
ss. 139, 140	540*, 500
s. 141	540*, 500, 518, 237
s. 142	540*, 500, 529
s. 143	540*, 500, 503, 504
s. 145	535
s. 333	536
s. 338	713
s. 342	500, 503, 509, 513, 514, 517, 525, 526, 527, 529, 530, 531, 535, 536, 537
53 & 54 Vict.	
c. 19	527
s. 3	601
c. 29	344, *Add.*
c. 39, s. 23	455
c. 51	150, 469
c. 63, s. 26	193
c. 69, s. 4	721*, 676, 706
s. 5	721*, 679
s. 6	721*, 696
s. 7	721*, 680, 702
s. 8	721*, 680, 682
s. 9	721*, 682

53 & 54 Vict.	PAGE
c. 69, s. 10 ..	.. 721*, 684
s. 11 ..	722*, 677, 685
s. 12 ..	.. ..722*
s. 13 ..	.. 723*, 692
s. 14 ..	.. 724*, 690
s. 15 ..	.. 724*, 693
s. 16 ..	724*, 677, 699
s. 17 ..	724*, 601, 699
s. 18 ..	725*, 679, 680, 692
s. 19 ..	725*, 462, 481
c. 70, s. 74 ..	679, 680, 692

54 Vict.	PAGE
c. 8, s. 10	.. 186
54 & 55 Vict.	
c. 39, ss. 54, 62 ..	.. 537
c. 64..	.. 568
s. 6	.. 453
55 & 56 Vict.	
c. 13, s. 2 ..	633*, 588, 589
ss. 3—5	.. 634*, 589
s. 6	..634*, 521, 602, 630

ADDENDA AND CORRIGENDA.

*** *The reader is requested to insert the cases on this and the following pages, and note the errors therein mentioned, in their proper places in the work. The cases have, for convenience of removal, been printed on one side only.*

Page 3, line 16, *add after Ewart* v. *Graham*, "see *Houston* v. *Sligo*, 52 L. T. 870; 55 L. T. 614."

,, 5, ,, 44, *add after Rangeley* v. *Midland R. Co.*, "see *Hawkins* v. *Rutter*, 1892, 1 Q. B. 668."

,, 7, ,, 33, "11 Ch. D. 352," *should read* "11 Ch. D. 852."

third marginal note, *omit words* "except in cases of light."

,, 27, line 16, *for Holcroft* v. *Hole*, *read* "*Holcroft* v. *Heel*."

,, 42, ,, 51, *add after Doidge* v. *Carpenter*, "see *Baring* v. *Abingdon*, 1892, 2 Ch. 374. Common is not extinguished on the release of seignorial rights in ancient arable land of customary freehold tenure (*Baring* v. *Abingdon*, *sup.*)."

,, 45, ,, 6 (from bottom), *for Homer*, *read* "*Horner*."

,, 48, ,, 47, *add after Blood* v. *Keller*, "*Plimmer* v. *Wellington*, 9 App. Cas. 714."

,, 57, ,, 36, *add after Burgess* v. *Northwich*, "*Ramus* v. *Southend Board*, 67 L. T. 169."

,, 77, ,, 30, *for Biddlesford* v. *Onslow*, *read* "*Bedingfield* v. *Onslow*."

,, 78, ,, 8, *for Shattlewell*, *read* "*Shuttleworth*."

,, 82, ,, 4 (from bottom), *add after Dixon* v. *Curwen*, "as to the public rights on the Norfolk broads, see *Micklethwaite* v. *Vincent*, 67 L. T. 225."

,, 83, ,, 12, *add after Colchester* v. *Brooke*, "see *Hawkins* v. *Rutter*, 1892, 1 Q. B. 668."

,, 93, ,, 28, *add after Birmingham Banking Co.* v. *Ross*, "*Corbett* v. *Jonas*, 1892, 3 Ch. 137."

,, 107, ,, 49, *add after Thomas* v. *Sylvester*, "*Ex p. Graham*, 42 Ch. Div. 343; *Searle* v. *Cooke*, 43 Ch. Div. 519."

,, 109, ,, 3 (from bottom), *add after Perry* v. *Eames*, "*Re Pratt*, 55 L. T. 313; *Dacre* v. *Patrickson*, 1 Dr. & Sm. 186."

,, 110, ,, 12 (from bottom), *add*, "As to Ireland, see 39 & 40 Vict. c. 37."

,, 111, ,, 6 (from bottom), *add*, "Under 52 Vict. c. 7, ss. 12, 14, the claim of the Crown to legacy and succession duty in specified cases cannot be enforced after the expiration of specified periods."

,, 120, ,, 2 (from bottom), *add after Rains* v. *Buxton*, "A title to a tunnel was acquired by possession (*Bevan* v. *London Portland Cement Co.*, 1892, W. N. 151)."

,, 123, ,, 17, *add reference to Eccl. Commissioners* v. *Treemer*, 1892, W. N. 170.

,, 142, ,, 14, *add after* (19 Car. 2, c. 6), "Compare the statutory rules in Scotland (44 & 45 Vict. c. 47)."

,, 151, ,, 3 (from bottom), *add after Thomson* v. *Eastwood*. "see *Re Barker*, *Buxton* v. *Campbell*, 1892, 2 Ch. 491."

,, 155, ,, 2, *for Bevington*, *read* "*Berrington*."

,, 161, ,, 21, *for* 234, *read* "284."

,, 166, ,, 18, *Boyer* v. *Norwich* has been affirmed in the H. L., see 1892, A. C. 417).

,, 171, ,, 28, *for* p. 183, *read* "p. 185."

,, 181, ,, 26, *add after* Darb. & Bos. Stat. Lim. 119, "see *Re Smith*, *Henderson Roe* v. *Hitchins*, 42 Ch. D. 302."

,, 181, ,, 30, *add after* (*Ib.*), "see however *Dix* v. *Burford*, 19 Beav. 412; *Re Smith*, *Henderson Roe* v. *Hitchins*, 42 Ch. D. 305."

,, 181, ,, 34, *add* "see *Re Barker*, *Buxton* v. *Campbell*, 1892, 2 Ch. 491."

,, 182, ,, 11 (from bottom), *for Linsall* v. *Bonson read* "*Linsell* v. *Bonsor*."

Page 183, line 23, *for Becker read "Beckett."*

„ 185, „ 15, *add after Millington* v. *Thompson*, "see however *Re Hoyle, Hoyle* v. *Hoyle*, 67 L. T. 234; 1892, W. N. 62."

„ 187, „ 31, *for Clark, read "Clarkson."*

„ 189, „ 12, *add*, "see *Re Gardner, Long* v. *Gardner*, 1892, W. N. 164.

„ 194, „ 4 (from bottom), *add* "and in the case of possession of a tunnel (*Bevan* v. *London Portland Cement Co.*, 1892, W. N. 151)."

„ 195, „ 5 (from bottom), *add reference to Eccl. Commissioners* v. *Treemer*, 1892, W. N. 170.

„ 199, „ 15 (from bottom), *add after Evans* v. *Moore*, "see *Re Barker, Buxton* v. *Campbell*, 1892, 2 Ch. 491."

„ 200, „ 2 (from bottom), *add after Evans* v. *Moore*, "see *Re Barker, Buxton* v. *Campbell*, 1892, 2 Ch. 491."

„ 214, „ 13 (from bottom), *add after Munns* v. *Burn*, "but see, as to purely common law actions, *Armstrong* v. *Milburn*, 54 L. T. 247, 723."

„ 215, „ 8 (from bottom), *add*, "Time was held to run against a trustee in bankruptcy in the same way as against the bankrupt (*Exp. Norton*, 1892, W. N. 32)."

„ 220, „ 21, *for Cliff, read "Clegg."*

„ 220, „ 26, *for* c. 39, *read* "c. 35."

„ 232, „ 14, *add*, "Where the action was commenced before 1st January, 1890, but the decree was made after that date, the section did not apply as against persons served with the decree (*Re Harrison, Allen* v. *Cort*, 1892, W. N. 148)."

„ 236, „ 34, *Hunt* v. *Wenham* is now reported "1892, 3 Ch. 59."

„ 244, „ 19, *for* 3 & 4 Will. 4, c. 27, *read* "3 & 4 Will. 4, c. 74."

„ 271, „ 7 (from bottom), *Snow* v. *Boycott* is now reported "1892, 3 Ch. 110."

„ 275, „ 26, *for Derry, read "Dering."*

„ 297, „ 21, *for Cowper, read "Cooper."*

„ 298, (last line), *for Butley, read "Butler."*

„ 299, line 2, *add after Cox* v. *Bennett*, "see *Everett* v. *Paxton*, 65 L. T. 383."

„ 316, „ 19, *add*, "see *Re Turner, Turner* v. *Fitzroy*, 66 L. T. 758."

„ 326, „ 4, *add after Byram* v. *Tull*, "*Re Gue, Smith* v. *Gue*, 1892, W. N. 88, 132."

„ 327, „ 11, *add after Pelton* v. *Harrison*, "She may be ordered to attend for examination as to her means (*Holtby* v. *Hodgson, sup.; Aylesford* v. *G. W. R. Co.*, 41 W. R. 42)."

„ 344, „ 3, *add* "The right to dower of the widow of an intestate is not affected by the provision made for her by 53 & 54 Vict. c. 29 (see sect. 4)."

„ 381, „ 34, *for* see *Re Parkin*, 1892, W. N. 114, *read* "As to the application in payment of a married woman's ante-nuptial debts of property appointed by her under a general testamentary power, see *Re Parkin, Hill* v. *Schwartz*, 67 L. T. 77."

„ 387, „ 21, *add after Re Tanqueray-Willaume*, "*Re Stokes, Parsons* v. *Miller*, 67 L. T. 223."

„ 391, „ 40, *omit the words* "and the note to."

„ 397, „ 8, *add after Lewis* v. *Lewis*, "see *Re Hooper, Ashford* v. *Brooks*, 1892, W. N. 151."

„ 411, „ 34, *for Beckford, read "Pickford."*

„ 420, „ 9, *for* 7 D. M. G. 555, *read* "7 D. M. G. 55."

„ 422, „ 14, *add after Moor* v. *Raisbeck*, "see *Re Clowes*, 1892, W. N. 154."

„ 424, „ 13 (from bottom) *add* "*Re Champion*, affirmed 1892, W. N. 170. Compare the effect of the codicil in *Re Blackburn, Smiles* v. *Blackburn*, 43 Ch. D. 75."

„ 427, „ 10 (from bottom), *Davies* v. *Davies* is now reported "1892, 3 Ch. 63."

„ 429, „ 14 (from bottom), *add* "*Re Blackburn, Smiles* v. *Blackburn*, 43 Ch. D. 75."

Page 435, line 25, *Re Champion*, affirmed 1892, W. N. 170.

„ 436, „ — *add*, "see *Re Fuller*, 1892, P. 377."

„ 452, „ 6 (from bottom), *add after Re Rush*, "see *Ex p. Hammond Brown*, 67 L. T. 234."

„ 460, „ 32, *add after Gibbs* v. *Pike*, "see *Ex p. Hammond Brown*, 67 L. T. 234."

„ 467, last marginal note, *read* "22 & 23 Vict. c. 35, s. 22."

„ 477, line 15, *add after Re Rush*, "see *Ex p. Hammond Brown*, 67 L. T. 234.

„ 477, „ 25, *add after Atkins* v. *Shephard*, "see *Re Cave*, *Mainland* v. *Cave*, 1892, W. N. 142."

„ 477, „ 43, *add*, "As to declaring a charge on reversionary personal estate of a judgment debtor, see *Flegg* v. *Prentice*, 1892, 2 Ch. 428."

„ 477, „ 47, *add*, "*Semble*, the application should be made by summons (*Re Hartley*, *Nuttall* v. *Whitaker*, 1892, W. N. 49)."

„ 499, „ 14 (from bottom), *for Davies*, *read* "*Davis*."

„ 503, „ 33, *for* c. 78, *read* "c. 73."

„ 507, „ 7, *for* c. 78, *read* "c. 73."

„ 508, „ 27, *for* c. 78, *read* "c. 73."

„ 513, „ 4, *add after Re Price*, "*Re Trubee*, 1892, 3 Ch. 55."

„ 513, „ 6, *Re Trubee* is now reported "1892, 3 Ch. 55."

„ 513, „ 7 (from bottom), *after Re Peacock*, *add reference to Re New Zealand Trust Co.*, 1892, W. N. 169.

„ 517, „ 17 (from bottom), *Re Higginbottom* is now reported "1892, 3 Ch. 132."

„ 517, „ 22, *add reference to Re New Zealand Trust Co.*, 1892, W. N. 169.

„ 523, bottom line, *after Re Peacock add reference to Re New Zealand Trust Co.*, 1892, W. N. 169.

„ 546, line 46, *for* 23 & 24 Vict., *read* "22 & 23 Vict."

„ 555, „ 5 (from bottom), *for Dicks* v. *Barford*, *read* "*Dix* v. *Burford*."

„ 569, „ 20, *add*, "See further, as to the jurisdiction under this section, remarks of Chitty, J., in *Re Lander & Bagley*, 1892, 3 Ch. 41."

„ 570, „ 29, *Re Lander & Bagley* is now reported "1892, 3 Ch. 41."

„ 589, „ 9 (from bottom), *add*, "The lien of a company on shares is within sect. 15 (*Everitt* v. *Automatic Weighing Machine Co.*, 1892, W. N. 143)."

„ 598, „ 26, *add after Merchant Banking Co.* v. *London*, "see *Provident Clerks' Association* v. *Lewis*, 1892, W. N. 164.

„ 604, first marginal note, *for* trustees for rule, *read* "trustees for sale."

„ 613, line 26, *for* As to, *read* "Compare."

„ 634, „ 7, *add* "As to the costs of employing a solicitor and surveyor before this Act, see *Skinners' Co.* v. *Knight*, 1892, 2 Q. B. 542; *Bridge* v. *Quick*, 67 L. T. 54."

„ 656, „ 21 (from bottom), *after Conway* v. *Fenton*, *add* "see *Re De Teissier*, 1892, W. N. 163, and S. L. Act, 1890, s. 13, *post*."

„ 676, „ 35, *for post*, p. 643, *read* "*post*, p. 721."

„ 700, „ 8 (from bottom), *for* 23 & 24 Vict., *read* "22 & 23 Vict."

„ 701, „ 31, *for* 23 & 24 Vict., *read* "22 & 23 Vict."

„ 722, „ 7 (from bottom), *Re Ailesbury* was affirmed on appeal to the House of Lords, *sub nom. Bruce* v. *Ailesbury* (1892, A. C. 356). A subsequent action to restrain the sale on the ground of fraud, was dismissed (*Bruce* v. *Ailesbury*, 1892, W. N. 149).

„ 724, „ 3, *add*, "Expenditure under sub-sect. (ii) can only be made for purpose of immediate letting (*Re De Teissier*, 1892, W. N. 163); which case see also as to 're-building' under sub-sect. (iv)."

STATUTES

RELATING TO

REAL PROPERTY,

PASSED IN THE REIGNS OF

KING WILLIAM IV. AND QUEEN VICTORIA.

PRESCRIPTION.

2 & 3 WILLIAM IV. CAP. 71.

An Act for shortening the Time of Prescription in certain Cases(a). [1st August, 1832.]

I. *Time limited for establishing rights of common and other profits à prendre.*
II. *Ways, easements, and watercourses.*
III. *Light.*
IV. *How periods of limitation are to be computed.*
V. *Pleadings.*
VI. *Period less than that provided by statute not to be allowed.*
VII. *Saving in favour of persons under disabilities.*
VIII. *Time excluded in computation of period of forty years.*

I. TIME LIMITED FOR ESTABLISHING RIGHTS OF COMMON AND OTHER PROFITS À PRENDRE.

WHEREAS the expression "Time Immemorial, or Time whereof the Memory of Man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, be it enacted, That no claim which may be lawfully made at the common law, by custom, prescription (*b*), or grant, to any right of common (*c*) or other profit or benefit, to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster

2 & 3 Will. 4, c. 71, s. 1.

Claim to right of common and other profits *à prendre* not to be defeated after

2 & 3 Will. 4, c. 71, s. 1.

thirty years' enjoyment by showing the commencement.

After sixty years' enjoyment the right to be absolute, unless had by consent or agreement.

or of the Duchy of Cornwall (*d*), or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (*e*).

This act extended to Ireland.

(*a*) By 21 & 22 Vict. c. 42, this act was extended to Ireland.

(*b*) The reader is referred to note (1) at the end of this act, as to the nature of prescription; the difference between it and custom; what customs are valid; what things may or may not be claimed by prescription; and how a right depending upon it may be lost (see *post*).

(*c*) As to rights of common, see note (2) at the end of this act.

(*d*) The provisions of this act are not affected by the Act for limiting Actions and Suits by the Duke of Cornwall, in relation to Real Property (23 & 24 Vict. c. 53, s. 2).

Rights in gross.

(*e*) Prescriptive rights in gross are not within the scope of the statute (*Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687).

Subject-matter of the first section.

The first section relates to such claims as may be lawfully made at common law, by custom, prescription, or grant, to any *right of common or other profit or benefit* to be taken or enjoyed from or upon any land. Tithes, rent and services are excepted from this act. The stat. 2 & 3 Will. 4, c. 100, provides the limitation of time with respect to claims of a *modus decimandi*, or exemption from, or discharge of tithes (See Shelford's Tithe Acts, 3rd ed.; Leach's Tithe Acts, 5th ed.) The stat. 3 & 4 Will. 4, c. 27, *post*, limits the time within which actions and suits must be brought respecting tithes not belonging to a spiritual or eleemosynary corporation sole. The limitation of time for the recovery of tithes is not affected by the Tithe Act, 1836 (see 6 & 7 Will. 4, c. 71, s. 49).

The first section of this act includes different subjects from those in the second, and distinguishes between easements and common or profit *à prendre;* a different limitation is established for the first and latter cases (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 167; *Lawson* v. *Langley*, 4 Ad. & Ell. 890; *Jones* v. *Richard*, 5 Ad. & Ell. 413). The right to receive air, light, or water, passing across a neighbour's land, may be claimed as an easement, because the property in them remains common; but the right to take "*something out of the soil*" is a profit *à prendre*, and not an easement (*Manning* v. *Wasdale*, 5 Ad. & Ell. 764; *Blewitt* v. *Tregonning*, 3 Ad. & Ell. 554). This section applies only to profits *à prendre* in the land of another, and has no application to a copyholder's acts on his copyhold tenement (*Hanmer* v. *Chance*, 4 D. J. & S. 626).

Profits *à prendre.*

The liberty of fowling has been decided to be a profit *à prendre* (*Davies' case*, 3 Mod. 246). The liberty to hunt is one species of *aucupium*, and the taking of birds by hawks seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish, takes for his own benefit (*Anon.*, Hardr. 407). The liberty of hunting is open to more question, as it does not of itself import the right to the animal when taken; and if it were a licence given to one individual, either on one occasion or for a time,

or for his life, it would amount only to a mere personal licence of pleasure, to be exercised by the individual licensee. But in the case of a grant by deed—"of free liberty with servants or otherwise to enter lands and there to hunt, hawk, fish, and fowl"—to persons, "their heirs and assigns," where it is apparent that not merely the particular individual named, but any to whom they or their heirs choose to assign it should exercise the right, it has been considered that an interest, or profit *à prendre*, was intended to be granted (*Wickham* v. *Hawker*, 7 M. & W. 78, 79). The property in animals *feræ naturæ*, while they are on the soil, belongs to the owner of the soil, and he may grant a right to others to come and take them by a grant of hunting, shooting, fowling, and so forth, and such a grant is a licence of a profit *à prendre*. Substantially it may be reserved by the owner of the fee simple when he alienates, although it is considered that, technically speaking, in such a case it is a re-grant of the right by the alienee of the fee simple to the alienor (*Ewart* v. *Graham*, 7 H. L. 344, 345). A right to cut down and carry away trees growing in a close (*Bailey* v. *Stevens*, 12 C. B. N. S. 91), and a right to take stones and sand from the seashore (*Constable* v. *Nicholson*, 14 C. B. N. S. 230), have been held to be profits *à prendre*. A claim to cut and carry away litter was held established as a claim by prescription to a profit *à prendre* (*De la Warr* v. *Miles*, 17 Ch. Div. 535).

2 & 3 Will. 4, c. 71, s. 1.

A profit *à prendre* in another's soil cannot be claimed by custom, for this among other reasons, that a man's soil might thus be subject to the most grievous burdens in favour of successive multitudes of persons like the inhabitants of a parish or other district who could not release the right (*A. G.* v. *Mathias*, 4 K. & J. 591; *Constable* v. *Nicholson*, 14 C. B. N. S. 230; *Johnson* v. *Barnes*, L. R. 7 C. P. 604; *Bland* v. *Lipscombe*, 4 Ell. & Bl. 713, n. (c); *Allgood* v. *Gibson*, 34 L. T. 883; *Blewitt* v. *Tregonning*, 3 Ad. & Ell. 554). Claims by custom on the part of "inhabitants" to profit *à prendre* in another's soil were held bad (*Chilton* v. *London*, 7 Ch. D. 735; *Rivers* v. *Adams*, 3 Ex. D. 361). Nor can such an indefinite class as "owners and occupiers" claim a profit *à prendre* by prescription (*Tilbury* v. *Silva*, 45 Ch. D. 98). But "inhabitants" were allowed to claim by custom a right to take water from a well, which was an easement (*Race* v. *Ward*, 4 E. & B. 702).

Profit *à prendre* in another's soil cannot be claimed by custom.

Before the passing of this act, a prescriptive claim was a claim of immemorial right; the evidence in support of it was such as a party might be able to give in such a case; and the jury were to draw their inference from such proof as could be produced. Now the burden of establishing an immemorial right is withdrawn, and the proof is limited to thirty years. But the party prescribing must prove his right for that whole period, and no presumption will be drawn from evidence as to part of that period (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 161, and note explanatory of case, *ib.* p. 1). It was also held, that proof of his enjoyment of pasture for twenty-eight years did not include proof of the right of turning on for twenty years, the latter right being an easement only, a right of a quite different nature. The enjoyment under this section must be enjoyment as of right (*De la Warr* v. *Miles*, 17 Ch. Div. 591; as to enjoyment as of right, see *post*, p. 9). A tenant accordingly cannot acquire any right under this section in other land belonging to his landlord (*Warburton* v. *Parke*, 2 H. & N. 64). Nor is an enjoyment sufficient which can be referred to an agreement in writing made by the owner of the servient tenement (*Lowry* v. *Crothers*, I. R. 5 C. L. 98); but where the acts were done as of right it was immaterial that they were done under a claim of an invalid custom (*De la Warr* v. *Miles*, 17 Ch. Div. 585). As to the nature of the evidence to be given in claiming a right under this section to common appurtenant, see *Commissioners of Sewers* v. *Glasse*, 19 Eq. 150, 151.

Proof of enjoyment under the section.

The plaintiff claimed a right of common by prescription in respect of a *que* estate in land, and also by thirty and sixty years' enjoyment by the occupier of the land. The defendant offered evidence that a tenant then deceased, while tenant of the land for years, had declared that he had no

2 & 3 Will. 4, c. 71, s. 1.

such right in respect of the land. The declaration was held not admissible, inasmuch as it was in derogation of the title of the reversioner (*Papendick* v. *Bridgwater*, 5 Ell. & Bl. 166). "It would be very mischievous if it were in the power of a tenant to destroy a profit *à prendre* belonging to the land which he occupies, or to impose a servitude upon it. There is no difference in this respect between destroying an easement and creating one. If the tenant might say that the land enjoyed no right of way, he might also say that it was liable to an easement for taking water, profit *à prendre* by turbary or other common. It would come to this: that by the tenant's acknowledgment of a servitude, like that in *Scholes* v. *Chadwick*, 2 Moo. & R. 507, or for cutting turves or taking away sand, the tenant might create a servitude against the reversioner. That would be very inconvenient, and it is upon the view of the balance of general convenience that the English laws of evidence are founded. In *Daniel* v. *North*, 11 East, 372, it was decided that the acquiescence of the tenant cannot prejudice the landlord, and if so, I think, *à fortiori*, that his declaration cannot" (*Papendick* v. *Bridgwater*, 5 Ell. & Bl. 177; see *Scholes* v. *Chadwick*, 2 Moo. & R. 507; *Reg.* v. *Bliss*, 7 Ad. & Ell. 550).

This section of the act does not prevent a claim to a right of common, &c., from being defeated after thirty years' enjoyment, by showing that such right was first enjoyed at a time when it could not have originated legally. A claim to a right of common over a Crown forest, in respect of a certain tenement which was grounded on thirty years' uninterrupted enjoyment under this section may be defeated by showing that the tenement has been inclosed from the waste of a manor only forty years, and that the grant of any right over the forest was made absolutely void by a statute passed previously to the inclosure. It was questioned whether this act has any application to the case in which the establishment of a right by means of this statute would be a violation of the express terms of statutes prohibiting the granting of such a right (*Mill* v. *New Forest*, 18 C. B. 60).

As to the nature of the enjoyment requisite to support a claim under the act, see further the note to sect. 2, *post*.

Period of enjoyment.

The 1st section requires in the case of a right of common or a profit *à prendre* enjoyment "without interruption for the full period of thirty years"; the most undoubted exercise of enjoyment for twenty-nine years and three-quarters will not be sufficient (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 164; see *Flight* v. *Thomas*, 11 Ad. & Ell. 688). Taking the first, fourth, and fifth sections together, it has been decided that the period mentioned in the act is thirty years next before some suit or action in which the claim shall be brought into question, and that an allegation of an enjoyment for thirty years next before the times when the trespasses to which the plea relates were committed is insufficient (*Richards* v. *Fry*, 7 Ad. & Ell. 698; *Wright* v. *Williams*, 1 M. & W. 77). See further the note to sect. 4, *post*.

Pleading.

If the statute be relied on it ought to be pleaded (*Welcome* v. *Upton*, 6 M. & W. 401). Plea of enjoyment of a right of common for thirty years before the commencement of the suit was held sufficient, without saying thirty years *next* before (*Jones* v. *Price*, 3 Bing. N. C. 52). The proper mode of pleading a profit to be taken out of land is the enjoyment of the right for the periods mentioned in the first section (*Welcome* v. *Upton*, 5 M. & W. 398).

II. Ways, easements, and watercourses.

In claims of right of way or other easement the

2. No claim which may be lawfully made at the common law (*f*), by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be

enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing (*g*).

2 & 3 Will. 4, c. 71, s. 2.

periods to be twenty years and forty years.

(*f*) As to the modes of claiming an easement by prescription at common law, and by non-existing grant, which were used before the passing of this act, see note (3) at the end of the act. The act has provided an additional mode of claiming easements, but has not abolished the former modes. As to the law of ways, see note (4); and as to watercourses, see note (5). As to the right to a pew, which is an easement, see note (6) at the end of the act.

Modes of claiming easements.

(*g*) This section relates to claims to any way or other *easement*, or to any watercourse, or the use of any water to be enjoyed or derived upon, over, or from any land or water.

Easement is the general term for several species of liberties which one man may have in the soil of another without obtaining any interest in the land itself (Cro. Car. 419). Rights of accommodation in another's land, as distinguished from those which are directly profitable, are properly called *easements*. An easement (from the French word *aise*, i.e. *commoditas*) is defined to be a privilege that one neighbour hath of another by writing or prescription without profit, as a way, or a sink through his land, or such like (Kitch. 103; 5 B. & C. 229; see *Mounsey* v. *Ismay*, 3 H. & C. 497). "A servitude is a charge imposed upon one heritage for the use and advantage of a heritage belonging to another proprietor" (Code Civil, Art. 637). Easements are incorporeal rights (*Hewlins* v. *Shippam*, 5 B. & C. 221) imposed upon corporeal property, and not upon the owner of it, so that on the change of the owner of the servient tenement the right to the easement is still retained by the owner of the dominant tenement. There can be no easement, properly so called, unless there be both a servient and a dominant tenement (*Rangeley* v. *Midland R. Co.*, 3 Ch. 310). The *servient* tenement is that over which a right claimed by custom, prescription, or grant is exercised, and the *dominant* tenement is that to which such right is attached. It is essential that the two tenements should belong to different owners; for upon both becoming absolutely vested in the same person the inferior right of easement is merged in the superior title of ownership (*Holmes* v. *Goring*, 2 Bing. 83). The owner of two tenements can have no easement over one of them in respect of the other (*Roe* v. *Siddons*, 22 Q. B. Div. 236). Where there is an unity of seisin of the land and of the way over the land in one person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way (*James* v. *Plant*, 4 Ad. & Ell. 761). An easement must be connected with the enjoyment of the dominant tenement (*Ackroyd* v. *Smith*, 10 C. B. 164); and must be an incident of a known and usual kind (*Hill* v. *Tupper*, 2 H. & C. 121; 11 W. R. 784). Rent cannot issue out of a mere easement

Definition and nature of easements.

Servient and dominant tenements.

See Hawkins v. Rutter

2 & 3 Will. 4, c. 71, s. 2.

(*Buzzard* v. *Capel*, 8 B. & C. 141; 2 M. & R. 197; 6 Bing. 150; 3 M. & P. 480; 3 Y. & J. 344); but a payment in respect of an easement may be secured by a covenant or agreement. A contract to grant a right of way was held to be a contract for the sale of real estate (*Rowe* v. *London School Board*, 36 Ch. D. 619; see *Jones* v. *Watts*, 43 Ch. D. 574).

Instances of easements.

There are an infinite number and variety of easements. The following may be enumerated:—Rights of way. Right to hang clothes on lines passing over the neighbouring soil (*Drewell* v. *Towler*, 3 B. & Ad. 735). The right to place telephone wires over neighbouring soil (*Lancashire Co.* v. *Manchester*, 14 Q. B. Div. 267). Right to move a timber traveller through air over neighbouring land (*Harris* v. *De Pinna*, 33 Ch. D. 251). The right of landing nets on another man's ground (*Gray* v. *Bond*, 2 Brod. & B. 667). Right to make spoil banks upon the surface in working mines (*Rogers* v. *Taylor*, 1 H. & N. 706; see *Ramsay* v. *Blair*, 1 App. Cas. 701); or quarries (*Middleton* v. *Clarence*, I. R. 11 C. L. 499). The right to use a close for the purpose of mixing muck and preparing manure thereon for an adjoining farm (*Pye* v. *Mumford*, 11 Q. B. 666). A right to place a pile in the soil of a river for the enjoyment of a wharf (*Lancaster* v. *Eve*, 5 C. B. N. S. 717; *Cory* v. *Greenwich*, L. R. 7 C. P. 499). A right to place a signpost on a common (*Hoare* v. *Metropolitan Board*, L. R. 9 Q. B. 296); or to affix a signboard to the walls of another's house (*Moody* v. *Steggles*, 12 Ch. D. 261); or to use a fascia on another's house (*Francis* v. *Hayward*, 22 Ch. Div. 177). A right in the occupier of a messuage to water cattle at a pond, and to take water for domestic purposes (*Manning* v. *Wasdale*, 5 Ad. & Ell. 758; see *Fitch* v. *Rawling*, 2 H. Bl. 395). The right to go on a neighbour's close and to draw water from a spring there (*Race* v. *Ward*, 4 El. & Bl. 702); or from a pump (*Polden* v. *Bastard*, L. R. 1 Q. B. 156). The right to go on the soil of another to clear a mill stream and repair its banks (*Beeston* v. *Weate*, 5 E. & B. 996). The right to conduct water across a neighbour's close by an artificial watercourse (*Ib.*) Right to discharge polluted water into another's watercourse (*Wright* v. *Williams*, 1 M. & W. 77). Right to discharge rain-water by spout or projecting eaves (*Harvey* v. *Walters*, L. R. 8 C. P. 162). Right to receive light by ancient windows (*Tapling* v. *Jones*, 11 H. L. C. 290). Right to pollute air by smoke or otherwise (*Crump* v. *Lambert*, 3 Eq. 413). A right to use the chimney of another's house for the passage of smoke (*Hervey* v. *Smith*, 1 K. & J. 389; 22 Beav. 299). A right of support from land (*Dalton* v. *Angus*, 6 App. Cas. 740); or from buildings (*Tone* v. *Preston*, 24 Ch. D. 739; *Waddington* v. *Naylor*, 60 L. T. 480).

A way over the land of another, a gateway, watercourse, or washing-place in another's ground, may be claimed by prescription as easements; but a multitude of persons cannot prescribe, though for an easement they may plead custom (Cro. Jac. 170; 3 Leon. 254; 3 Mod. 294). In *Goodday* v. *Mitchell*, Cro. Eliz. 441, a way to a common fountain is mentioned as an easement claimable for parishioners by custom. See *Race* v. *Ward*, *sup.* The undertakers of a navigation, in whom the soil of the river is not vested, have a mere easement in the land through which it passes (9 B. & C. 109; *Hollis* v. *Goldfinch*, 1 B. & C. 205). The licence to make a vault in a parish church, and to have the sole and exclusive use of it, is an easement (*Bryan* v. *Whistler*, 8 B. & C. 288). The right to sit in a pew in a church annexed to a house is an easement (5 B. & Ald. 361; *Hinde* v. *Chorlton*, L. R. 2 C. P. 104; *Brumfitt* v. *Roberts*, L. R. 5 C. P. 224; see *Crisp* v. *Martin*, 2 P. D. 15; *Halliday* v. *Phillips*, 23 Q. B. Div. 53). The right to a fishing weir in non-tidal waters may be claimed as an easement (*Rolle* v. *Whyte*, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657).

Under the 2nd section of the act, a prescription which was pleaded for a right every year, and at all times of the year, to turn cattle into a certain close, is too vague (*Bailey* v. *Appleyard*, 8 Ad. & El. 161).

Subject-matter of the second section.

The second section refers to easements properly so called, and to rights which are in some way appurtenant to a dominant tenement (*Shuttle-*

worth v. *Le Fleming*, 19 C. B. N. S. 687). A custom for the freemen of a town to enter upon another man's land for the purpose of holding horse-races there, is not an easement within this section (*Mounsey* v. *Ismay*, 3 H. & C. 486). This section includes a claim to support for buildings from land (*Dalton* v. *Angus*, 6 App. Cas. 798); or from buildings (*Le Maitre* v. *Davies*, 19 Ch. D. 281). It was said by *Erle*, C. J., that this section was meant to apply only to the two descriptions of easements specified, viz., the right to a way or watercourse, which may be enjoyed or derived on, over, or from any land or water (*Webb* v. *Bird*, 10 C. B. N. S. 282, 286). But Lord *Selborne* was of opinion that the section included other easements (*Dalton* v. *Angus*, 6 App. Cas. 798; see *Bass* v. *Gregory*, 25 Q. B. D. 483). The section does not, however, apply to light (*Perry* v. *Eames*, 1891, 1 Ch. 665). A claim to a watercourse within this section includes a claim to send through another's watercourse polluted water (*Wright* v. *Williams*, 1 M. & M. 77); or sand and rubble (*Carlyon* v. *Lovering*, 1 H. & N. 784); also a claim to have water which would otherwise flow down to the plaintiff's land diverted over other land (*Mason* v. *Shrewsbury Co.*; L. R. 6 Q. B. 578; see *Staffordshire Co.* v. *Birmingham Co.*, L. R. 1 H. L. 254). **2 & 3 Will. 4, c. 71, s. 2.**

This section includes only such easements upon or over the surface of the servient tenement as are susceptible of interruption by the owner of such servient tenement, so as to prevent the enjoyment on the part of the owner of the dominant tenement from ripening into a right (*Webb* v. *Bird*, 10 C. B. N. S. 283). The owner of a windmill accordingly cannot under this section claim by twenty years' user a free passage of air to his mill (*Ib.*) Nor can the right of access of air to chimneys over the unlimited surface of a neighbour be acquired (*Bryant* v. *Lefevre*, 4 C. P. Div. 172; see as to the passage of air through a defined channel, *Bass* v. *Gregory*, 25 Q. B. D. 481). Nor can subterranean water percolating in no known channels be acquired as an easement by user (*Chasemore* v. *Richards*, 7 H. L. C. 349). Nor can the right to annoy neighbours by noise be acquired by user, unless during the user the noise has amounted to an actionable nuisance; the above principle applying to both affirmative and negative easements (*Sturges* v. *Bridgman*, 11 Ch. D. 852; see *Murgatroyd* v. *Robinson*, 7 E. & B. 391). **Easement must be susceptible of interruption.**

Where a claim is made under the act, it is incumbent on the claimant to prove that the right founded on the claim by user might at the beginning of or during that user have been lawfully granted to him; and where such a grant would have been *ultra vires* and void by reason of an act of parliament, the claim cannot be sustained (*Staffordshire, &c. Co.* v. *Birmingham Co.*, L. R. 1 H. L. 278). So it has been held that a company incorporated by act of parliament for making and maintaining a canal, and having powers under their act to take water for the purpose of supplying the canal, cannot by user acquire, under this section, a prescriptive right to take the water for any other purpose (*National Manure Co.* v. *Donald*, 4 H. & N. 8; see *Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 287; *Mill* v. *New Forest*, 18 C. B. 60, *ante*, p. 4). Compare the case of a grant by a railway company which was held to be *ultra vires* (*Mulliner* v. *Midland R. Co.*, 11 Ch. D. 611; and see *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623). **Right must be capable of being granted.**

The Prescription Act does not appear to have superseded the common law. (See note (3) at the end of the act.) As to the difference between the mode of claiming easements under the statute and at common law, see Gale on Easements, 177, n. (*d*), 6th ed. **Statute has not superseded common law, ~~except in cases of light.~~**

It has been decided under the statute 2 & 3 Will. 4, c. 71, that an enjoyment of twenty years, which cannot give a good title against all having estates in the lands in question, will not confer any title at all, even as between the parties having partial interests under leases. Thus, where for more than twenty years the plaintiff, holding a lease from a bishop of one close, enjoyed without interruption a way over another close occupied by the defendant holding a lease under the same bishop, the question arose whether such an enjoyment gave to the plaintiff a right of way over the **Enjoyment under statute. *Bright* v. *Walker*.**

2 & 3 Will. 4, c. 71, s. 2.

Bright v. *Walker*.

Nature of the enjoyment.

defendant's close, so as to enable him to maintain an action for obstructing the way. *Parke*, B., after stating the second section of the act, said, "In order to establish a right of way, and to bring the case within this section, it must be proved that the claimant has enjoyed for the full period of twenty years, and that he has done so 'as of right,' for that is the form in which, by section 5, such a claim must be pleaded, and the like evidence would have been required before this statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly, and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done; if he shall have occasionally asked the permission of the occupier of the land; no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed, 'as of right,' the 'easement,' but the soil itself. So it must have been enjoyed 'without interruption.' Again, such a claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible; and therefore it may be answered by proof of a grant or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. . . . But if the enjoyment take place with the acquiescence or laches of one who is tenant for life only, the question is, what is its effect, according to the true meaning of the statute? . . . Whatever construction is put on the seventh section, it admits of no doubt under the eighth. It is quite certain, that an enjoyment of forty years instead of twenty, under the circumstances of this case, would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period, as against the bishop, it certainly must from the shorter. Therefore, there is no doubt but that possession of twenty years gives no title as against the bishop, and cannot affect the right of the See. . . . On the fullest consideration we think that no title at all is gained by a user which does not give a valid title against all, and permanently affect the See.

No title gained by user which does not give valid title against all.

"Before the statute this possession would indeed have been evidence to support a plea or claim by non-existing grant from the termor in the *locus in quo* to the termor under whom the plaintiff claims. . . . But we think that since the statute such a qualified right is not given by an enjoyment for twenty years. For in the first place, the statute is for the shortening the time of *prescription*, and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. In the next place, the statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute, valid as to some persons and invalid as to others. . . .

"The conclusion, therefore, at which we have arrived is, that the statute in this case gives no right from the enjoyment that has taken place; and as sect. 6 forbids a presumption in favour of a claim to be drawn from a less period than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other by the proof of possession alone. Of course nothing that has been said by the court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or upon proof of its loss by secondary evidence; nor prevent the jury from taking this possession into consideration, *with other circumstances*, as evidence of a grant which they may still find to have been made, if they are satisfied that it was made in point of fact." It was therefore decided that the plaintiff was not entitled to recover (*Bright* v. *Walker*, 1 C. M. & R. 211, 223).

2 & 3 Will. 4, c. 71, s. 2.

Bright v. *Walker* was a decision on the part of the section relating to twenty years' enjoyment (See *Harris* v. *De Pinna*, 33 Ch. D. 251). And it is clear in general that the tenant of one close cannot as such acquire by twenty years' user a prescriptive easement over another close belonging to the same landlord (*Gayford* v. *Moffatt*, 4 Ch. 133; *Russell* v. *Harford*, 2 Eq. 507; *Bayley* v. *G. W. R.*, 26 Ch. D. 441; *Daniel* v. *Anderson*, 31 L. J. Ch. 610; see *per Jessel*, M. R., *Sturges* v. *Bridgman*, 11 Ch. D. 855; as to the presumption of a grant in such a case, see *Timmons* v. *Hewitt*, 22 L. R. Ir. 627). Where, however, the user extended to forty years, it was held under similar circumstances that an easement could be acquired (*Beggan* v. *Macdonald*, 2 L. R. Ir. 560; *Fahey* v. *Dwyer*, 4 L. R. Ir. 271, approved by *Chitty*, J., *Harris* v. *De Pinna*, 33 Ch. D. 252). Compare the similar result of sect. 3 in the case of a twenty years' user of light (*Frewen* v. *Phillips*, 11 C. B. N. S. 449).

Easement must have been enjoyed as such.

The enjoyment of an easement as of right for twenty years next before the commencement of the suit, within this statute, means a *continuous* enjoyment as of right for twenty years next before the commencement of the suit, of the easement as an easement, without interruption acquiesced in for a year.

Effect of unity of possession.

It is therefore defeated by unity of possession during all or part of the period of enjoyment, although such unity of possession has its inception after the completion of the twenty or forty years (*Battishill* v. *Reed*, 18 C. B. 696). Where a plaintiff had enjoyed a way as of right and without interruption from 1800 to 1855, when the action was brought, it was held, that his claim under this statute was defeated by an unity of possession from 1843 to 1853 (*Ib.*) And such unity of possession need not be specially replied under the 5th section (*Onley* v. *Gardiner*, 4 M. & W. 496; see *Monmouthshire Canal Co.* v. *Harford*, 1 C. M. & R. 631; *Richards* v. *Fry*, 7 Ad. & Ell. 698). Easements were defeated by showing unity of possession in *Clay* v. *Thackerah*, 9 C. & P. 47, and *Wilson* v. *Stanley*, 12 Ir. C. L. Rep. N. S. 345.

Enjoyment as of right.

The words, "enjoyed by any person *claiming right*," applied to easements in the 2nd section, and "enjoyment thereof *as of right*," in the 5th section of this act, mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions of using it; but an enjoyment had openly and notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract or licence, in case of a plea for twenty years (*Tickle* v. *Brown*, 4 Ad. & Ell. 369; see *Bright* v. *Walker*, 1 C. M. & R. 219; *ante*, p. 8; *Arkwright* v. *Gell*, 5 M. & W. 333). In the case of prescription, long enjoyments, in order to establish a right, must have been as of right, and therefore neither by violence nor by stealth, nor by leave asked from time to time (*Mills* v. *Colchester*, L. R. 2 C. P. 486; see *De la Warr* v. *Miles*, 17 Ch. Div. 591).

An enjoyment which the owner of the servient tenement cannot stop is not an enjoyment as of right (*Winship* v. *Hudspeth*, 10 Exch. 5; see *Sturgess* v. *Bridgman*, 11 Ch. D. 852; *Sanders* v. *Manley*, 1878, W. N. 181).

Where an easement was enjoyed during part of the period in exercise of a statutory right, and, the statutory right having ceased, the enjoyment was continued for the rest of the period, no easement was acquired (*Kinloch* v. *Neville*, 6 M. & W. 806). Where a watercourse was made and enjoyed by a tenant, the landlord and tenant both believing that this was authorized by the lease, there was no enjoyment as of right (*Chamber, &c. Co.* v. *Hopwood*, 32 Ch. Div. 549).

The use of waste water from a canal was held not to be an enjoyment as of right (*Staffordshire Co.* v. *Birmingham Co.*, L. R. 1 H. L. 254). It was said by *Blackburn*, J., that *Wood* v. *Waud* (3 Ex. 748) was in effect

2 & 3 Will. 4, c. 71, s. 2.

a decision that an active enjoyment in fact for more than the statutable period is not an enjoyment as of right, if during the period it is known that it is only permitted so long as some particular purpose is served (*Mason* v. *Shrewsbury, &c. R. Co.*, 6 Q. B. 584; compare *Tone* v. *Preston*, 24 Ch. D. 739).

Effect of leave being given.

It was said by *Alderson*, B., that "if a parol permission extends over the whole of the twenty years, the party enjoys the way as of right and without interruption for the twenty years; not so, if the leave be given from time to time within the twenty years" (*Kinloch* v. *Neville*, 6 M. & W. 795). Where the simple issue is, whether there has been a continued enjoyment of a way for twenty years, any evidence negativing the continuance is admissible. "Every time that the occupiers asked for leave, they admitted that the former licence had expired, and that the continuance of the enjoyment was broken" (*Monmouthshire Canal Co.* v. *Harford*, 1 C. M. & R. 615).

The plaintiff occupied as tenant certain clayworks. Previous to his occupation a watercourse had been cut by the then occupant from a stream to the works, and there was evidence of this being done with the consent of the owner of the stream on certain terms. A few years after the watercourse was cut the plaintiff took the works, and used the watercourse uninterruptedly for more than twenty years, and he knew nothing of the circumstances under which the watercourse was made. Held, that there was evidence to go to the jury that the watercourse had not been enjoyed by the plaintiff for twenty years as of right (*Gaved* v. *Martyn*, 19 C. B. N. S. 732).

Effect of interruptions.

In questions under this section it is most important to show the nature of the user, and of the interruptions, as bearing on the question, whether the enjoyment was as of right. For though no interruption less than a year breaks the period when once the enjoyment as of right has begun, yet interruptions acquiesced in for less than a year may show that the enjoyment never was of right (*Eaton* v. *Swansea Co.*, 17 Q. B. 275; see *Brook* v. *Archer*, 1868, W. N. 5). See further, as to interruptions in the enjoyment, the note to sect. 4, *post*.

Evidence of user.

To support a plea framed on the 2nd section of this statute, of a right of way enjoyed for forty years, evidence may be given of user more than forty years back. If evidence of user beyond forty years were to be excluded, it might be that, after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to the two or three preceding years, and the party might fail because he was unable to carry his case on without going to the distance of forty-one years (*Lawson* v. *Langley*, 4 Ad. & Ell. 890; see *Beeston* v. *Weate*, 5 E. & B. 986). To a plea of forty or twenty years' enjoyment of a way, a licence, if it cover the whole time, must be pleaded (*Tickle* v. *Brown*, 4 Ad. & Ell. 369). But a parol or other licence, given and acted on during the forty or twenty years, may be proved under a general traverse of the enjoyment as of right; and this, whether such licence be granted for a single time of using, or for a definite period (*Ib.*) Where issue is joined on the allegation of an interruption acquiesced in, the party alleging the interruption, having proved a non-user during part of the time, may, in order to show that such non-user was not a voluntary forbearance, give evidence that, two years before the non-user commenced, the party claiming the way paid a consideration for being allowed to use it (*Ib.*) A right claimed under this act can only be co-extensive with the user; and an issue on a plea justifying under such a right is an issue, not upon the right, but the user, and differs therefore from an issue on a right claimed by prescription (*Davies* v. *Williams*, 16 Q. B. 546). See further, as to evidence of user, the note to sect. 4, *post*.

2 & 3 Will. 4, c. 71, s. 3.

III. Light.

3. When the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing (*h*).

Claim to the use of light enjoyed for twenty years indefeasible, unless shown to have been by consent.

(*h*) See note on law of lights, *post*.

Modes of claiming light.

The modes of claiming the easement of light before this act were (1) by prescription at common law; (2) by presuming a lost grant. It seems to have been considered by Lord *Westbury* that this section, while providing a new mode of claiming the easement, had taken away the former modes. Thus, in *Tapling* v. *Jones* (11 H. L. C. 290), he said, "The right to what is called an ancient light now depends upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be rested on any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title which would otherwise arise from uninterrupted user or possession during the requisite period. This observation is material, because I think it will be found, that error in some decided cases has arisen from the fact of the courts treating the right as originating in a presumed grant or licence. It must also be observed, that after an enjoyment of an access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible; and it would seem, therefore, that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment, not amounting to abandonment." And see the remarks of *Coleridge*, J., in *Truscott* v. *Merchant Taylors' Co.*, 11 Exch. 863. On the other hand, in *Aynsley* v. *Glover* (10 Ch. 283) a right to light was established by prescription at common law; *Mellish*, L.J., remarking that this statute had not taken away any of the modes of claiming easements which previously existed. In *Norfolk* v. *Arbuthnot* (5 C. P. Div. 392), and *Ecclesiastical Commissioners* v. *Kino* (14 Ch. Div. 213), both the former modes of claiming the easement of light were treated as still existing. And *Malins*, V.-C., expressed his opinion to the same effect (*Lanfranchi* v. *Mackenzie*, 4 Eq. 427).

Section retrospective.

This section of the act is retrospective, so that the right to the access of light and air may be acquired by virtue of an enjoyment prior to the passing of the act (*Simper* v. *Foley*, 2 J. & H. 555).

Period of twenty years.

The period of twenty years' enjoyment, which confers a right to the access of light under this section, is by the 4th section of this act the period of twenty years next before any suit or action wherein the claim to the right was brought into question, and is not limited to the period of twenty years next before the pending suit or action (*Cooper* v. *Hubbuck*, 12 C. B. N. S. 456). If there has been an enjoyment for nineteen years and a fraction, and then an interruption takes place, the right may be established at the end of the twentieth year, inasmuch as the interruption, under the 4th section, in order to defeat the twenty years' user, must have been acquiesced in or submitted to for a whole year (*Flight* v. *Thomas*, 8 Cl. & Fin. 231).

Nature of the enjoyment.

There can be no prescription under the statute for light to open ground forming a garden (*Potts* v. *Smith*, 6 Eq. 311). Compare the case of a timber yard (*Roberts* v. *Macord*, 1 M. & Rob. 230). Under the statute light must be claimed in respect of a "building" (*Scott* v. *Pape*, 31 Ch.

2 & 3 Will. 4, c. 71, s. 3.

Div. 554); and a structure for storing timber is not such a "building" (*Harris* v. *De Pinna*, 33 Ch. Div. 238). Before the act, light was held not acquired where the building was not permanent (*Maberley* v. *Dowson*, 5 L. J. (K.B.) 261). The right may be acquired for a church (*Ecclesiastical Commissioners* v. *Kino*, 14 Ch. D. 213; but see *Norfolk* v. *Arbuthnot*, 5 C. P. Div. 392); an unconsecrated chapel (*A. G.* v. *Queen Anne Co.*, 60 L. T. 759); a picture gallery (*Ib.*) The building need not be occupied, or fit for occupation, during the period (*Courtauld* v. *Legh*, L. R. 4 Ex. 126); and even where the building has been pulled down, an injunction may be granted if the right has not been abandoned (*Ecclesiastical Commissioners* v. *Kino*, *sup.*) Structural identity between the building which acquires the right, and the building which, after the period, is to enjoy the right, is not necessary (*Scott* v. *Pape*, *sup.*) The owner of a building having windows with moveable shutters acquires the right if during twenty years he opens the shutters at any time he pleases (*Cooper* v. *Straker*, 40 Ch. D. 21).

"Access," in the section, refers not to access through the aperture of the dominant tenement, but to freedom of passage over the servient tenement. The aperture defines the free area (*Scott* v. *Pape*, 31 Ch. Div. 554). The access must be by one and the same definite channel (*Harris* v. *De Pinna*, 33 Ch. Div. 238).

This section converts into a right such an enjoyment only of access of light over contiguous land as has been had for twenty years *in the character of an easement*, distinct from the enjoyment of the land itself (*Harbidge* v. *Warwick*, 3 Exch. 552). During a period of unity of occupation of the dominant and servient tenements the running of the twenty years is suspended (*Ladyman* v. *Grave*, 6 Ch. 763). There is no such unity of possession of the glebe and the church on the part of the rector as to prevent the acquisition of an easement of light for the church (*Ecclesiastical Commissioners* v. *Kino*, 14 Ch. Div. 213). No right can, under this section, be acquired as against the Crown, which is not named therein (*Perry* v. *Eames*, 1891, 1 Ch. 658).

Enjoyment as against tenant for life or years.

The actual enjoyment required by this section need not be as of right (*Per Cresswell*, J., *Truscott* v. *Merchant Taylors' Co.*, 11 Exch. 855). With respect to enjoyment of light as against a tenant for life or years, it was held, before the act, that the acquiescence of lessees or tenants for life in the enjoyment of lights did not bind the landlord or reversioner, unless they had knowledge and acquiesced for twenty years; and a presumption against the owner of lands was not so easily inferred in the case of light as in cases of rights of way or common, where the tenant suffered an immediate injury (*Daniel* v. *North*, 11 East, 370, case of a tenant; *Barker* v. *Richardson*, 4 B. & Ald. 579, case of a rector; see also *Cross* v. *Lewis*, 2 B. & C. 686).

Before the statute.

Since the statute.

Since the act it has been said that from the language of sect. 3, it would seem that the legislature contemplated such an enjoyment as could be interrupted by the adjoining occupier, at least during some part of the time (*Harbidge* v. *Warwick*, 3 Exch. 557). It has been held, however, that since this statute, where the right to light is acquired against an owner of a leasehold interest, it is also acquired against the owner of the reversion (*Simper* v. *Foley*, 2 J. & H. 555). *Pollock*, C. B., said it may be, since the Prescription Act, that if a man opens a light towards his neighbour's land, the reversioner may have no means of preventing a right thereto being acquired by a twenty years' enjoyment, unless he can prevail upon his tenant to raise an obstruction, or is able to procure from the other party an acknowledgment that the light is enjoyed only by consent (*Frewen* v. *Phillips*, 11 C. B. N. S. 455; and see *Ladyman* v. *Grave*, 6 Ch. 769).

Enjoyment by tenant for years.

The circumstance of two houses being held under the same landlord and for the same term does not prevent the one tenant from acquiring an indefeasible right to light as against the other (*Frewen* v. *Phillips*, 11 C. B. N. S. 449; *Mitchell* v. *Cantrill*, 37 Ch. Div. 56).

Interruption.

The enjoyment under this section must be uninterrupted. As to interruptions, see note to sect. 4, *post*. A fluctuating interruption to light is not sufficient (*Presland* v. *Bingham*, 41 Ch. Div. 268). A hoarding for

the purpose of an interruption may be erected by a railway company (*Bonner* v. *G. W. R.*, 24 Ch. Div. 1; see *Myers* v. *Catterson*, 43 Ch. Div. 470). 2 & 3 Will. 4, c. 71, s. 3.

Mere payment of rent by the occupier of a house for the use of lights is not an interruption of the enjoyment within this section (*Plasterers' Co.* v. *Parish Clerks' Co.*, 6 Exch. 630). An actual enjoyment of light for twenty years, even under a permission verbally asked for the occupier of a house, and given by the person having a right to obstruct, is sufficient (*London* v. *Pewterers' Co.*, 2 M. & Rob. 409; see as to a verbal agreement, *Judge* v. *Lowe*, I. R. 7 C. L. 291). Payment of rent or verbal permission does not prevent acquisition of right.

A writing signed by A., the owner of the dominant tenement, but not by B., the owner of the servient tenement, declaring that A. would at any time block up certain windows at B.'s request, and in the meantime would pay B. sixpence a year, was held to be a sufficient "consent or agreement" within this section (*Bewley* v. *Atkinson*, 13 Ch. Div. 283). But where a tenant for years claimed a right to light, and the lease under which he held contained an exception of any right restricting the free use of the adjoining land, this did not operate as an agreement (*Mitchell* v. *Cantrill*, 37 Ch. Div. 56). "Consent or agreement."

By the custom of London (which is stated in the case of *Wynstanley* v. *Lee*, 2 Swanst. 339, 340; see *Perry* v. *Eames*, 1891, 1 Ch. 658), an occupier of a house there had not an absolute property in the enjoyment of his share of light, whatever it might be, but the owner of the adjoining house or site of houses might build to any height, and to the obstruction of his light, unless he was precluded by some writing between them. And the custom was not repealed *merely by the length of time* during which one party enjoyed and the other acquiesced in such enjoyment (2 Swanst. 341; see Privilegia Londini, p. 101, cited Mood. & Malk. 351; and see Godb. 183; Yelv. 215; 1 Bulstr. 115; Com. R. 273; 1 Burr. 248; 3 C. & P. 317; *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97). This section extends to and controls this custom (*Salters' Co.* v. *Jay*, 3 Q. B. 109; *Truscott* v. *Merchant Taylors' Co.*, 11 Exch. 855; see *Perry* v. *Eames*, 1891, 1 Ch. 667). Custom of London.

IV. Periods how to be computed.

4. Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made (*i*). Before-mentioned periods to be deemed those next before suit for claims to which such periods relate.

(*i*) This section is nothing but an exposition of the proof required to establish the right (*Jones* v. *Price*, 3 Bing. N. C. 52). The enjoyment of the occupier to give right under this statute is enjoyment for thirty, sixty, twenty, or forty years, according to the nature of the case, next before the commencement of some suit, and not before the act complained of (*Ward* v. *Robins*, 15 M. & W. 242; *Richards* v. *Fry*, 7 Ad. & Ell. 707).

In *Wright* v. *Williams* (1 M. & W. 98), Lord *Abinger*, C. B., said, "It is said for the plaintiff that one of the absurdities and inconveniences to which a literal construction of this provision would give rise was that no good title could arise to any incorporeal hereditament mentioned in the How periods mentioned in the act to be computed.

2 & 3 Will. 4, c. 71, s. 4.

Wright v. *Williams.*

statute by virtue thereof, unless some action should have been brought by or against the party claiming it; to which may be added, that one action could not perfect the title to the right, as the act requires an enjoyment for the full period immediately before any action. . . . . We are of opinion, however, that it is impossible to construe the act of parliament as intending that the periods of years therein mentioned should terminate at a different time from that fixed in express and positive terms. If the words of the statute were capable of being modified, so as to avoid an inconvenience plainly and manifestly arising from a strict construction of them, we ought to do so; but here the words are precise and unambiguous, and the mischief suggested is perhaps rather apparent than real; and most cases of grants by prescription before the act passed were of the same nature, and the validity of rights gained by them depended much upon the mode of enjoyment, until that action was brought in which they came in question. . . . It appears to us that the statute in question intended to confer, after the periods of enjoyment therein mentioned, a right from their first commencement, and to legalise every act done in the exercise of the right during their continuance" (See *R.* v. *Calow*, 3 M. & S. 22).

The period of twenty years referred to in the statute may be the period of twenty years next before any action wherein the claim to the right is brought into question, and is not limited to the twenty years next before the pending action (*Cooper* v. *Hubbuck*, 12 C. B. N. S. 456).

Where a right of way was claimed by prescription at common law, it was necessary to show user for at least twenty years as of right; but not necessarily for the twenty years next before the commencement of the suit (*Darling* v. *Clue*, 4 F. & F. 329).

Requisite evidence of user during statutory period.

A plea of forty or twenty years' user, under the 2nd and 4th sections of this statute, is not supported by proof of a user from a period of fifty years before the commencement of the action down to within four years of it (*Parker* v. *Mitchell*, 11 Ad. & Ell. 788). It was said in the earlier cases that some act of user must be shown to have been exercised in the year in which the action was brought (*Lowe* v. *Carpenter*, 6 Exch. 825; see *Ennor* v. *Barwell*, 2 Giff. 420); and also during the first year (*Bailey* v. *Appleyard*, 8 Ad. & Ell. 161). *Carr* v. *Foster* (3 Q. B. 581) seemed to intimate that the intermediate time was not so material: (but see *De la Warr* v. *Miles*, 17 Ch. Div. 593). The Court of Appeal, however, recently denied any distinction between non-user for a year at the beginning or end or in the middle of the statutory period. Proof of actual user in every year is not essential, but the absence of user for any year will be fatal unless explained in such a way as to warrant the inference of continual actual enjoyment, notwithstanding such temporary non-user (*Hollins* v. *Verney*, 13 Q. B. Div. 314). It was further laid down that no actual user can be sufficient to satisfy the statute, unless during the whole statutory term (whether user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted if such right is not recognised (*Ib.* 315).

It was said by *Patteson*, J., that if there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, yet this may be a sufficient enjoyment of the old right for twenty years to make it indefeasible under this statute (*Payne* v. *Shedden*, 1 M. & Rob. 383).

Interruption.

A right to an easement was held established under this act which had only been actually enjoyed for nineteen years and a fraction, and then interrupted during the remainder of the twentieth year and down to the commencement of the action, the action, however, having been commenced within a year from the notice of the interruption (*Flight* v. *Thomas*, 11 Ad. & Ell. 688; 8 Cl. & Fin. 231; see 17 Q. B. 272). The interruption which defeats a prescriptive right under 2 & 3 Will. 4, c. 71, is an adverse obstruction, not a mere discontinuance of user by the

claimant himself (*Carr* v. *Foster*, 3 Q. B. 581; see note to sect. 6, *post*). The mere intermission of the exercise of the right for more than a year, in the middle of the prescriptive period, is not necessarily an interruption of the right within the meaning of this section: such an intermission may be explained, and it is for the jury to say whether there has notwithstanding been a substantial enjoyment of the right for the requisite period (*Ib.*; see *Plasterers' Co.* v. *Parish Clerks' Co.*, 6 Exch. 630; *Hollins* v. *Verney*, 13 Q. B. Div. 314). 2 & 3 Will. 4, c. 71, s. 4.

Where it appeared that at a period much earlier than twenty years before the commencement of the action, a stream of water had flowed through the plaintiff's lands; but that there had been some interruption about twenty-two years before the action, and it was not till within nineteen years that the stream had again flowed constantly in its former course, and it was objected that there was a want of sufficient evidence to support the plaintiff's claim, *Tindal*, C. J., said, it would be very dangerous to hold that a party should lose his right in consequence of such an interruption; if such were the rule, the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment (*Hall* v. *Swift*, 4 Bing. N. C. 381; see *Carr* v. *Foster*, 3 Q. B. 585, 586). The interruption may be caused by the act of a stranger, as well as by that of the person in whose land the easement is claimed (*Davies* v. *Williams*, 16 Q. B. 558). A fluctuating interruption was held not sufficient to prevent a right to light being acquired (*Presland* v. *Bingham*, 41 Ch. Div. 268, where the onus of proof as to interruptions was considered).

An interruption in the enjoyment may cause the acquisition of a qualified easement instead of altogether preventing the acquisition of any easement (*Rolle* v. *Whyte*, L. R. 3 Q. B. 286; see *Brook* v. *Archer*, 1868, W. N. 5). Although, under this section, no interruption will prevent a right from being acquired by twenty years' user, unless it has been acquiesced in for a whole year, yet an interruption for a shorter period may have the effect of showing that the enjoyment never was as of right, and thereby of preventing a right being acquired under the second section of this act (*Eaton* v. *Swansea Co.*, 17 Q. B. 267; see *Brook* v. *Archer*, 1868, W. N. 5).

Acquiescence in interruptions.

Where an obstruction to an ancient light had existed more than twelve months, but a promise had been given to remove the obstruction, and twelve months had not elapsed from the date of that promise before proceedings were taken, it was held, that there had not been such an interruption of the enjoyment as would deprive the owner of the light of his remedy (*Gale* v. *Abbott*, 10 W. R. 748). It was said by *Kindersley*, V.-C., that if the plaintiff had allowed twelve months to elapse without taking proceedings, even though he had continued to complain, that would have been a submission to the interruption within sect. 4 (*Ib.*) It has, however, been held that, in order to negative submission to the interruption to light, it is not necessary to bring an action or actively remove the obstruction (*Glover* v. *Coleman*, L. R. 10 C. P. 108). Non-acquiescence in an interruption is a question of fact for a jury (*Bennison* v. *Cartwright*, 5 B. & S. 1). An interruption acquiesced in for four years before action brought was held to bar the right (*Tibury* v. *Silva*, 45 Ch. D. 98). A person asserting an interruption must prove that some notice was given to the person interrupted of the person by whose authority the interruption was made; the mere existence of a physical obstruction is not sufficient notice (*Seddon* v. *Bank of Bolton*, 19 Ch. D. 462).

As to evidence of interruptions to the right of common, see *Davies* v. *Williams*, 16 Q. B. 558; *Welcome* v. *Upton*, 6 M. & W. 536. Where the lord attempted to stop the user of a common, the fact that some of the tenants yielded is not an interruption of the right within the meaning of this section, so as to bar the rights of freeholders, who as a body have never yielded to, or acquiesced in, the claim of the lord (*Warwick* v. *Queen's College*, 10 Eq. 105).

2 & 3 Will. 4, c. 71, s. 5.

V. Pleadings.

In actions on the case the claimant may allege his right generally as before the act.

5. In all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation (*k*).

In pleas to trespass and other pleadings, where party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied to specially.

Pleading before 2 & 3 Will. 4, c. 71.

(*k*) Before the passing of the statute 2 & 3 Will. 4, c. 71, a prescription in a *que estate* must always have been laid in the person who was seised of the fee simple. A tenant for life, for years, or at will, or a copyholder, could not prescribe in this manner, by reason of the imbecility of their estates; for as prescription was deemed to be always beyond time of memory, it would have been absurd that those whose estates commenced within the memory of man should have prescribed for any thing. Therefore, a tenant for life must have prescribed under cover of the tenant in fee simple, and a copyholder under cover of his lord (6 Rep. 60 a; Fortesc. 340). The uniform practice, in a plea justifying under a right of common, was to set out the title to the common specially, by showing a seisin in fee of the land to which the defendant claimed a right of common, either in himself or in some other person under whom he derived title, and then to prescribe in the *que estate* for the right of common, by showing the right to have been in the party seised in fee, and all those whose estate he had in the land from time immemorial (*Grimstead* v. *Marlow*, 4 T. R. 718; 1 Wms. Saund. 346, n. (1)). And if the defendant was lessee for years, he must have shown the seisin in his lessor, and prescribed in him; for if he laid the prescription in himself it was bad (Cro. Car. 599; 4 Rep. 38; *A. G.* v. *Gauntlett*, 3 Y. & Jer. 93).

By the above section, the claimant might allege his right generally; and in pleading to actions of trespass, where previously it would have been necessary to have alleged the right to have existed from time immemorial, it was sufficient under the act to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed during the period provided by the act, and without claiming in the name of the owner of the fee.

Pleading under 2 & 3 Will. 4, c. 71.

The 5th section gives a new plea, by enacting, that in certain cases it shall be sufficient to allege the enjoyment "as of right." If the parties

choose to avail themselves of that provision, they must follow the very words; and if they neglect to do so, the plea is bad (*Stamford* v. *Dunbar*, 13 M. & W. 827; *Holford* v. *Hankinson*, 5 Q. B. 584). For the meaning of "enjoyment as of right," see *Tickle* v. *Brown*, 4 Ad. & Ell. 369, quoted *ante*, p. 9. 2 & 3 Will. 4, c. 71, s. 5.

In several cases decided upon this section it was held that under a general denial of the enjoyment as of right, evidence of unity of possession was admissible, inasmuch as such proof went to show that the enjoyment was not as of right (*Onley* v. *Gardiner*, 4 M. & W. 496; *Clayton* v. *Corby*, 2 Q. B. 813; *England* v. *Wall*, 10 M. & W. 699; *Clay* v. *Thackrah*, 9 C. & P. 47). Evidence admissible under a general denial of enjoyment as of right.

In *Beasly* v. *Clark* (2 Bing. N. C. 709), *Tindal*, C. J., said, "Under a replication denying that the defendant had used the way for forty years as of right, and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time—as, that it was used by stealth, and in the absence of the occupier of the close, and without his knowledge; or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it was an user or enjoyment under a claim of right; the words of the 5th section not inconsistent with the simple fact of enjoyment, being referable, as we understand the statute, to the fact of enjoyment as before stated in the act, viz., an enjoyment claimed and exercised as of right." So, under a general denial, evidence might be given of asking leave within the period (*Monmouthshire Co.* v. *Harford*, 1 C. M. & R. 614), or of an agreement commencing within the period (*Tickle* v. *Brown*, 4 Ad. & Ell. 383). As to whether a parol permission extending over the whole period could be shown, see *Kinloch* v. *Nevile*, 6 M. & W. 806.

It was said that where a defendant justified under an enjoyment for a statutory period if the plaintiff relied on a licence covering the whole period, it must be replied specially (*Tickle* v. *Brown*, 4 Ad. & Ell. 369; see *Lowry* v. *Crowthers*, 5 Ir. 698). It was decided that where a defendant pleaded an enjoyment for a statutory period, and the plaintiff relied on the existence of a life estate, &c. (See sect. 7), such life estate must be replied specially (*Pye* v. *Mumford*, 11 Q. B. 666). Matters to be replied specially.

The above section and the decisions under it must now be read in connection with the rules of pleading established under the Jud. Acts, and so far as inconsistent therewith the section must be taken to have been repealed (Jud. Act, 1875, sects. 17, 21, 33). R. S. C., Ord. 19, provides (r. 4) that every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies; and further (r. 15) that a party must raise by his pleading all matters which show the action or counterclaim not to be maintainable, and all such grounds of defence or reply as, if not raised, would be likely to take the opposite party by surprise; and further (r. 17), that in a defence or reply a general denial shall not be sufficient, but the party must deal specifically with each allegation of fact of which he does not admit the truth. Pleadings need not state inferences of law (*Hanmer* v. *Flight*, 24 W. R. 347). Pleading prescriptive rights under the Jud. Acts.

The forms of pleading contained in the appendices to R. S. C.—which are not to be slavishly adhered to (*The Isis*, 8 P. D. 228), but illustrate the meaning of the act (*Turquand* v. *Fearon*, 40 L. T. 545)—include a statement of claim in an action for obstruction of light (App. C. sect. 6, No. 10), which contains the simple allegation, "The plaintiff is the owner of a house in which are the following ancient lights, &c." Further, to the defence in an action for polluting water given in App. D. sect. 6, there is added the following note:—"If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of his claim, *i. e.*, whether by prescription, grant, or what."

It would seem from Ord. 19, that the general allegations and denials which were sufficient within sect. 5 of 2 & 3 Will. 4, c. 71, are now in-

2 & 3 Will. 4, c. 71, s. 5.

sufficient. Accordingly, in an action to restrain the obstruction of an alleged private right of way, the plaintiff was bound in his pleading to give a short statement of the title by which he claimed, and whether by grant or by prescriptive user (*Harris* v. *Jenkins*, 22 Ch. D. 483; *Farrell* v. *Coogan*, 12 L. R. Ir. 14). Compare the case of a recent action for trespass, where the defendants pleaded that the *locus in quo* was a highway, and were ordered to amend so as to show the mode or title in or under which they claimed that it had become a highway, and were further ordered to give particulars of acts of dedication (*Spedding* v. *Fitzpatrick*, 38 Ch. Div. 410).

Under the R. S. C., Ord. 19, r. 18, a joinder of issue operates as a denial of every material allegation of facts in the defence or reply, as the case may be. Where a party justifies the acts complained of by an allegation of a prescriptive right, it is doubtful whether a mere joinder of issue will include a denial of the allegation that the acts were done in exercise of the right (See Bullen & Leake, Pleading, 354, 522, 4th ed.)

New assignment.

In a case before the Jud. Acts, a plea of a right of way for the occupiers of a close for twenty years, for horses, carts, waggons, and carriages, at their free will and pleasure, was traversed. Under the issue, the plaintiff was allowed to show that the defendant had a right of way for horses, carts, waggons, and carriages, for certain purposes only, and not for all, and was not compelled to new assign; and he could show that the purpose for which the defendant had used the road, and in respect of which the action was brought, was not one of those to which the right extended (*Cowling* v. *Higginson*, 4 M. & W. 245). In an action of trespass, defendant justified as having acted in exercise of a right of way for foot passengers. Plaintiff taking issue, gave evidence at the trial that defendant had used the alleged pathway with horses and carts. Held, that the excessive user should have been new assigned (*Lane* v. *Hone*, I. R. 6 C. L. 232). What was formerly alleged by way of new assignment is now introduced by amendment of claim or by reply (R. S. C., Ord. 23, r. 6).

Amendments.

According to the practice before the Jud. Acts, it was a rule that in cases of prescription the allegation must be proved as laid (2 Roll. Abr. 706; 5 Rep. 79; 4 Rep. 29 b; 1 Campb. 313; see *Brook* v. *Willet*, 2 H. Bl. 224). It was not material that a party proved a larger right than he alleged (Cro. Eliz. 722; 1 Taunt. 142; *West* v. *Andrews*, 1 B. & C. 77; *Bailey* v. *Appleyard*, 8 Ad. & Ell. 167; *Manifold* v. *Pennington*, 4 B. & Cr. 161; *Pigott* v. *Bayley*, 6 B. & C. 16); but if he alleged a larger right than he proved, he could not amend (*Drewell* v. *Towler*, 3 B. & Ad. 735; see *Ricketts* v. *Salway*, 2 B. & Ald. 363; *Beadsworth* v. *Torkington*, 1 Q. B. 782; *Brunton* v. *Hall*, *Ib.* 792). If the allegation of right was divisible, the plaintiff was entitled to a limited verdict for a divisible part of the right alleged, though he failed to prove the residue (*Giles* v. *Groves*, 12 Q. B. 721).

Since the Jud. Acts, a much wider liberty of amendment has been introduced. R. S. C., Ord. 28, r. 1, provide that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. And this wider liberty of amendment has been allowed in pleading prescriptive rights (*Budding* v. *Murdoch*, 1 Ch. D. 42; *Laird* v. *Briggs*, 19 Ch. D. 22; *Bourke* v. *Alexandra Co.*, 1877, W. N. 30).

Raising by defence different prescriptive rights.

Since the passing of 2 & 3 Will. 4, c. 71, it has been frequently considered advisable to plead together in the same case pleas of prescription at common law of a non-existing grant, and of prescription by the statute (*Bailey* v. *Stevens*, 12 C. B. N. S. 91), and in the case of pleas under the statute, prescription both for the longer and shorter periods mentioned in sects. 1 and 2 (*Stamford* v. *Dunbar*, 13 M. & W. 827); the reason being to meet a possible difficulty arising from failure of proof by reason of interruption, &c. (See *Welcome* v. *Upton*, 5 M. & W. 398; 6 M. & W. 536; *Hollins* v. *Verney*, 13 Q. B. Div. 304, and cases quoted in the judgment).

VI. Less period not to be allowed.

2 & 3 Will. 4, c. 71, s. 6.

Restricting the presumption to be allowed in support of claims herein provided for.

6. In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim (*l*).

(*l*) This section forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute (*Bright* v. *Walker*, 1 C. M. & R. 222; *ante*, p. 8). The meaning of this section seems to be that no presumption or inference in support of the claim shall be derived from the bare fact of user or enjoyment for less than the prescribed number of years; but when there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight or evidence, so as to preclude a jury from taking it along with other circumstances into consideration as evidence of a grant (*Hanmer* v. *Chance*, 4 D. J. & S. 626). The "interruption" which defeats a prescriptive right under this statute is an adverse obstruction, not a mere discontinuance of user by the claimant himself. In a case under the 1st section, if proof be given of a right of enjoyment at the time of action brought, and thirty years before, but disused during any part of the intermediate time, it is always a question for the jury whether at that time the right had ceased or was still substantially enjoyed. The inference to be drawn from the facts proved on this point is not a presumption within the 6th section. Where a commoner had ceased to use the common during two years of the thirty, having no commonable cattle at the time, but had used it before and after: it was held that a jury were justified in finding a continued enjoyment of the right during thirty years (*Carr* v. *Foster*, 3 Q. B. 581; see *Hall* v. *Swift*, 4 Bing. N. C. 381; *Dare* v. *Heathcote*, 25 L. J. Ex. 245).

VII. Disabilities.

Proviso for persons under disabilities.

7. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible (*m*).

(*m*) It is the intention of the act that an enjoyment of thirty years, or twenty years, shall be of no avail against an idiot or other person labouring under incapacity, but that one of sixty or forty years shall confer an absolute title, even against parties under disabilities (See *Wright* v. *Williams*, 1 M. & W. 77). This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim) is *tenant for life*. During the period of a tenancy for life the exercise of an easement will not affect the fee; in order to do that there

2 & 3 Will. 4, c. 71, s. 7.

must be that period of enjoyment *against* an owner of the fee (*Bright* v. *Walker*, 1 C. M. & R. 222; *ante*, pp. 7, 8). A claim was defeated by proof of an outstanding life estate under this section (*Hale* v. *Oldroyd*, 14 M. & W. 739). Under sects. 1, 4 and 7 of this act an enjoyment as of right for thirty years next before the commencement of an action may be proved by showing that the party has enjoyed for several periods amounting together to thirty years, and that during the whole time between such periods, and between the last of them and the action (if such period intervened), the estate over which the right has been exercised was in the hands of a tenant for life (*Clayton* v. *Corby*, 2 Q. B. 813).

Cases where right is declared absolute.

The cases in which the right is declared by the statute to be absolute and indefeasible are as follows. By the 1st section, where the right, profit or benefit shall have been taken as required for the full period of sixty years, the right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing. By the 2nd section, where any way or easement, or any watercourse, or the use of any water, shall have been enjoyed as therein mentioned for the full period of forty years, the right thereto is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. By the 3rd section, the enjoyment of light for the full period of twenty years without interruption is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

VIII. Time excluded from forty years.

What time to be excluded in computing the term of forty years appointed by this act.

8. Provided always, and be it further enacted, That when any land or water upon, over, or from which any such way or other convenient (*n*) watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof (*o*).

Omission of easement in 8th section.

(*n*) The words of the 2nd section extend to all easements; but the word "easement" is omitted in the 8th section. There seems reason for thinking that the word *convenient* has crept into the 8th section instead of the word "easement," for, with that exception, the expressions in the two sections are the same. It does not appear why it should be supposed that the legislature would have neglected to protect the interests of reversioners in the case of other easements than ways and watercourses (See *Wright* v. *Williams*, 1 M. & W. 77).

(*o*) The 8th section applies expressly to the computation of an enjoyment for forty years; and it would be contrary to all rules of construction to hold that it applies also to the computation of an enjoyment for twenty years (*Palk* v. *Skinner*, 18 Q. B. 568). Under the 7th and 8th sections of this act, the time during which the servient tenement has been under lease for a term exceeding three years, is to be excluded

from the computation of forty years' enjoyment, but not from the computation of an enjoyment for twenty years (*Ib.*) The effect of the 8th section is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment, which is necessary to give a right, by so long a time as the land is out on lease, subject to the condition therein mentioned (*Onley* v. *Gardiner*, 4 M. & W. 500). 2 & 3 Will. 4, c. 71, s. 8.

A tenancy for life is excluded from the period of forty years by the 8th section on condition that the reversioner shall bring his action within three years after its determination; a user of forty years confers a *primâ facie* title, which is good, unless the reversioner pursues his remedy within the three years (*Wright* v. *Williams*, 1 M. & W. 77). The word "reversion" at the end of the section does not include remainder (*Symons* v. *Leaker*, 15 Q. B. D. 629; see *Laird* v. *Briggs*, 16 Ch. D. 440; 19 Ch. Div. 22).

Where a replication to a plea of enjoyment of an easement for forty years, under this act, sets up a life estate in order to bring the case within the 8th section of the act, it must show that the plaintiff is the party entitled to the reversion expectant upon such life estate (*Wright* v. *Williams*, 1 M. & W. 100). Replication of life estate.

9. This act shall not extend to Scotland (*p*). Not to extend to Scotland.

(*p*) This act has been extended to Ireland by 21 & 22 Vict. c. 42.

On Subjects included in the Prescription Act.

1. *Of the Nature of Prescription.*
2. *Of Rights of Common.*
3. *Of the Presumption of Grants of Easements and of Licences.*
4. *Of Rights of Way.*
5. *Of Watercourses.*
6. *Of the Right to Pews.*
7. *Of the Right to Light and Air.*

(1.) OF THE NATURE OF PRESCRIPTION.

Every species of prescription by which property is acquired or lost is founded on this presumption, that he who has a quiet and uninterrupted possession of any thing for a certain number of years is supposed to have a just right, without which he would not have been suffered to continue in the enjoyment of it; for a long possession may be considered as a better title than can commonly be produced, as it supposes an acquiescence in all other claimants, and that acquiescence also supposes some reason for which the claim was forborne (1 Domat, 461). The most ancient and distinguished writers on the common law of England have recognized the principle, that a right to any incorporeal hereditament may be acquired by length of time. This mode of acquisition they have denominated *prescription*, "*præscriptio est titulus ex usu et tempore substantiam capiens ab authoritate legis*" (Co. Litt. 113 b). Every prescription supposes a *grant* once made, and afterwards lost, and therefore nothing can be claimed by prescription which in its nature could not have been granted (See *Goodman* v. *Saltash*, 7 App. Cas. 654). Provision was made against the insecurity to property for want of a reasonable term of limitation by the stat. 3 Edw. 1 (Westm. 1), c. 39, by protecting possession, when as old as Richard I., against certain legal proceedings. By analogy to that statute, the term of legal memory was fixed at the same period; but as no provision was made to shift the period, in consequence of the continual

Nature of prescription at common law.

Supposes a grant.

Prescription.

lapse of time, the reign of Richard I. was left as the point from which legal memory was dated. Hence, in order to constitute a prescription previously to 2 & 3 Will. 4, c. 71, the enjoyment must have existed *time out of mind*, or, in other words, must have commenced antecedent to the reign of Richard I. (Bract. L. 2, c. 22; 3 Lev. 160; 1 Bl. Comm. 76; 2 *Id.* 263). The period called *legal memory*, in contradistinction to living memory, commenced in 1189 (Co. Litt. 114 b; 2 Inst. 238; 2 Ves. sen. 511). But in order to make persons on the alert in guarding their rights, and to prevent disputes respecting rights which have been long and peaceably enjoyed, the courts have interpreted an enjoyment of an incorporeal right for the period of forty years, or even twenty years, unless rebutted by other circumstances, *presumptive evidence* that the right has existed time out of mind, and consequently (unless its origin could be proved) a sufficient foundation for establishing a prescriptive right (10 East, 476; 2 Brod. & Bing. 403; Cowp. 215; 2 Wils. 23). And accordingly a regular usage for twenty years, not explained nor contradicted, was that upon which many public and private rights were held, there being nothing in the usage to contravene public policy (*R.* v. *Joliffe*, 2 B. & C. 54; 6 East, 214; 2 Wms. Saund. 175, a, d; see *Whitstable* v. *Gann*, 11 C. B. N. S. 412). But since 2 & 3 Will. 4, c. 71, a title to subjects included in the first section of that act cannot be established by an enjoyment for a less period than thirty years, *ante*, p. 3. To every prescription there were two inseparable incidents—time and usage (Co. Litt. 113). Prescription, and time whereof no memory runneth to the contrary, were all one in law (Litt. s. 170). And this was understood not only of the memory of anyone living, but also of proof by any record or writing, or otherwise, to the contrary, which was considered within memory (Co. Litt. 115 a). Thus a lease of ground for fifty-six years to be a passage negatived a prescription, and suffering it to be used for three or four years after the expiration of the lease was held not to amount to a gift to the public (*R.* v. *Hudson*, Str. 909). A prescription ought to be certain; therefore a prescription for copyholders to pay to the lord for a fine upon death *two years' rent or less* is bad (Com. Dig. Prescription (E. 3); see *A. G.* v. *Mathias*, 4 K. & J. 592). And a claim to carry from a close so much clay as might at any time be required for making bricks at a brick kiln in every year, and at all times of the year, was held bad (*Clayton* v. *Corby*, 5 Q. B. 415; see 2 Q. B. 813). And a prescription ought to be reasonable; and therefore a man cannot prescribe for an heriot upon the death of every stranger within his manor (Com. Dig. Prescription (E. 4)). But it may be reasonable, although unusual or inconvenient, as for a way over a churchyard, or through a church (2 Roll. Abr. 265, l. 40). There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected (*Dyce* v. *Hay*, 1 Macq. H. L. C. 305). In order to make out a prescriptive right, it must be claimed as annexed to land, or as having been created by grant and enjoyed by a body corporate in continuance from time immemorial, or as a right handed down from ancestor to heir without intermission until the person who claims the present enjoyment (*per* Willes, J., *Constable* v. *Nicholson*, 14 C. B. N. S. 230; 32 L. J. C. P. 240).

Twenty years' enjoyment presumptive evidence of prescriptive right.

Prescription must be certain and reasonable.

Different sorts of prescription.

Prescription is of two sorts,—either a personal right, which has been exercised by a man and his ancestors; or a right attached to the ownership of a particular estate, and only exercisable by those who are seised of the estate. The first is termed a prescription in the person; the second is called a prescription in a *que estate*, which, in plain English, means a right or privilege claimed by prescription as annexed to and going along with particular lands (Co. Litt. 113 b, 121 a; 3 Gwill. 1291; *Austin* v. *Amhurst*, 7 Ch. D. 692). As to prescribing in *qie estate*, see note to 2 & 3 Will. 4, c. 71, s. 5, *ante*, p. 16. There is a third mode of prescription, which is apparently, but not really, a third, namely, claiming as a member of a corporation. There the member claims in right of the body corporate as a person (*per Fry*, J., *Austin* v. *Amhurst*, 7 Ch. D. 692).

Prescription.

Difference between prescription and custom.

Prescription differs from custom in this respect, that a custom is properly a local usage not annexed to the person, such as the custom that all the copyholders of a manor have common of pasture upon the waste; whereas prescription is in a particular person (Co. Litt. 113 b; 4 Rep. 31 b). Custom is local, prescription personal: and the difference lies in the mode of claim suited to the difference of the claimants. Where the claimant has a weak and temporary estate, he cannot claim in his own right, but must have recourse either to the place, and allege a custom there, or if he prescribes in the *que estate*, it must be under cover of the tenant in fee (*Bean* v. *Bloom*, 2 Bl. R. 928; *S. C.* 3 Wils. 456; *Sharp* v. *Lowther*, Cas. temp. Hard. 293; *Lynn Regis* v. *Taylor*, 3 Lev. 160). See further as to the distinction between custom and prescription proper, Brown's Law of Limitation, pp. 134, 209.

A custom which has existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is in effect the common law within that place to which it extends, though contrary to the general law of the realm. In the case of a custom, therefore, it is unnecessary to look out for its origin; but, in the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin where no grant could have been made to support it. Thus a *custom* for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom, as it was held in 5 Co. 84; and yet a *grant* of such an easement to fishermen within the district *eo nomine* might well be held to be void (*per Tindal*, C. J., *Lockwood* v. *Wood*, 6 Q. B. 64, 65; and see *Goodman* v. *Saltash*, 7 App. Cas. 654).

The "inhabitants" of a town cannot by that name and description prescribe for an easement *in alieno solo*; where such a claim has been allowed, it will be found to have been invariably rested on the ground of custom, and not of prescription (Co. Litt. 3 a; *Day* v. *Savadge*, Hob. 85, 5th edit.; *Gateward's case*, 6 Rep. 59 b; *S. C.* as *Smith* v. *Gateward*, Cro. Jac. 152; *Baker* v. *Brereman*, Cro. Car. 418; *Fitch* v. *Rawling*, 2 H. Bl. 393; see *A. G.* v. *Acton*, 22 Ch. D. 228). An easement as a right of way *in alieno solo* may be claimed by custom (*Grimstead* v. *Marlow*, 4 T. R. 717). As to a claim by "parishioners" to a church way, see *Batten* v. *Gedye*, 41 Ch. D. 507.

Rights of common in the waste of a manor can be claimed by copyholders by custom. They cannot prescribe in their own names by reason of the want of permanence. Nor can they in their lord's name, for he cannot claim common in his own land. They are therefore allowed to claim it by custom (*per* Lord *Denman*, *Rogers* v. *Brenton*, 10 Q. B. 61; see *Warrick* v. *Queen's College*, 10 Eq. 122). But common cannot be claimed by "dwellers" in a manor (*Allgood* v. *Gibson*, 25 W. R. 60; 34 L. T. 883); or by "occupiers" of copyhold lands under the copyholders (*Austin* v. *Amhurst*, 7 Ch. D. 689; *Knight* v. *King*, 20 L. T. 494; as to a charitable trust for "occupiers," see *Re Christ Church Act*, 38 Ch. Div. 520). Freeholders claim common by prescription (*Warrick* v. *Queen's College*, 6 Ch. 716).

Profit *à prendre* in another's soil cannot be claimed by custom.

Except in the case of common claimed by copyholders by custom, a profit claimed out of another man's soil must be alleged by way of prescription, and not by way of custom, for a custom to take a profit *in alieno solo* is bad (*Blewitt* v. *Tregonning*, 3 Ad. & Ell. 575; see 9 C. B. N. S. 682). The reason why a profit *à prendre* cannot be supported by a custom in an indefinite number of people is, that the subject of the profit *à prendre* would in that case be liable to be entirely destroyed (*per* Lord *Campbell*, C. J., *Race* v. *Ward*, 4 Ell. & Bl. 705). In trespass for taking stones, &c., from the sea-shore, defendant pleaded a custom in the inhabitants of a township of which he was a member, and also a prescriptive right for the inhabitants and overseers of highways to take such stones. Held that such a custom was bad, being a profit *à prendre in alieno solo*, and that the overseers of the highways and the inhabitants

Prescription.

of a township, not being a corporation, were not capable of taking by grant, and therefore could not claim such right by prescription (*Constable* v. *Nicholson*, 14 C. B. N. S. 230; *Pitts* v. *Kingsbridge Board*, 19 W. R. 884; see *A. G.* v. *Mathias*, 4 K. & J. 591). "Owners and occupiers" cannot claim a profit *à prendre* by prescription (*Tilbury* v. *Silva*, 45 Ch. D. 98). A claim, however, by "inhabitants" of tenements in a borough to the privilege of oyster dredging within a fishery which had been acquired by prescription by the borough corporation was supported by presuming a grant to the corporation subject to a trust (in the nature of a charitable trust) in favour of the inhabitants (*Goodman* v. *Saltash*, 7 App. Cas. 633; see the charitable trusts held to exist in *Re Christ Church Act*, 38 Ch. Div. 520; *Wilson* v. *Barnes*, 38 Ch. Div. 507). Compare the right of fishing vested in a corporation in trust for its members (*Re Free Fishermen of Faversham*, 36 Ch. Div. 329). A Crown grant to the inhabitants of a parish to take profits *à prendre* out of a royal manor is valid, the effect of the grant being to incorporate the inhabitants for the purpose of enabling them to exercise the right (*Willingale* v. *Maitland*, 3 Eq. 103). But such a grant will not be presumed from proof of user by the inhabitants, if the presumption is inconsistent with the past and existing state of things and there is no trace of such a corporation having existed at any time (*Rivers* v. *Adams*, 3 Ex. D. 361). And in the case of such a grant an action is maintainable only by the inhabitants as a corporation (*Chilton* v. *London*, 7 Ch. D. 735).

CUSTOM.

What customs are valid.

Custom is "local common law"; which, as a general rule, is proved by usage (*per Jessel*, M. R., *Hammerton* v. *Honey*, 24 W. R. 603). Equally in the case of custom as in that of prescription, long enjoyment, in order to establish a right, must have been as of right, and therefore neither by violence nor by stealth, nor by leave asked from time to time (*Mills* v. *Colchester*, L. R. 2 C. P. 476; 3 C. P. 575). "It is an acknowledged principle that, to give validity to a custom, it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption. It belongs to the judges of the land to determine whether a custom is reasonable or not. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for '*consuetudo ex certâ causâ rationabili usitata privat communem legem*' (Co. Litt. 113 a), as the custom of gavelkind and borough-English, which are directly contrary to the law of descent; or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation. But, on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement: as a custom set up in a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude, and beneficial only to the lord (Year B. Trin. 2 H. 4, fol. 24, B. pl. 20). So a custom that the lord of the manor shall have £3 for every pound breach of any stranger (21 H. 4 (a)); or that the lord of the manor may detain a distress taken upon his demesnes until fine be made for the damage, at the lord's will (Litt. s. 212)." (*Per Tindal*, C. J., *Tyson* v. *Smith*, 9 Ad. & Ell. 421.)

A custom must be —certain;

A custom accordingly must be certain. Thus a custom is void which sets up a claim to lay coals to an indefinite extent and for an indefinite time on the lands of other copyholders whereby their lands may be made practically useless, although they would still be liable to pay their rents and perform their services (*Broadbent* v. *Wilkes*, Willes, 360; recognized in *Salisbury* v. *Gladstone*, 9 H. L. C. 692).

Prescription.

Again, a custom must be reasonable. Thus an alleged custom to make grips at sides of roads for drainage was bad as unreasonable (*Nicol* v. *Beaumont*, 50 L. T. 112). So also an alleged custom that an outgoing tenant should look to the incoming tenant for payment for seeds, &c., to the exclusion of the landlord's liability (*Bradburn* v. *Foley*, 3 C. P. D. 129). But a custom for a tenant (whose lease reserved minerals to the landlord) to take away flints turned up in ordinary course of good husbandry was held reasonable (*Tucker* v. *Linger*, 8 App. Cas. 508); also a manorial custom of leasing (*R.* v. *Venn*, L. R. 10 Q. B. 310).

—reasonable;

Again, the custom must have commenced from time immemorial. Accordingly a custom to erect stalls for hiring servants at statute sessions was held bad, statute sessions having been introduced by the Statutes of Labourers, the first of which was in the reign of Edward 3 (*Simpson* v. *Wells*, L. R. 7 Q. B. 214). A custom is usually proved by evidence extending over at least half a century (*Hammerton* v. *Honey*, 24 W. R. 604). But a regular usage for twenty years unexplained and uncontradicted may suffice to support an immemorial custom (*R.* v. *Jolliffe*, 2 B. & C. 54).

—immemorial;

Lastly, a custom must be continuous (see *Hammerton* v. *Honey*, 24 W. R. 603).

—continuous.

Instances of customs.

Customs derogatory from the general right of property must be construed strictly, and, above all things, they must be reasonable (*Rogers* v. *Brenton*, 10 Q. B. 57). It is a general rule that customs are not to be enlarged beyond the usage, because it is the usage and practice that make the law in such cases, and not the reason of the thing (11 Mod. 160; Fitzgib. 243). An usage for the inhabitants to have common to their houses was held not to extend to a new house (Owen, 4; see *Chilton* v. *London*, 7 Ch. D. 735). A custom would be bad which required a township, part of a parish, to pay a proportion of a church rate without requiring the inhabitants of the township to be summoned to consider the rate (*R.* v. *Dalby*, 3 Q. B. 602). A custom exempting occupiers of a hamlet from contributing to repair of highways beyond its limits was held not proved (*R.* v. *Rollett*, L. R. 10 Q. B. 469). A custom for the inhabitants of a township to go on a close and take water from a spring was held good (*Race* v. *Ward*, 4 Ell. & Bl. 702). A custom for victuallers during a fair to enter upon a certain close within a borough, and to erect booths there leaving sufficient part of such close open for use as a public highway, and paying to the owner of the soil a reasonable compensation, was held good (*Elwood* v. *Bullock*, 6 Q. B. 383). So a custom for victuallers during a fair to erect booths on a common part of the waste of a manor (*Tyson* v. *Smith*, 9 Ad. & Ell. 406). A custom is good for the inhabitants of a vill to dance on a particular close for their recreation (*Abbot* v. *Weekly*, 1 Lev. 176; cited 4 El. & Bl. 713; *Hall* v. *Nottingham*, 1 Ex. D. 1; see *Warrick* v. *Queen's College*, 10 Eq. 105). So a custom for the freemen of a town to hold horse races (*Mounsey* v. *Ismay*, 3 H. & C. 486; 34 L. J. Ex. 52). The right of recreation by custom cannot be claimed for the public, but must be confined to the inhabitants of a particular district (*Bourke* v. *Davis*, 44 Ch. D. 120; *Coventry* v. *Willes*, 12 W. R. 127). A custom for the inhabitants of a parish to exercise horses in a place beyond the parish is bad (*Sowerby* v. *Coleman*, L. R. 2 Ex. 96). As to custom in the election of churchwardens, see *R.* v. *Green*, 30 L. T. 255; *Bremner* v. *Hull*, L. R. 1 C. P. 748.

Customs as to mines and quarries.

A custom for the lord of a manor to enter on the waste and to dig through the same for the purpose of working the quarries below was held good (*Rogers* v. *Taylor*, 1 H. & N. 706; 26 L. J. Ex. 203). So, also, the custom for the lord to enter on copyhold tenements for purpose of mining proved to exist in the Isle of Man (*Ballacorkish Co.* v. *Harrison*, L. R. 5 P. C. 49). An alleged custom for the lord of a manor to work mines under any parcel of the manor so as to let down the surface, without making compensation, was held bad (*Hilton* v. *Granville*, 5 Q. B. 701; Cr. & Ph. 283; a decision criticised unfavourably in *Blackett* v. *Bradley*, 1 B. & S. 140; and in *Buccleuch* v. *Wakefield*, L. R. 4 H. L. 410; but approved in *Bell*

Prescription.

v. *Love*, 10 Q. B. Div. 561; 9 App. Cas. 286; see *Consett Co.* v. *Ritson*, 22 Q. B. D. 321). A similar custom requiring the lord to pay compensation would be good (*Aspden* v. *Seddon*, 1 Ex. Div. 510). As to mining customs in the High Peak District, see *Wake* v. *Redfearn*, 43 L. T. 123; *Wake* v. *Hall*, 8 App. Cas. 195. A custom of tin bounders as to marking out tin works on waste lands in Cornwall is stated in *Rogers* v. *Brenton* (10 Q. B. 26). Tin bounders also claim to be entitled by custom to divert all water within their bounds for the purposes of their mines (*Gaved* v. *Martyn*, 19 C. B. N. S. 732). This claim was discussed, and it was held that a presumption should be made that a right to use the water had been acquired by arrangement with the owner of the mine as well as with the bounders (*Ivimey* v. *Stocker*, 1 Ch. 396).

PRESCRIPTION PROPER.

A prescription by immemorial usage can in general only be for incorporeal hereditaments, which may be created by *grant*, such as commons, ways, waifs, estrays, wreck, warren, park, treasure trove, royal fishes, fairs, markets, and the like (Co. Litt. 114 a; 5 Rep. 109 b; 1 Ventr. 387; Bac. Abr. Customs (B); Com. Dig. Prescription (C.); *Ib.* Franchises (A. 1)).

What may be claimed by prescription.

A prescription to have a free warren in a manor and in the demesnes thereof is good (*R.* v. *Talbot*, Cro. Car. 311; Jones, 320; as to franchises, see Cruise's Dig. tit. XXVII.; 2 Bl. Comm. 37—40). The general rule with regard to prescriptive claims is, that every such claim may be good if by possibility it might have had a legal commencement (1 T. R. 667). Profits *à prendre* (See *ante*, p. 2), and easements (See *ante*, p. 5), can be claimed by prescription. The owner of one close may be bound by prescription to maintain a fence between his close and an adjoining close (*Lawrence* v. *Jenkins*, L. R. 8 Q. B. 274). And the owner of land fronting the sea may be similarly bound to maintain a sea-wall for the protection of an adjoining owner (*Hudson* v. *Tabor*, 2 Q. B. Div. 292; *R.* v. *Essex*, 14 Q. B. Div. 561; 11 App. Cas. 449). As to the duty of a riparian proprietor on a tidal river in this respect, see *Nitro-Phosphate Co.* v. *London and S. Katharine's Dock Co.*, 9 Ch. Div. 503; *Burt* v. *Victoria Co.*, 47 L. T. 378. A claim to visitation fees may be supported by prescription (*Shepherd* v. *Payne*, 16 C. B. N. S. 132; 33 L. J. C. P. 158); and also to marriage fees (*Bryant* v. *Foot*, L. R. 3 Q. B. 497).

Markets.

The right to hold a fair or market may be acquired by grant and by prescription (2 Inst. 220). Where a market has been held immemorially in certain places within a manor, it may be presumed the market was granted to be holden in any convenient place within the manor (*De Rutzen* v. *Lloyd*, 5 Ad. & Ell. 456). Where a royal charter granted the right to hold a market on two days of the week, and a usage to hold the market also on additional days was proved, the court refused, under the circumstances, to presume a lost grant of the market in respect of the additional days (*A. G.* v. *Horner*, 14 Q. B. Div. 245). The grant of a market does not imply a right in the grantee to prevent persons selling marketable articles on market days in their own houses within the limits of the franchise (*Macclesfield* v. *Chapman*, 12 M. & W. 18; *Penryn* v. *Best*, 3 Ex. Div. 292). But such a right may be acquired by prescription (*Ib.*; *Fearon* v. *Mitchell*, L. R. 7 Q. B. 696; *Moseley* v. *Walker*, 7 B. & C. 40; *Macclesfield* v. *Pedley*, 4 B. & Ad. 404). A right to market tolls was held to have been acquired by prescription in *Lawrence* v. *Hitch*, L. R. 3 Q. B. 521. Where an old market franchise has been increased in strength and character by statute, the old franchise is gone, and the statute is alone to be looked to (*Abergavenny* v. *Straker*, 42 Ch. D. 89). The lord of the manor, to whom the grant of a market is made, has a right to remove the market-place from one situation to another within the precincts of his grant (*Curwen* v. *Salkeld*, 3 East, 538; see *De Rutzen* v. *Lloyd*, 5 Ad. & Ell. 456; *London* v. *Lowe*, 42 L. T. 16). As to the enlargement of a market, see *A. G.* v. *Cambridge*, L. R. 6 H. L. 303; *A. G.* v. *Horner*, 14 Q. B. Div. 245.

Prescription.

A market may be disturbed by establishing a new market, either within or without the limits of the franchise (*Dorchester* v. *Entsor*, L. R. 4 Ex. 341). If a new market is held on the same day as an old market, it is presumed to be a disturbance of the old market, but if on a different day actual damage must be shown (*Ib.*; *Elwes* v. *Payne*, 12 Ch. D. 472; *Yard* v. *Ford*, 2 Wms. Saund. 500). A market may also be disturbed by establishing a rival place of sale, though not technically a market (*London* v. *Lowe*, 42 L. T. 16; *Goldsmid* v. *G. E. Ry. Co.*, 25 Ch. D. 541; 9 App. Cas. 927; *Abergavenny* v. *Straker*, 42 Ch. D. 83); and the rival place of sale may be outside the limits of the franchise (*S. CC.*) But as an ordinary rule, the sale of a man's own goods in the ordinary course of business, in his own shop, outside the limits of the franchise, is not a disturbance (*Manchester* v. *Lyons*, 22 Ch. Div. 307). Where the grantee of a market from the Crown suffered another to erect a market in his neighbourhood, and to use it for twenty-three years without interruption, such user was a bar to an action on the case for disturbance (*Holfcroft* v. ~~*Hole*~~, 1 Bos. & P. 400; see 2 Wms. Saund. 502, n.; and *Campbell* v. *Wilson*, 3 East, 294). See, however, *London* v. *Lowe* (42 L. T. 16), where acts of disturbance were held not justified, although they had continued for more than half a century. The act 10 & 11 Vict. c. 14 consolidates the provisions usually contained in acts for regulating markets.

Stallage.

There is a distinction between market tolls which are paid for the use of a market, and stallage which is paid for the occupation of lands within the market (*London* v. *St. Sepulchre*, L. R. 7 Q. B. 313; *R.* v. *Casswell*, *id.* 382; *Yarmouth* v. *Groom*, 1 H. & C. 102). The test is, has a man any occupation beyond what the general public has? (*R.* v. *Bedford*, 45 L. T. 616, 621). Stallage tolls are rateable, but market tolls are not (*S. CC.*; and see *Percy* v. *Ashford Union*, 34 L. T. 579). As to occupiers of stands within a market being entitled to franchise, see *Hall* v. *Metcalfe*, 1892, 1 Q. B. 208. The word "toll" in a grant of a market may include stallage. An exemption from stallage for the inhabitants of a town can be only by way of custom, not by grant or prescription. Whether an exemption or discharge from toll, other than stallage, could be claimed by such grant or prescription for inhabitants generally was questioned in *Lockwood* v. *Wood*, 6 Q. B. 50.

Tolls.

Toll *traverse*, which is defined to be a sum demanded for passing over the private soil of another (Com. Dig. tit. Toll (A.)), or a duty which a man pays for passing over the soil of another in a way not a high street (Vin. Abr. tit. Toll (A.)), or for a passage over the private ferry, bridge, &c. of another (1 Sid. 454), may be claimed by prescription by a corporation or an individual, without alleging any consideration, and payment time out of mind is sufficient to support the prescription (2 Wils. 296; see *Brecon Co.* v. *Neath Co.*, L. R. 7 C. P. 555; 8 C. P. 157). Until the act 2 & 3 Will. 4, c. 71, such toll could not have been claimed unless it had been taken time out of mind (Fitzh. tit. Toll, pl. 3), and reserved contemporaneously with the dedication of the way to the public (*Pelham* v. *Pickersgill*, 1 T. R. 660; see *Lawrence* v. *Hitch*, L. R. 3 Q. B. 521). In order to support a prescription against public right, a consideration must be proved; as where *toll-thorough*, that is, a toll for passing over the public highway, is claimed (*Nottingham* v. *Lambert*, Willes, 111; *Brett* v. *Beales*, 10 B. & C. 508). And where the plaintiff claimed toll-thorough, and showed that the soil and the tolls before the time of legal memory belonged to the same owner, although they had been severed since, it was held that it was to be presumed that the right of passage had been granted to the public in consideration of the toll (*Pelham* v. *Pickersgill*, 1 T. R. 660). A right of distress is incident to every toll (Bac. Abr. Distress, F. pl. 6), but it cannot be sold, except in the case of turnpike tolls under 3 Geo. 4, c. 126, s. 39. Tolls may be recovered in assumpsit, and no proof is given of anything like a contract by the party against whom the claim is made; and stallage, which is a satisfaction to the owner of the soil for the liberty of placing a stall upon it, may be recovered in the same way

Prescription.

without showing any contract between the owner of the market and the occupier of the stall (*Newport* v. *Saunders*, 3 B. & Ad. 411). The exemption from toll may also be claimed by prescription or by the king's grant (4 Inst. 252; 1 H. Bl. 206; 4 T. R. 130; 1 Bos. & P. 512; 7 Br. P. C. 126; *Truro* v. *Reynolds*, 8 Bing. 275; *Middleton* v. *Lambert*, 1 Ad. & Ell. 401; 3 Nev. & M. 841). The citizens or burgesses of a city, borough, &c., may prescribe to be quit of tolls (F. N. B. 226, I.; 1 H. Bl. 206; Com. Dig. Toll (G. 1.)). As to whether inhabitants of a place may prescribe to be quit of toll, see *Baker* v. *Brereman*, Cro. Car. 418; recognized 6 Q. B. 63. Port or anchorage tolls may be claimed by prescription (*Foreman* v. *Whitstable*, L. R. 4 H. L. 266). See further as to the distinction between toll thorough and toll traverse, *Brecon Co.* v. *Neath Co.*, L. R. 7 C. P. 555; 8 C. P. 157.

What cannot be claimed by prescription.

No prescriptive right can be acquired to justify a public nuisance (*A. G.* v. *Barnsley*, 1874, W. N. 37; see *Brown* v. *Russell*, L. R. 3 Q. B. 251; *Mumford* v. *Oxford, &c. R. Co.*, 1 H. & N. 34). Nor can a claim be made by prescription to anything which could not have had a legal beginning (*Goodman* v. *Saltash*, 7 App. Cas. 648). But it seems that it is not necessary that the thing should be legal through all the time of prescription (*Millington* v. *Griffiths*, 30 L. T. 65, 68).

A title to lands and other corporeal substances, of which more certain evidence may be had, cannot be made by prescription, as that a man, and all those whose estate he has, have been seised time out of mind of particular lands (Brooke, Prescription, 122; Vin. Abr. Pres. B. pl. 2; Dr. & St. dial. 1, c. 8; Finch, 132; 2 Bl. Comm. 264). The right to a given substratum of coal lying under a certain close is a right to land, and cannot be claimed by prescription. It is otherwise of a right to take coal in another man's land (*Wilkinson* v. *Proud*, 11 M. & W. 33; see *Stoughton* v. *Leigh*, 1 Taunt, 402). What arises by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands (which are now abolished by stat. 9 & 10 Vict. c. 62), felons' goods, and the like. These not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by an inferior title (Co. Litt. 114; 2 Bl. Comm. 265). A prescription for a right common to all the subjects of the realm cannot be supported (*Pell* v. *Towers*, Noy, 20; Br. Abr. Pres. pl. 71).

One prescription cannot be prescribed against another prescription, for the one is as ancient as the other; as if a man prescribe for a way, light or other easement, another cannot prescribe for liberty to stop it when he pleases (*Aldred's case*, 9 Rep. 58 b; 2 Mod. 105; Com. Dig. Prescription (F. 4)).

A man cannot prescribe or allege a custom against a statute, because it is the highest matter of record in law (3 T. R. 271; 11 East, 495), unless the custom or prescription be saved or preserved by another act (Co. Litt. 115). And Lord *Coke* makes a difference between acts in the negative and in the affirmative; for a statute in the affirmative, without any negative, express or implied, does not take away the common law; and likewise between statutes that are in the negative, for if a statute in the negative be declarative of the ancient law, a man may prescribe or allege a custom against it, as well as he may against a common law (Harg. Co. Litt. 115 a, n. (15)). An ancient custom may be destroyed by the express provisions of a statute or by positive language inconsistent with the existence of the custom (*Merchant Taylors' Co.* v. *Truscott*, 11 Exch. 855; *Salters' Co.* v. *Jay*, 3 Q. B. 109). But where a statute making an act illegal comes into force while a prescription is running, the prescription, after the proper period has elapsed, may be an answer to an individual suing as an individual (*Millington* v. *Griffiths*, 30 L. T. 65).

How prescriptive rights may be lost.

By the common law a man might have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. But by the Statute of Limitations (32 Hen. 8, c. 2), it is

enacted that no person shall make any prescription by the *seisin or possession* of his ancestor or predecessor, unless such seisin or possession had been within threescore years next before such prescription made (2 Bl. Com. 263, 264). And the remedy for such rights, so far as it depended upon real actions, was further abridged by the abolition of real actions after 31st December, 1834, by the statute 3 & 4 Will. 4, c. 27, s. 36 (see *post*). It was said by Lord *Redesdale* that where a profit of any kind to be taken out of lands has not been taken for a vast number of years, and the lands have been enjoyed without yielding such profit to a third person, the consequence is, that the title to it, whatever its nature, shall be presumed to be discharged (*Norbury* v. *Meade*, 3 Bligh, 245). But in *Neill* v. *Devonshire* (8 App. Cas. 135), it was said that an incorporeal hereditament such as a several fishery, which can only pass by deed, cannot be abandoned. **Prescription.**

A title gained by prescription or custom is not lost by mere interruption of *possession* for ten or twenty years, unless there be an interruption of the *right*, as by unity of possession of right of common, and the land charged therewith of an estate equally high and perdurable in both (Co. Litt. 114 b). An unity of possession merely suspends; there must be an unity of ownership to destroy a prescriptive right (*Canham* v. *Fisk*, 2 Cr. & Jerv. 126). Thus if a person, having a right of common by prescription, takes a lease of the land for twenty years, whereby the common is suspended, he may, after the determination of the lease, claim the common again by prescription; for the suspension was only of the enjoyment, not of the right (Co. Litt. 113 b). Easements are extinguished by the union of seisin of the dominant and servient tenements in the same person (*James* v. *Plant*, 4 Ad. & El. 749). Easements are sometimes extinguished by the express words of a statute, *e.g.*, the General Inclosure Acts, 41 Geo. 3, c. 109; 8 & 9 Vict. c. 118 (See *Turner* v. *Crush*, 4 App. Cas. 221); or by necessary implication from a statute (*Yarmouth* v. *Simmons*, 10 Ch. D. 518). They are extinguished when the purpose for which they were created no longer exists (*National Manure Co.* v. *Donald*, 4 H. & N. 8). A prescriptive right may be lost by the destruction of the subject-matter (4 Rep. 88); but not by an alteration of the quality of the thing to which a prescription is annexed (Hob. 39; 4 Rep. 86 a, 87 a). Alterations in the dominant tenement will sometimes extinguish an easement (*Allan* v. *Gomme*, 11 Ad. & El. 772). The release of an easement may be implied from abandonment or non-user (*Cook* v. *Bath*, 6 Eq. 177). It was said that a release of a right of way, or of a right of common, will not be presumed by mere non-user for a less period than twenty years, although it is otherwise as to lights (*Moore* v. *Rawson*, 3 B. & C. 339). But "it is not so much the duration of the cesser, as the nature of the act done by the grantee of the easement or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material" (*R.* v. *Chorley*, 12 Q. B. 519; see *Crossley* v. *Lightowler*, 2 Ch. 482; *Eccl. Commrs.* v. *Kino*, 14 Ch. Div. 213). The right to hold courts for the determination of civil suits, granted by the king's charter to the steward and suitors of a court of ancient demesne, was held not to be lost by a non-user of fifty years (*R.* v. *Havering*, 5 B. & Ald. 691; *R.* v. *Hastings*, *Id.* 692, n.) A prescriptive right may be defeated by showing the origin of the user, and that it is not in accordance with the right claimed (*Commissioners of Sewers* v. *Glasse*, 19 Eq. 155; see *Neill* v. *Devonshire*, 8 App. Cas. 135).

An ancient grant without date did not necessarily destroy a prescriptive right; for it might be either before time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury (*Addington* v. *Clode*, 2 Bl. Rep. 989); but if the ancient grant is clearly not antecedent to the time of legal memory it will disprove immemorial prescription (*Welcome* v. *Upton*, 5 M. & W. 398; see *R.* v. *Westmark*, 2 M. & Rob. 305). The grant by the Crown of a franchise to hold a market on Thursdays and Saturdays precludes the presumption of a lost grant from the Crown giving a right to exercise the franchise on other days (*A. G.* v. *Horner*, 14 **Effect of ancient grant.**

Prescription.

Q. B. Div. 245). Where a bishop, having free warren by prescription over the demesne and tenanted lands of a manor whereof he was seised *jure ecclesiæ*, accepted a grant from the Crown to himself and his successors of free warren over the demesne lands of all his manors in England: it was held that, even admitting the grant to have the effect of extinguishing the prescription as to the demesne lands (which the court considered to be at least doubtful), it could not affect it over the other lands of the manor (*Carnarvon* v. *Villebois*, 13 M. & W. 313).

Prescription against the Crown.

Formerly a prescription could not run against the king, as no delay in resorting to his remedy would bar his right. The maxim was *nullum tempus occurrit regi* (2 Inst. 273; 2 Roll. 264, l. 40; Com. Dig. Prescription (F. 1); Broom's Maxims, p. 61, 6th ed.) Liberties and franchises were excepted in the statute 9 Geo. 3, c. 16, limiting the claims of the Crown to sixty years (see *post*, note on the limitation of the rights of the Crown). By 32 Geo. 3, c. 58, the Crown is barred in informations for usurping corporate offices or franchises by the lapse of six years (See Bac. Abr. 7th ed., Prerogative (E. 6), 467, and stat. 7 Will. 4 & 1 Vict. c. 78, s. 23; *R.* v. *Harris*, 11 Ad. & Ell. 518). By the stat. 2 & 3 Will. 4, c. 71, ss. 1, 2 (*ante*, pp. 1, 4), the Crown is placed upon the same footing with the subject as to the rights affected by those sections. *Secus*, as to the rights affected by sect. 3 (*Perry* v. *Eames*, 1891, 1 Ch. 658).

(2.) OF RIGHTS OF COMMON.

Several species of common.

Common is a right or privilege which one or more persons claim to take or use in some part or portion of that which another man's lands, waters, woods, &c., naturally produce, without having an absolute property in such lands, waters, woods, &c. It is called an incorporeal right, which lies in grant, as originally commencing by some agreement between lords and tenants, for some valuable purposes, which by age being formed into a prescription continues good, although there be no deed or instrument in writing that proves the original contract or agreement (4 Rep. 37 a; 2 Inst. 65; Vent. 387; Bac. Abr. Common). Common has been divided into five sorts, viz.: 1st, *Common of pasture*, which is a right or liberty that one man or more have to feed or fodder their beasts or cattle in another man's land. 2ndly, *Common of turbary*, or the liberty of cutting turves in another's soil, to be burnt in a house (see Noy, 145; 7 East, 121; 3 Lev. 165). 3rdly, *Common of estovers*, which is a right of taking trees, loppings, shrubs, or underwood, in another's woods, coppices, &c. (see Cro. Jac. 25, 256; 5 Rep. 25 a; 4 Rep. 87 a; Cro. Eliz. 820; Plowd. 381). 4thly, *Common of piscary*, or a right and liberty of taking fish in another's pond, pool, or river. And 5thly, a liberty which in some manors the tenants have, of digging and taking sand, gravel, stone, &c. in the lord's soil (Bac. Abr. Common, (A.)). All claims of this kind, in order to be valid, must be made with some limitation and restriction (*Clayton* v. *Corby*, 5 Q. B. 419).

What commonable rights may be prescribed for.

A party may prescribe to take the sole and several herbage which may be granted (Co. Litt. 122; *Hoskins* v. *Robins*, Pollexf. 13; *Potter* v. *North*, 1 Vent. 385; *Welcome* v. *Upton*, 6 M. & W. 543; see *North* v. *Cox*, 1 Lev. 253; *Johnson* v. *Barnes*, L. R. 8 C. P. 527). Instances of sole pasturage are to be found in the South Downs, in Sussex, and they are frequently transferred in gross; it is the same with the cattle-gates in the North of England, although some have thought the owners of them are tenants in common of the soil (*Welcome* v. *Upton*, 6 M. & W. 541, 542; *R.* v. *Whixley*, 1 T. R. 137). The grant of *vesturam terræ* or *herbagium terræ* does not pass the land or soil itself (Co. Litt. 4 b). A cattle-gate is not a more extensive right than the above, and does not include the right to the soil (*Rigg* v. *Lonsdale*, 1 H. & N. 923, 936). A person may prescribe to have the sole and several pasture, vesture or herbage, in exclusion of the owner of the

soil, for a *limited time in every year* (Fitz. Prescription, 51; Co. Litt. 122 a; 2 Roll. Abr. 267 (L.) pl. 6; Winch's Rep. 5; Hutt. 45); or for the whole year (*Hoskins* v. *Robins*, 2 Saund. 324; *S. C.*, 2 Lev. 2; Pollexf. 13; 1 Mod. 74). So a tenant may prescribe to have all the thorns growing upon such a place in exclusion of the owner of the soil (*Dowglass* v. *Kendal*, Cro. Jac. 256). But a man cannot prescribe to have *common eo nomine* for the *whole* year, in exclusion of the lord, for this is held to be repugnant to the nature of the thing (Co. Litt. 122 a; 1 Roll. Abr. 396 (A.), pl. 1, 2; 2 Roll. Abr. 267, pl. 3; 2 Lev. 268; 1 Ventr. 395). However, it is said that the lord may by custom be restrained to a qualified right of common during a part of the year (Yelv. 129; 1 Brownl. 187; Cro. Jac. 208, 257). So it is said the lord may be restrained, together with the commoners, from using a common at all during a part of the year (1 Roll. Abr. 405, 406); and that the commoners may prescribe to have common in exclusion of the lord for part of a year (2 Roll. Abr. 267 (L.), pl. 1; 1 Wms. Saund. 353, n. (2)). The claim in right of a freehold estate and the lands which formerly belonged to the manor farm, of a separate right of feeding and folding an unlimited number of sheep, is not a claim of a right of common, but of something in the nature of a separate right of feeding and folding (Kielway, 198 a; *Punsany and Leader's case*, 1 Leon. 11), which may have arisen out of an exception made by the lord upon granting the lands, or it may have been created by an act of parliament (*Ivatt* v. *Mann*, 3 M. & G. 699). A right of pannage, *i. e.*, the consumption by pigs of fallen acorns, may be prescribed for (*Chilton* v. *London*, 7 Ch. D. 562); as also a right to cut and carry away litter from a forest (*De la Warr* v. *Miles*, 17 Ch. Div. 535).

Claims to common by prescription.

A person cannot prescribe for a right of common as occupier of a messuage (*English* v. *Burnell*, 2 Wils. 258). And a plea claiming an immemorial right of common in occupiers for the time being, was held bad after verdict (*Davies* v. *Williams*, 16 Q. B. 543). Where rights of common have been exercised for many years by the freehold tenants of a manor, and also by the inhabitants, the court will presume that the inhabitants claimed through the freehold tenants. And where such rights have been exercised for many years, the court will try to find a legal origin for those rights, and presume a grant, if necessary (*Warrick* v. *Queen's College*, 6 Ch. 716). Such rights may be claimed in the case of copyhold tenants of the manor by custom, and in the case of the freehold tenants by prescription (*Ib.*)

Claims to common by custom.

Rights of common in the wastes of the lord may be claimed by custom by copyholders (*Gateward's case*, 6 Rep. 59; *Bean* v. *Bloom*, 2 Bl. R. 926; *S. C.*, 3 Wils. 456), but not by "occupiers" of copyhold lands (*Austin* v. *Amhurst*, 7 Ch. D. 689; *Knight* v. *King*, 20 L. T. 494; as to a charitable trust for occupiers, see *Re Christchurch Act*, 38 Ch. Div. 520).

Common of pasture.

Common of pasture is, where one person has, in common with other persons, the right of taking by the mouths of his cattle the herbage growing on the land of which some other person is the owner. This species of common is either appendant, appurtenant, or in gross (Selw. N. P. Common, s. 2).

Common appendant.

Common appendant is a right belonging to the owners and occupiers of arable lands to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either horses and oxen to plough the land, and cows and sheep to manure it (Co. Litt. 122 a). This as matter of universal right was originally permitted not only for the encouragement of agriculture but for the necessity of the thing. For when lords of manors granted out parcels of land to tenants for services either done or to be done, these tenants could not plough or manure the land without beasts. These beasts could not be sustained without pasture, and pasture could not be had but in the lord's wastes and in the uninclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common as inseparably incident to the grant of the lands (2 Bl. Com. 33; *Tyrringham's case*, 4 Rep. 36 a; 2 Inst. 85). There is no general common law right of

Of Rights of Common.

tenants of a manor to common appendant in the waste. *Parke*, B., said, although there are some books which state that common appendant is of common right, and that common appendant is the common law right of every free tenant in the lord's wastes (See *Mellor* v. *Spateman*, 1 Wms. Saund. 346 d, 6th ed.; *Bennett* v. *Reeve*, Willes, 227; Com. Dig. Comm. B.), it is not to be understood that every tenant of a manor has by common law such a right, but only that certain tenants have such a right, not by prescription, but as a right at common law, incident to the grant. The right therefore is not a common right of all tenants, but belongs only to each grantee, before the stat. *Quia emptores*, of arable land by virtue of his individual grant and as incident thereto; and it is as much a peculiar right of the grantee as one derived by express grant, or by prescription, though it differs in its extent being limited to such cattle as are kept for ploughing and manuring the arable land granted, and as are of a description fit for that purpose; whereas the right by grant or prescription has no such limits and depends on the will of the grantor (*Dunraven* v. *Llewellyn*, 15 Q. B. 810, 811). As to this decision see Williams' Real Prop., App. C., 605, 15th ed., and *Warrick* v. *Queen's College*, 10 Eq. 123.

Meaning of levant and couchant.

Common appendant can only be claimed in the lord's wastes (2 Inst. 85; 1 Roll. 396; 4 Rep. 37), for the claimant's own commonable cattle levant and couchant upon the land (*Ib.*; Burr. 320). A right of common for cattle "*levant and couchant*," upon inclosed land, extends to such cattle as the winter eatage of the land, together with the produce of it during the summer, is capable of maintaining (*Whitelock* v. *Hutchinson*, 2 M. & Rob. 205; 5 T. R. 46; Willes, R. 227; 8 T. R. 396; *Willis* v. *Ward*, 2 Chit. 297). In other words the right is governed by the number of cattle which the commoner has the means of housing and providing for in the winter (*Dyce* v. *Hay*, 1 Macq. H. L. C. 313). Levant and couchant expresses a measure of the number of cattle that may be put in, and does not necessarily refer to cattle actually fed upon the particular land (*Johnson* v. *Barnes*, L. R. 7 C. P. 592). It is rather the measure of capacity of the land than a condition to be actually complied with (*Robertson* v. *Hartopp*, 43 Ch. Div. 517; see *Carr* v. *Lambert*, L. R. 1 Exch. 168). This species of common must have existed from time immemorial (1 Roll. Abr. 396), and only arises in the case of grants of arable land (*Warrick* v. *Queen's College*, 6 Ch. 730). It might formerly be claimed as appendant to a cottage, because by 31 Eliz. c. 7 (repealed by 15 Geo. 3, c. 32), it was requisite for a cottage to have four acres of land attached to it (*Emerson* v. *Selby*, 1 Salk. 169; 2 Lord Raym. 1015). Common appendant is so necessarily incident to the land, that it cannot be severed from it, and, therefore, however often the land may be divided, every parcel of it is entitled to common appendant (Willes, 240). The right to common appendant is extinguished by the erection of permanent buildings on the land in respect of which it is claimed, but not by the conversion of arable land into pasture (*Warrick* v. *Queen's College*, 6 Ch. 730; *Robertson* v. *Hartopp*, 43 Ch. Div. 517).

Common appurtenant.

Common appurtenant may be claimed by prescription or by grant. And after the extinction of a prescriptive right of common by a unity of possession of the waste with the land in respect of which the right is claimed, proof that the successive tenants of such land for above fifty years under different lords had actually enjoyed the right of common is evidence for presuming a new grant from the lord (*Cowlam* v. *Slack*, 15 East, 108). This species of common, though frequently confounded with common appendant, differs from it in many circumstances. It may be created by grant or prescription. It may be claimed as annexed to any kind of land, whereas common appendant can only be claimed on account of ancient arable land (4 Rep. 37 a). And it may be not only for beasts usually commonable, such as horses, oxen and sheep, but likewise for goats, swine, &c. (1 Roll. Abr. 399); but not geese (*Morley* v. *Clifford*, 20 Ch. D. 753). A fold course is a right of common appurtenant of pasture for sheep (*Robinson* v. *Duleep Singh*, 11 Ch. Div. 798). Common appurtenant

Of Rights of Common.

for a fractional part of a cow was claimed in *Nicholls* v. *Chapman* (5 H. & N. 643). In the case of common appurtenant there must be some connection between the occupation of the lands in respect of which the right is enjoyed, and the right itself, which connection must limit the right (*Baylis* v. *Tyssen-Amhurst*, 6 Ch. D. 58). A copyholder cannot lawfully claim common appurtenant without stint in respect of his copyhold tenement; but such common must be limited to the cattle levant and couchant on the tenement to which it is annexed, or the number must be ascertained by the court rolls, or in some other manner (*Morley* v. *Clifford*, 20 Ch. D. 753; see *Benson* v. *Chester*, 8 T. R. 396; *Scholes* v. *Hargraves*, 5 T. R. 46). A person may claim common appurtenant for a certain number of cattle, in which case the cattle of a stranger may be put upon the common, as no injury can arise to the owner of the soil as the number is ascertained (Bac. Abr. 96; *Richard* v. *Squibb*, 1 Ld. Raym. 726; see *Stevens* v. *Austin*, 2 Mod. 185; *Thornel* v. *Lassels*, Cro. Jac. 27). The principle furnished by *Potter* v. *North* (1 Wms. Saund. 635; *Hoskins* v. *Robins*, 2 Wms. Saund. 726), as to claims to common by custom or prescription, seems to be to ascertain the extent of the rights conferred, and the rights reserved by the grant, and to see whether the act be in derogation of the latter (*Jones* v. *Richard*, 6 Ad. & Ell. 530; see 5 *Ib.* 413). If the common appurtenant be for an uncertain number of cattle, it is limited to the claimant's own commonable cattle levant and couchant upon his lands (See *Manchester* v. *Vale*, 1 Wms. Saund. 28, ed. 1871; and see further, as to common appurtenant for cattle levant and couchant, *Bowen* v. *Jenkins*, 6 Ad. & Ell. 911). A right of common appurtenant for cattle levant and couchant proved by acts of user for thirty years, and exercised in respect of a tenement formerly in a condition to support cattle, is not extinguished or suspended by reason of a change in the condition of the tenement, if the tenement might still easily be turned to the purpose of feeding cattle (*Carr* v. *Lambert*, L. R. 1 Exch. 168). As to the evidence in support of a claim to common appurtenant, see *Commissioners of Sewers* v. *Glasse*, 19 Eq. 150; and as to the proper mode of pleading a prescriptive right to common appurtenant, see *Baylis* v. *Tyssen-Amhurst*, 6 Ch. D. 500.

Apportionment of common.

If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right, but it is otherwise as to common appurtenant and other kinds of common, as common of estovers or piscary. But both common appendant and common appurtenant will be apportioned on alienation of part of the land to which the common is appendant or appurtenant (Co. Litt. 122 a, 164 a; *Tyrringham's case*, 4 Rep. 36; *Wild's case*, 8 Rep. 78; *O'Hare* v. *Fahy*, 10 Ir. C. L. R. 318).

The rent-charges under the acts for the commutation of tithes in England and Wales, in respect of the tithes of common appendant or appurtenant, are to be a charge on the allotments thereafter to be made in respect of the lands to which the right of common is attached (2 & 3 Vict. c. 62, s. 14).

Common because of vicinage.

Common because of vicinage or neighbourhood, is not strictly a right of common. It happens where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with each other, the beasts of the one straying mutually into the other's fields without any molestation from either. It is confined to two townships (*Commissioners of Sewers* v. *Glasse*, 19 Eq. 159), and if you have three vills, each of which has a common, A., B. and C., and vill B. lies between A. and C., B. may intercommon with A. or C., but A. cannot intercommon with C. (*Ib.*) It is only a permissive right, intended to excuse, what, in strictness, is a trespass in both, and to prevent a multiplicity of suits (*Musgrove* v. *Cave*, Willes, 322). And therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common; but if they escape and stray thither of them-

Of Rights of Common.

selves, the law winks at the trespass (Co. Litt. 121, 122; 4 Rep. 38; 2 Bl. Comm. 33). The position, that this species of common is not a right, but matter of excuse for a trespass, is sufficiently established (*Wells* v. *Pearcy*, 1 Bing. N. C. 556; *Gullett* v. *Lopes*, 13 East, 348). Although it may be claimed by prescription, it is rather matter of immemorial custom. The substance of the custom is, that cattle lawfully on one common have been used to stray upon the other. All that it is necessary therefore for the pleadings to show is, that the cattle were lawfully on their own common before they strayed, and that is done by showing thirty years' user under the statute 2 & 3 Will. 4, c. 71 (*Prichard* v. *Powell*, 10 Q. B. 589; see *Hetherington* v. *Vane*, 4 B. & Ald. 428). Reputation may be given in evidence in support of the immemorial right of such common so pleaded (*Prichard* v. *Powell*, *sup.*) If to an action of trespass in the common called A., the defendant plead that A. and B. commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the whole prescription (*Morewood* v. *Wood*, 14 East, 327). Common *pur cause de vicinage* cannot be set up as an excuse for cattle rambling from downs subject to common of pasture into downs of which the owner has exclusive possession, notwithstanding there be no fence or visible boundary separating the downs (*Heath* v. *Elliot*, 4 Bing. N. C. 388). This common cannot be claimed by usage between the close of an individual and a common (*Clarke* v. *Tinker*, 10 Q. B. 604). Nor can it be claimed by custom in respect of a private estate over which no other right of common is shown (*Jones* v. *Robin*, 10 Q. B. 620).

Common because of vicinage.

To establish a right of common *pur cause de vicinage* an intercommoning between the two districts must be alleged and proved. It is not enough to show that there was no fence between the two districts, and that cattle strayed from one to the other, but were constantly either driven back by their own respective owners, or turned off by the owners of the land into which they had strayed (*Clarke* v. *Tinker*, 10 Q. B. 604).

Where the commons of two towns adjoin, and a right of common by reason of vicinage exists, and in one town there are fifty acres of common and in the other town one hundred acres of common, the commoners in the first town cannot put more cattle upon the common of fifty acres than it will feed, without any respect to the common in the other town (*Corbet's case*, 7 Rep. 5 a). Where common *pur cause de vicinage* exists one commoner cannot take the law into his own hands and distrain another commoner's cattle for a surcharge (*Cape* v. *Scott*, L. R. 9 Q. B. 269).

An end may be put to this species of common by inclosure (*Tyrringham's case*, 4 Rep. 36 b, 38 b, 39 a; *Corbet's case*, 7 Rep. 5 a). Where one of two adjoining commons, with common of vicinage, is inclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway, which led over the one to the other; yet, as the separation was not complete, so as to prevent cattle straying from one to the other by means of the highway, the common by vicinage still continues (*Gullett* v. *Lopes*, 13 East, 348). In case of open field lands, the owner of any particular spot may, by custom, exclude the other from right of pasture there, by inclosing his own land (2 Wils. 269). By a local act, all rights of common whatever in B. were extinguished; the wastes were divided; the owners of allotments were directed to inclose and authorized to distrain the cattle of strangers trespassing. No fence having been made, it was held, that the owner of an allotment in B. could not distrain cattle which had strayed into his allotment from a common in W. in pursuance of an alleged right of common *pur cause de vicinage* in the inhabitants of W. (*Wells* v. *Pearcy*, 1 Bing. N. R. 556). It was questioned whether a notice in fact to the commissioners in W. (without inclosure), that all the rights of common in B. were extinguished, would put an end to the legal excuse of trespasses *pur cause de vicinage* (*Ib.*) It was admitted, that when there is a common *pur cause de vicinage* between two wastes, and one of them is under a private act of parliament conveyed to allottees, for the purpose of being inclosed, and the commissioners under

Of Rights of Common.

the act extinguish all rights of common on such one waste, these proceedings do not of themselves put an end to the common *pur cause de vicinage* (*Clarke* v. *Tinker*, 10 Q. B. 604).

Common in gross.

Common in gross is such a right of common as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. It is a separate inheritance, entirely distinct from landed property, and may be vested in one who has no land in the manor (Co. Litt. 122 a; 2 Bl. Comm. 34). Common appurtenant for a certain number of cattle may be converted into common in gross (Cro. Jac. 15; 5 Taunt. 244). If A. and all those whose estate he has in the manor of D. have had from time immemorial a fold course, that is, common of pasture for any number of sheep not exceeding 300, in a certain field, as appurtenant to the manor, he may grant over to another this fold course, and so make it in gross (1 Roll. Abr. 402, pl. 3; *Day* v. *Spooner*, Cro. Car. 432; Sir W. Jones, 375; 3 Wms. Saund. 327, n.) A right of common in gross *sans nombre*, in the latitude in which it was formerly understood, cannot exist (1 Saund. 346; 1 Ld. Raym. 407; Willes, 232; 8 T. R. 396), and it can have no rational meaning but in contradistinction to stinted common, where a man has a right only to put on a particular number of cattle (*Bennett* v. *Reeve*, Willes, 232). A right of common in gross does not confer a vote for the coroner of a county (*R.* v. *Day*, 3 Ell. & Bl. 859).

A corporation may prescribe for common in gross for cattle levant and couchant within the town, but not for common in gross *sans nombre* (*Mellor* v. *Spateman*, 1 Saund. 343; *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.; *Johnson* v. *Barnes*, L. R. 8 C. P. 527). Where, before the passing of 5 & 6 Will. 4, c. 76, all freemen inhabiting within an ancient borough claimed right of common on certain lands, and that act (sect. 7) has extended the limits of the borough, the right of common can no longer be described in pleading to be a right "in all freemen inhabiting within the borough"; for that act only reserves the right to those who reside within the old limits, and does not make the newly-defined borough the same to all intents and purposes as the old one (*Beadsworth* v. *Torkington*, 1 Q. B. 782; *Hulls* v. *Estcourt*, 2 New Rep. 131). See a plea of common by a burgess under a grant to a corporation, *Parry* v. *Thomas*, 5 Exch. 37.

The stat. 2 & 3 Vict. c. 62, s. 13, provides the mode in which Lammas lands and a right of common in gross are to be charged with rent-charges, in lieu of tithes, under the acts for the commutation of tithes in England and Wales.

Common of turbary.

Common of turbary is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can only be appurtenant to a house, not to land; for turves are to be burnt in a house; nor can it extend to a right to dig turf for sale (*Valentine* v. *Penny*, Noy, 145; see *Hayward* v. *Cannington*, 1 Lev. 231; 1 Sid. 354). An ancient right of turbary can only exist as being a right in respect of an ancient dwelling-house or building, or at the most, for the house which supplies the place of that house (*Warrick* v. *Queen's College*, 6 Ch. 730). In an action of trespass the user of this right of common was held to extend to all parts of a common fit for the production of fuel, but not to a rock (*Peardon* v. *Underhill*, 16 Q. B. 120). A custom for all the customary tenants of a manor, having gardens, to dig turf on the waste, for making grass plots, at all times of the year, and as often and in such quantity as occasion required, is bad in law, as being indefinite, uncertain, and destructive of the common (*Wilson* v. *Willes*, 7 East, 121, recognized in *Salisbury* v. *Gladstone*, 9 H. L. C. 692, *post*, p. 39; see *Peppin* v. *Shakespear*, 6 T. R. 748). Common of turbary, appurtenant to a house, will pass by a grant or demise of such house with the appurtenances (*Solme* v. *Bullock*, 3 Levinz, 165; *Dobbyn* v. *Somers*, 13 Ir. C. L. R. 293). There is nothing in law to prevent a party dealing with his own land and demising it, from annexing to the land or granting to the lessee a right to take turbary upon other lands of the landlord, to be consumed upon houses to be sub-

Of Rights of Common.

sequently built upon the premises (*Hill* v. *Barry*, Hay & J. 688; *Duggan* v. *Carey*, 8 Ir. C. L. R. 210). The right of turbary is apportionable (*Hargrove* v. *Congleton*, 12 Ir. C. L. R. 368).

Common of estovers.

Common of estovers, or *estouviers*, that is, necessaries (from estover, to furnish), is a liberty of taking necessary wood for the use or furniture of a house or farm from off another's estate. The Saxon word bote is used by us as synonymous to the French estovers: and therefore house-bote is a sufficient allowance of wood to repair or to burn in the house; which latter is sometimes called fire-bote; plough-bote, and cart-bote, are wood to be employed in making and repairing all instruments of husbandry; and hay-bote or hedge-bote, is wood for repairing hedges or fences, as pales, stiles, and gates, to secure inclosures. These botes or estovers must be reasonable ones: and such any tenant or lessee, except a strict tenant at will, may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary (Co. Litt. 41; 2 Bl. Com. 35). A person having common of estovers in a certain wood of another, by view and delivery of the owner's bailiff, by taking estovers without such view and delivery is a trespasser, though he takes less than he was entitled to (5 Rep. 25 a). The rule is founded on the obligation upon tenants of making necessary repairs (*De Salis* v. *Crossan*, 1 Ball & B. 188). Where no wood exists, and where part of the premises demised are bog, from which no other beneficial use can arise, a tenant is at the common law in Ireland entitled to use such bog for the purposes of fuel, as he would have been authorized to use wood, had there been any for a like purpose (*Howley* v. *Jebb*, 8 Ir. C. L. R. 435). Where tenants abuse their right of estovers, the court will grant an injunction, as if they cut turf for sale (*Courtown* v. *Ward*, 1 Sch. & Lef. 8; see *Wilson* v. *Bragg*, 8 Bac. Abr. 428, Waste (O)).

Every tenant for life or years has a liberty of this kind of common right in the lands which he holds unless restrained, which is usual by particular covenants or exceptions (2 Bl. Com. 282). The right to estovers may also be appendant or appurtenant to a messuage or dwelling-house by prescription or grant, to be exercised in lands not occupied by the tenant of the house; as if a man grants estovers to another for the repair of a certain house, they become appurtenant to that house; so that whoever afterwards acquires it, shall have such common of estovers. This right may be claimed either by prescription or grant, but (except in the case of copyholders) it cannot be claimed by custom; for, according to a well-known rule, a custom to take profits *in alieno solo* is bad (*Gateward's case*, 6 Rep. 59; *Bean* v. *Bloom*, 3 Wils. 456; 2 Sir W. Black. 926; *Grimstead* v. *Marlowe*, 4 T. R. 717; *Selby* v. *Robinson*, 2 T. R. 758; *Hoskins* v. *Robins*, 1 Vent. 123—163; 2 Saund. 320).

A person having common of estovers, either by grant or prescription annexed to his house, may alter the rooms or chambers, or build new chimneys, or add to the house without losing the right, but he cannot use any of the estovers in the parts newly added (*Luttrell's case*, 4 Rep. 87 a). Common of estovers can only be claimed by prescription for an ancient house (F. N. B. 180; 4 Co. 86; see, however, *Arundel* v. *Steer*, Cro. Jac. 25); but if it be pulled down and another rebuilt, either in the same or another place, the prescription will not be lost (*Costard and Wingfield's case*, Godb. 97; *Cowper* v. *Andrews*, Hob. 39). A person having common of estovers is not entitled to estovers out of timber which the owner of the soil has cut down in part of the wood, but he must take his estovers out of the residue (Cro. Eliz. 820; Cro. Jac. 256). A person having common of estovers appurtenant to a house cannot grant the estovers to another, reserving the house to himself, nor grant the house to another, reserving the estovers to himself; for in either of those cases, the estovers cannot be severed from the house, because they must be spent on the house (Plowd. 381).

The estovers taken must be reasonable, and limited to the wants of the tenement in respect of which a man claims them, upon which therefore

they must be expended (7 E. 4, 27; 12 E. 4, 8; 8 Rep. 54); and cannot be sold to be used elsewhere (11 H. 6, 11 b; *Pembroke's case*, Clayt. 47). A claim of a prescriptive right to cut down and carry away all the trees and wood growing and being on a certain close, is void as being too large (*Bailey* v. *Stevens*, 12 C. B. N. S. 91).

A prescriptive right in an individual to cut and carry away litter from a forest was established in *De la Warr* v. *Miles*, 17 Ch. Div. 535. As to Crown grants of the right of lopwood to the inhabitants of a parish, see *Willingale* v. *Maitland*, 3 Eq. 103; *Rivers* v. *Adams*, 3 Ex. D. 361; and *Chilton* v. *London*, 7 Ch. D. 735, *ante*, p. 24.

Common of piscary.

A *common of fishery* is a right of fishing in common with other persons in a stream or river, the soil whereof belongs to a third person. This does not differ in any respect from any other right of common (Salk. 637); and trespass will not lie for an injury to it. Common of fishery may be claimed by tenants of a manor by custom (*Tilbury* v. *Silva*, 45 Ch. Div. 115); but not by inhabitants of a parish (*Bland* v. *Lipscombe*, 24 L. J. Q. B. 155 n.; *Lloyd* v. *Jones*, 6 C. B. 81); nor by "dwellers" in a manor (*Allgood* v. *Gibson*, 34 L. T. 883); the ground being that, independently of manorial rights, a fishery *in alieno solo*, which is a profit *à prendre*, must be claimed not by custom but by prescription (*Bland* v. *Lipscombe*, *sup.*); and a large and indefinite class cannot prescribe (*Tilbury* v. *Silva*, *sup.*) A grant of a "free fishery" is *primâ facie* a grant of non-exclusive fishery (*Bloomfield* v. *Johnston*, L. R. 8 C. L. 68). A "common fishery," as distinguished from a "common of fishery," means a fishery extending to all mankind, as in the sea (*Benett* v. *Costar*, 8 Taunt. 136).

Different kinds of fishery.

As to the various kinds of fisheries, the only substantial distinction is between an exclusive right of fishery usually called "several," sometimes "free," used as in "free warren"; and a right in common with others usually called common of fishery, sometimes "free," used as in "free port" (*Per Willes*, J., *Malcolmson* v. *O'Dea*, 10 H. L. C. 593).

Several fishery.

A several fishery is when a person has an exclusive right of fishery either in his own soil or in the soil of another (1 Selw. N. P. 751, 13th ed.) within particular limits (3 Salk. 360; 2 Salk. 637; see Co. Litt. 122 a, n. 7; *R.* v. *Ellis*, 1 M. & S. 652). Such a right is, strictly speaking, the proper subject of a grant, but not of an exception or reservation (*Doe* v. *Loch*, 2 Ad. & El. 743; *Wickham* v. *Hawker*, 7 M. & W. 76; *Corker* v. *Payne*, 18 W. R. 436; see *Hamilton* v. *Musgrave*, 19 W. R. 443).

A several fishery cannot be appurtenant to a several pasture (*Edgar* v. *Fishery Commissioners*, 23 L. T. 732). But a several fishery may be appurtenant to a manor (*Rogers* v. *Allen*, 1 Camp. 309). And in such a case will remain in gross if the lands of the manor are conveyed away (*Neill* v. *Devonshire*, 8 App. Cas. 153, 169; *Devonshire* v. *Pattinson*, 20 Q. B. Div. 263), unless the intention to transfer the fishery appear in the conveyance (*Tilbury* v. *Silva*, 45 Ch. Div. 98). A several fishery whether in tidal or non-tidal waters, may exist independently of riparian ownership, and that whether the owner of the fishery be the owner of the soil of the river (*Neill* v. *Devonshire*, 8 App. Cas. 153; *Devonshire* v. *Pattinson*, *sup.*; *Smith* v. *Andrews*, 1891, 2 Ch. 697), or not (*A. G.* v. *Emerson*, 1891, A. C. 654; *Miller* v. *Little*, 4 L. R. Ir. 302; *Foster* v. *Wright*, 4 C. P. D. 449). A perfect paper title to a several fishery may not be absolutely conclusive if there be evidence of user by others inconsistent therewith (*Blount* v. *Layard*, 1891, 2 Ch. 681, n.; *Neill* v. *Devonshire*, *sup.*; *Smith* v. *Andrews*, 1891, 2 Ch. 678). As to whether a right to a several fishery can be lost by abandonment, see *Neill* v. *Devonshire*, 8 App. Cas. 154, 170. A several fishery may be followed where the water gradually shifts its course (*Foster* v. *Wright*, 4 C. P. D. 438; see *Miller* v. *Little*, 4 L. R. Ir. 302); but not where it leaves the old course and commences to follow a new course which was always distinguishable from the old (*Carlisle* v. *Graham*, L. R. 4 Ex. 361).

A claim to a fishery in gross is not within the Prescription Act (*Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687; 34 L. J. C. P. 309).

In addition to the above distinction between common of fishery and

Of Rights of Common.

a several fishery, it is important to bear in mind the distinction between (1) non-tidal waters (which include that part of a river in which the water is not salt, and in ordinary tides is unaffected by tidal influence, *Reece* v. *Miller*, 8 Q. B. D. 626); and (2) tidal waters.

Non-tidal waters.

In the case of a non-tidal river the presumption is that each riparian owner is entitled to a several fishery in the river in front of his land *ad medium filum* (*Blount* v. *Layard*, 1891, 2 Ch. 689, n.) This is so even in the case of a navigable non-tidal river or "king's stream" (*Ib.*); or of a river flowing through a manor (*Lamb* v. *Newbiggin*, 1 C. & K. 549). It seems, however, that the several fishery of a riparian owner may extend over the whole stream (*Blount* v. *Layard*, *sup.* p. 688). As to fishery in a lake, see *Bristow* v. *Cormican*, 3 App. Cas. 641; *Marshall* v. *Ulleswater Co.*, 3 B. & S. 732; *Johnson* v. *Bloomfield*, I. R. 8 C. L. 68. As to whether the Crown can grant a right of fishing in a non-tidal river flowing over the soil of a subject, see *Devonshire* v. *Pattinson*, 20 Q. B. Div. 263. In non-tidal waters, an individual may acquire a title by prescription to a several fishery (Co. Litt. 122 a; Ventr. 391; see 2 Saund. 326; *Peers* v. *Lacy*, 4 Mod. 362), or to a fishing weir (*Rolle* v. *Whyte*, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657). The public cannot have a right to fish in non-tidal waters founded on custom, prescription, or lost grant (*Smith* v. *Andrews*, 1891, 2 Ch. 699, and cases there quoted; *Blount* v. *Layard*, *Ib.* 689, n.)

Tidal waters.

In tidal waters (whether sea or river), the right of fishing is *primâ facie* in the public (*Neill* v. *Devonshire*, 8 App. Cas. 177; *Malcolmson* v. *O'Dea*, 10 H. L. C. 618). And this public right extends to shell fish (as oysters), as well as to floating fish (*Bagot* v. *Orr*, 2 Bos. & P. 472; *Saltash* v. *Goodman*, 7 Q. B. Div. 116). The right to create a several fishery in tidal waters existed in the Crown before Magna Charta, and a several fishery so created could lawfully afterwards be made the subject of a grant by the Crown to an individual (*Malcolmson* v. *O'Dea*, *sup.*; see *Neill* v. *Devonshire*, 8 App. Cas. 135). And when the Crown acquired the right to such a fishery by merger since Magna Charta it could re-grant it (*Northumberland* v. *Houghton*, L. R. 5 Ex. 127). Long exclusive enjoyment alone may be ground for presuming the grant of such a fishery (*Edgar* v. *Fishery Commissioners*, 23 L. T. 732; *Mannall* v. *Fisher*, 5 C. B. N. S. 856; *Little* v. *Wingfield*, 8 Ir. C. L. R. 279; *Beaman* v. *Kinsella*, *Ib.* 291). So a several fishery in tidal waters has been presumed to have been granted to a corporation subject to a trust (in the nature of a charitable trust) in favour of inhabitants, authorizing them to dredge for oysters within a certain period annually (*Goodman* v. *Saltash*, 7 App. Cas. 633). A several fishery was held to have been granted to a corporation in trust for the members thereof (*Re Free Fishermen of Faversham*, 36 Ch. Div. 329). There may be a several fishery for oysters, the right to take floating fish remaining in the public (*Rogers* v. *Allen*, 1 Camp. 29). An individual may claim a several fishery in an arm of the sea by prescription (*Orford* v. *Richardson*, 4 T. R. 437; see *Ward* v. *Cresswell*, Willes, 265; *Crichton* v. *Collery*, 19 W. R. 107). A grant of foreshore would not of itself convey the right to a several fishery over it (*A. G.* v. *Emerson*, 1891, A. C. 654). The owner of a several fishery over foreshore, whether owner of the soil or not, can restrain the reclamation of part of the foreshore (*Bridges* v. *Hinton*, 11 L. T. 653).

Ownership of soil.

As to the relation of the ownership of a fishery to the ownership of the soil of the bed, it is settled that the owner of a several fishery must be presumed to be the owner of the soil, whether the fishery is in tidal waters (*A. G.* v. *Emerson*, 1891, A. C. 649); or in a non-tidal river (*Holford* v. *Bailey*, 13 Q. B. 426); or in a lake (*Marshall* v. *Ulleswater Co.*, 3 B. & S. 732). But the terms of the grant may rebut this presumption (*Somerset* v. *Fogwell*, 5 B. & C. 886; see *Bloomfield* v. *Johnston*, I. R. 8 C. L. 95, 106; *A. G.* v. *Emerson*, 1891, A. C. 655). In the case of a grant of a "free fishery," *i.e.*, a non-exclusive right, the presumption is that the soil does not pass (*Bloomfield* v. *Johnston*, *sup.*) For the ordinary rules as to the ownership of the soil below water, see *post*, p. 84. And as to when

Of Rights of Common.

the rights of lords of manors depend upon the ownership of the soil, see *Grand Union Canal Co.* v. *Ashby*, 6 H. & N. 394; *Clarke* v. *Mercer*, 1 F. & F. 492.

As to weirs, see *Weld* v. *Hornby*, 7 East, 195.

As to the relief in equity in the case of common of fishery, see *post*, p. 44.

Customs to take sand, gravel, &c.

Customs have been established for copyholders to take sand and gravel from the waste of the manor (*Peppin* v. *Shakespear*, 6 T. R. 748; *Duberly* v. *Page*, 2 T. R. 391; see *Portland* v. *Hill*, 2 Eq. 765), and loam for the repair of ancient tenements (*Robertson* v. *Hartopp*, 43 Ch. Div. 514). Compare the customs established for copyholders to take clay, &c. without limit from their copyhold tenements (*Salisbury* v. *Gladstone*, 9 H. L. C. 692; *Hanmer* v. *Chance*, 4 D. J. & S. 626).

As to taking materials for repairing highways from wastes or commons, see 5 & 6 Will. 4, c. 50, s. 51; *Rylatt* v. *Marfleet*, 14 M. & W. 233.

The lord may take gravel and loam from the waste, provided he does not infringe the commoners' rights (*Hall* v. *Byron*, 4 Ch. D. 667; see *Bateson* v. *Green*, 5 T. R. 411; *Folkard* v. *Hemmett*, 5 T. R. 417; *Hilton* v. *Granville*, 5 Q. B. 730). The onus of showing that such rights are interfered with lies on the commoner (*Hall* v. *Byron*, 4 Ch. D. 680; *Robertson* v. *Hartopp*, 43 Ch. D. 501).

Presumption that waste land belongs to lord of manor.

Primâ facie the lord of the manor is entitled to all waste lands within the manor; and it is not essential that the lord should show acts of ownership of such lands; and evidence that the public have been used to throw rubbish on waste lands is rather evidence that it belongs to the lord than to any private individual (*Doe* v. *Williams*, 7 C. & P. 332). A right to any part of the waste may, however, be established against the lord by repeated acts of ownership, as by cutting trees, digging turf, and the like (*Tyrwhitt* v. *Wynne*, 2 B. & Ald. 554; *Barnes* v. *Mawson*, 1 M. & S. 77; *Richards* v. *Peake*, 2 B. & C. 918). An encroachment by a copyholder on the waste becomes, at any rate where the lord may by custom grant the waste as copyhold, an accretion to the holding, and a copyhold title is acquired (so held by *Fry*, J., in *A. G.* v. *Tomline*, 5 Ch. D. 750; see, however, *S. C.* before the C. A., 15 Ch. Div. 150).

Grants by the lord.

The lord may, with the consent of the homage, grant part of the soil for building, if he has immemorially exercised such right (*Folkard* v. *Hemmett*, 5 T. R. 417). In like manner there may be a valid custom in a manor within the limits of an ancient forest belonging to the Crown, for the lord with the assent of the homage to grant parcels of the waste to be holden by copy of court roll, and for the grantees to inclose the same, and to hold them in severalty against the commoners, and in exclusion of their rights (*Boulcott* v. *Winmill*, 2 Camp. 261; see *Northwich* v. *Stanway*, 3 Bos. & P. 346; *Lascelles* v. *Onslow*, 2 Q. B. D. 433). But without a custom for the purpose, the lord cannot make a new grant of copyhold (*R.* v. *Hornchurch*, 2 B. & Ald. 189; *R.* v. *Wilby*, 2 M. & S. 504). Nothing in 4 & 5 Vict. c. 35, empowers the lord to grant waste without the consent of the homage, where such is the custom of the manor (4 & 5 Vict. c. 35, s. 91). A custom for the lord to grant leases of the waste of the manor without restriction is bad in point of law (*Badger* v. *Ford*, 3 B. & Ald. 153). A custom to inclose (even as against a common right of turbary), leaving sufficiency of common, is good; but the *onus* of proving that a sufficiency is left lies on the lord (*Arlett* v. *Ellis*, 7 B. & C. 346; see *Rogers* v. *Wynne*, 7 D. & R. 521; *Betts* v. *Thompson*, 6 Ch. 732; *Robertson* v. *Hartopp*, 43 Ch. D. 501).

Presumption that encroachments by tenant belong to the landlord.

It is well settled, that encroachments made by a tenant are for the benefit of the landlord, unless it appears clearly, by some act done at the time of the making of the encroachments, that the tenant intended the encroachments for his own benefit, and not to hold them as he held the farm to which the encroachments were adjacent (*Doe* v. *Rees*, 6 C. & P. 610). This doctrine originated in those cases where the landlord was lord of the manor, and the tenant encroached upon the waste (2 Ell. & Bl. 353). Where a tenant who holds under the lord of a manor encroaches upon the waste, he is presumed to have approved against the commoners for the

Of Rights of Common.

benefit of the lord. In other cases, when the power to encroach is derived from the occupation of the premises held of a landlord, and the encroachment is occupied as if it was part of the holding, then at the end of the tenancy the presumption as between the landlord and tenant is, that it is part of the holding, and it belongs to the landlord (*Doe* v. *Tidbury*, 14 C. B. 324; see *A. G.* v. *Tomline*, 15 Ch. Div. 155). The encroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit; the same rule prevails where the encroachment is at a distance. Even though at the time of making the encroachment there is nothing to rebut this presumption, circumstances may afterwards occur by which it may be severed from the farm; for instance, if the tenant conveys it to another person, and the conveyance is communicated to the landlord (*Per Parke*, B., *Kingsmill* v. *Millard*, 11 Exch. 318, 319; see further *Lisburne* v. *Davies*, L. R. 1 C. P. 259; and *Whitmore* v. *Humphries*, L. R. 7 C. P. 1). Such presumption may be rebutted by the special circumstances of the case (*Berney* v. *Bickmore*, 8 L. T. 353). The presumption was held to prevail where the landlord was not lord of the waste (*Doe* v. *Jones*, 15 M. & W. 380), and was not rebutted by the fact that the encroachment was separated from the tenant's holding by a road (*Andrews* v. *Hailes*, 2 Ell. & Bl. 349). The presumption in favour of the landlord only prevails as against the tenant, and not as against the rights of a third party (*Doe* v. *Massey*, 17 Q. B. 373). This presumption does not apply where the tenant is in occupation of the waste land before entering upon his tenancy (*Dixon* v. *Baty*, 14 W. R. 836).

Right to approve.

By the Statute of Merton (20 Hen. 3, c. 4), and by subsequent statutes (29 Geo. 2, c. 36, and 31 Geo. 2, c. 41), the lord of a manor may inclose so much of the common as he pleases, for tillage, or wood ground, provided he leaves common sufficient for such as are entitled to rights of common. This inclosure, when justifiable, is called in law "*approving*," an ancient expression signifying the same as "*improving*" (2 Bl. Com. 34). The statutory right to approve applies as against common appurtenant of pasture (*Robinson* v. *Duleep Singh*, 11 Ch. D. 798); but there can be no approvement against tenants of a manor who have a right to dig gravel on the waste, and to take estovers (*Duberley* v. *Page*, 2 T. R. 391; *Grant* v. *Gunner*, 1 Taunt. 435; *Shakespear* v. *Peppin*, 6 T. R. 741). The statute does not authorize the lord to approve as against common of turbary or estovers; but such a right may exist by custom (*Lascelles* v. *Onslow*, 2 Q. B. D. 451; *Clarkson* v. *Woodhouse*, 5 T. R. 412, n.; *Bateson* v. *Green*, 5 T. R. 411; *Place* v. *Jackson*, 4 D. & R. 318; 2 Atk. 189). There can be no inclosure under 29 Geo. 2, c. 36, as against persons entitled to the underwood on the waste (*Nicholls* v. *Mitford*, 20 Ch. D. 380). A custom for tenants to approve by the lord's consent, and by presentment of the homage of the court baron, does not restrain the lord's right to approve (2 T. R. 392, n.)

An owner *pur autre vie* of a common may approve under the statute (*Patrick* v. *Stubbs*, 9 M. & W. 830). A person seised in fee of part of the waste, although he be not lord, may approve without the consent of the homage, provided he leaves a sufficiency of common for the tenants of the manor (*Glover* v. *Lane*, 3 T. R. 445).

Where a lord approves, the *onus* of showing that sufficient waste is left for the commoners lies on the lord (*Betts* v. *Thompson*, 6 Ch. 732). The question of sufficiency depends, not on the average number of sheep commoners have in fact turned out, but on the number they are entitled to turn out (*Robertson* v. *Hartopp*, 43 Ch. Div. 484, see p. 518, where the C. A. treat as doubtful the decisions in *Lake* v. *Plaxton*, 10 Exch. 196, and *Lascelles* v. *Onslow*, 2 Q. B. D. 433).

Inclosure acts.

The greater part of the commons in England have been inclosed under local acts of parliament. The 41 Geo. 3, c. 109, called the General Inclosure Act, consolidated certain provisions which had usually been inserted in acts of inclosure, and facilitated the mode of proving the several facts usually required on the passing of such acts. The 1 &

2 Geo. 4, c. 23, amended the law respecting the inclosure of open fields, common, and waste lands in England. The 3 & 4 Will. 4, c. 87, remedied defects in titles to real property allotted under inclosure acts, in consequence of the award not having been enrolled, or not having been enrolled within the time limited by the several inclosure acts, and authorized the appointment of new commissioners where the same should have been omitted. Further facilities for the inclosure of open and common, arable, meadow and pasture lands and fields in England and Wales were given by stat. 6 & 7 Will. 4, c. 115; 3 & 4 Vict. c. 31. By 8 & 9 Vict. c. 118, the superintendence of applications for the inclosure of lands and the carrying the same into operation was entrusted to the first commissioner of woods and forests, and two other commissioners, who were styled "The Inclosure Commissioners for England and Wales." The powers and duties of these commissioners are now vested in the Board of Agriculture (52 & 53 Vict. c. 30). The principal act has been amended by many recent acts; see the acts given in the schedule to 39 & 40 Vict. c. 56.

Inclosure commissioners.

29 & 30 Vict. c. 122, amended and extended by 32 & 33 Vict. c. 107, provides for the improvement, protection and management of commons near the metropolis.

Under the act 8 & 9 Vict. c. 118, gavelkind lands in Kent may be exchanged for lands in Middlesex held in common socage (*Minet* v. *Leman*, 7 D. M. & G. 340).

Where by an agreement between the lord of the manor and the copyholders, the waste lands are allotted and inclosed, the allotments taken by the copyholders are of freehold tenure (*Paine* v. *Ryder*, 24 Beav. 151; *Doe* v. *Davidson*, 4 M. & S. 175).

Where, under an inclosure act, the waste lands of a manor are directed to be allotted in certain proportions, the freehold of such part of the lands as are not portioned out in the award remains in the lord of the manor (*Packe* v. *Mee*, 9 W. R. 335). See further, as to inclosure, Cooke on Inclosures, 4th ed.

Interest of the commoner.

The interest which a commoner has in the common is, in the legal phrase, to eat the grass with the mouths of his cattle. He must not meddle at all with the soil, nor with its fruit and produce, even though it may eventually improve and meliorate the common (1 Roll. Abr. 406, pl. 10; 12 H. 8, 2 a; *Harcourt's case*). Therefore he cannot cut the grass, wood, bushes, fern, or other thing, growing on the common; nor can he cut the molehills, or make fishponds there (12 H. 8, 2 a; *per Brooke*, J., 2 Leon. 202; Godb. 182, pl. 258; *Anon.*, Bridg. 10; *Samborn* v. *Harilo*, 2 Bul. 116; *Carrill* v. *Pack*, 1 Sid. 251). If the lord plant trees on the common, and the commoner thereby cannot have his common so beneficially as he ought, he cannot cut them down, for they are part of the soil itself, being the fruit and produce of the soil, but he must bring an action (6 T. R. 483; *Sadgrove* v. *Kirby*, 1 Bos. & P. 13). So if the lord's rabbits on a common increase so much that there is not a sufficiency of common left, a commoner cannot fill up the coney-burrows (*Cooper* v. *Marshall*, 1 Burr. 259; *S. C.*, 2 Wils. 51; 1 Roll. Abr. 405, pl. 3). Much less can a commoner kill the rabbits to prevent their increase, to the prejudice of the common (*Hodson* v. *Grissell*, 1 Roll. Abr. 405, pl. 1, 2; Cro. Jac. 195; Yel. 104; *S. C.*, cited 1 Lutw. 108; 2 Leon. 203; see 1 Wms. Saund. 353 n.; *Robertson* v. *Hartopp*, 43 Ch. D. 501).

By what words a right of common will pass.

By the conveyance of the lands to which either common appendant or appurtenant is annexed, the right of common will pass (*Solme* v. *Bullock*, 3 Lev. 165; *Sacheverell* v. *Porter*, Cro. Car. 482; *Drury* v. *Kent*, Cro. Jac. 14). Where common has been extinguished by union of ownership, and a grant is made of the land, to which, before the extinguishment, the right of common was attached, and the words "appertaining" and "belonging" only are used, the right will not pass. But if the words "or therewith used or enjoyed" are inserted, they would be sufficient to revive the right (*Clements* v. *Lambert*, 1 Taunt. 205; *Morris* v. *Eggington*, 3 Taunt. 24; *Barlow* v. *Rhodes*, 1 C. & M. 448; *Wardle* v. *Brocklehurst*, Ell. & Ell. 1058). Now, by Conv. Act, 1881, s. 6, a conveyance of land

Of Rights of Common.

includes all commons appertaining or reputed to appertain to the land or any part thereof, or at the time of the conveyance demised, occupied, or enjoyed with, or reputed or known as, part or parcel of or appurtenant to the land. The effect of an enfranchisement of copyholds being to extinguish all rights and privileges annexed to the copyholder's estate as such, if a copyholder has a right of common, and his copyhold is enfranchised, the common is gone, since the copyhold tenure has ceased: and the right of common will not pass by the word "appurtenances" in the deed of enfranchisement (Moore, 667; Cro. Jac. 253; 2 Ld. Raym. 1225; Salk. 170, 364); but must be made by express grant (Moore, 667; Cro. Eliz. 570). General words in a conveyance by the lord were held not to re-create rights of common (*Hall* v. *Byron*, 4 Ch. D. 667). Where, however, a copyhold tenement, to which a right of common was originally appendant, having vested in the lord by forfeiture, was granted by him as copyhold, with the appurtenances; it was held, that having always continued demisable while in the hands of the lord, it was a customary tenement, and as such was still entitled to a right of common (*Badger* v. *Ford*, 3 B. & Ald. 153). And a copyholder, who has common in a waste, *without* the manor of which his copyhold is parcel, has it as annexed to the land, and not to his customary estate; such common is not extinct by enfranchisement of the copyhold, though there be no words of re-grant. And after enfranchisement, the feoffee must, previous to the stat. 2 & 3 Will. 4, c. 71, have prescribed in a *que estate* of his lord for himself and his customary tenants till the time of the enfranchisement, and since that time for the feoffee and his heirs, as appurtenant to the enfranchised tenement (*Barwick* v. *Matthews*, 5 Taunt. 365).

Extinguishment of common.

A right of common may be extinguished by a release, by unity of possession of the land, by severance, or by the enfranchisement of a copyhold. If the commoner releases part of the common, it will operate as an extinguishment of the whole, because the right is entire throughout the whole land, therefore a release of part is a release of the whole (*Rotherham* v. *Green*, Cro. Eliz. 593; 1 Show. 350; *Johnson* v. *Barnes*, L. R. 8 C. P. 527). Common appendant and appurtenant become extinguished by unity of possession of the land to which the right of common was annexed with the land in which the common was. But it is necessary that the party should have an estate equal in duration, quality, and other circumstances of right, in the tenements in respect of which the common is claimed, and in the premises over which the right was claimed (*R.* v. *Hermitage*, Carth. 239; *Bradshaw* v. *Eyr*, Cro. Eliz. 570; 4 Rep. 38 a; see *Lloyd* v. *Powis*, 4 El. & Bl. 485). Common appendant or appurtenant for cattle levant and couchant may also be extinguished by severance. As where a person, having common of this kind annexed to a messuage or tenement, conveys the messuage or tenement, excepting the common, the common is extinguished (1 Roll. Abr. 401). Where a right of common is annexed to a copyhold, and the lord grants the land to the copyholder and his heirs, with the appurtenances, the common is extinguished, because it was annexed to the customary estate, which being converted into a freehold, the right of common is gone (*Marsham* v. *Hunter*, Cro. Jac. 253; Gilb. Ten. 224). But there may be words amounting to a re-grant of common (*Doidge* v. *Carpenter*, 6 M. & S. 49). Equity will, under certain circumstances, decree the continuance of common, where it would be extinct at law (*Styant* v. *Staker*, 2 Vern. 250; Comb. 127).

In case of the enfranchisement of copyholds, under the statutes 4 & 5 Vict. c. 35, s. 81, and 15 & 16 Vict. c. 51, s. 45, it is provided that copyhold lands when enfranchised are to become freehold, subject to the payment of the consideration for the enfranchisement; but it is provided that nothing contained in those acts shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such lands, but such right shall continue attached thereto, notwithstanding the same shall become freehold.

As to the extinguishment of a right of common appurtenant for cattle

levant and couchant by alteration in the dominant tenement, see *Carr* v. *Lambert* (L. R. 1 Ex. 168; *ante*, p. 33).

Of Rights of Common.

Remedies for disturbance of right of common by action.

The usual remedy adopted by commoners for an injury to the right of common is an action for a disturbance of the right of common, which may be maintained either against the lord or owner of the soil (*Hassard* v. *Cantrell*, Lutw. 101), or a stranger, or a commoner (1 Selw. N. P. 381, 13th ed.) In this action the plaintiff must prove an injury sustained; but the smallest injury is sufficient, as that of taking away the manure which was dropped on the common by the cattle (*Pindar* v. *Wadsworth*, 2 East, 154; see cases cited in *Marzetti* v. *Williams*, 1 B. & Ad. 426; *Blofield* v. *Payne*, 4 B. & Ad. 410; and *Beadsworth* v. *Torkington*, 1 Q. B. 782).

If one of the commoners surcharges the common, that is, puts more cattle into the common than he is entitled to do, the commoner who is injured may maintain an action against the other for a surcharge, notwithstanding he has himself been guilty of a surcharge (*Hobson* v. *Todd*, 4 T. R. 71; see *Bowen* v. *Jenkins*, 6 Ad. & Ell. 911; *Atkinson* v. *Teesdale*, 2 W. Bl. 817; *Cheesman* v. *Hardham*, 1 B. & Ald. 706). In case for a surcharge of common, the plaintiff need not show that he was exercising his right of common at the time of the surcharge, but only that he could not enjoy his common so beneficially as he ought (*Wells* v. *Watling*, 2 W. Bl. 1233). One commoner cannot distrain the cattle of another commoner, because they come on the commonable land by colour of right (*Hall* v. *Harding*, 4 Burr. 2426). This principle applies to common *pur cause de vicinage*, as well as to common appurtenant (*Cape* v. *Scott*, L. R. 9 Q. B. 269). As to the right of distress for a surcharge, see further 1 Wms. Saund. 630, edit. 1871.

An action of trespass will lie by one tenant in common against another, and also against his licensee, for making holes in the common, and for digging and taking turves away, when those acts are not done in the exercise of a right of common. But the plaintiff will recover such damages only as are proportionate to his interest (*Wilkinson* v. *Haygarth*, 16 L. J. Q. B. 103). An owner seised in fee of a close, upon which the burgesses of a borough had a right during a certain portion of the year to depasture their cattle, and having during that period exclusive possession of the close, may maintain an action of trespass against a party who, during that period, commits a trespass in the subsoil by digging holes; but not against one who, during that period, merely rides over the close (*Cox* v. *Glue*, 5 C. B. 533). As to pleading in an action of trespass against several claiming a right of common, see *Church* v. *Wright*, 15 C. B. N. S. 750; *Davies* v. *Williams*, 16 Q. B. 543.

Before the stat. 3 & 4 Will. 4, c. 27, the commoner was barred of his right of entry and ejectment, by having acquiesced in the inclosure of part of a common for more than twenty years, and his remedy was by writ of assize of common. The lord was not conclusively barred of his remedy to recover common lands which had been inclosed until the lapse of sixty years, within which time he might recover the lands by a real action (*Edwards* v. *M'Leay*, Cooper, C. C. 318; *Hawke* v. *Bacon*, 2 Taunt. 155; *Creach* v. *Wilmot*, *Id.* 159; see 2 Smith's L. C. 799, 9th ed.) Writs of assize have been abolished by 3 & 4 Will. 4, c. 27, s. 36, *post*.

Abatement.

It is the policy of the law not to allow commoners to abate except in a few cases. The abator is a judge in his own cause, which ought seldom to be permitted, whereas an action will best ascertain the just measure of the damages he has sustained. The cases where the law allows an abatement by a commoner are where the acts of the lord are directly contrary to the nature of the common. For by the grant of it, the grantor gives everything which is incident to the enjoyment of the grant, such as free ingress, egress, &c. Therefore, if the lord erect a wall, gate, hedge or fence around the common, to prevent the commoner's cattle from going into the common, the commoner may abate the erection, because it is inconsistent with the terms of the grant (2 Roll. Abr. 145, (W.) pl. 2;

Of Rights of Common.

Cooper v. *Marshall*, 1 Burr. 259; *Sadgrove* v. *Kirby*, 6 T. R. 485). The power of abatement in this case seems analogous to other cases where the acts done are inconsistent with the terms of the grant; and if the grantor of a way, &c., stops it up, the grantee may abate the erection.

A commoner may pull down a house wrongfully erected upon the common, if necessary for the exercise of his right, unless persons are in it at the time (*Perry* v. *Fitzhowe*, 8 Q. B. 757; *Jones* v. *Jones*, 1 H. & C. 1; see *Harvey* v. *Bridges*, 1 Exch. 261). And may do so even where persons are in the house at the time, after notice and request to the occupier to remove it (*Davies* v. *Williams*, 16 Q. B. 543; see *Lane* v. *Capsey*, 1891, 3 Ch. 411). If a mere stranger erect a building upon land belonging to another, the owner of the land is justified in pulling down the building, although the intruder is at the time in the building (*Barking* v. *Read*, 19 L. J. Q. B. 291).

So where the commoner is deprived of part of his common by the erection of a wall, gate or hedge upon the common itself, it seems he may abate the erection, for it deprives him of his common, and forms no part of the soil of the common, and by such abatement the commoner does not at all meddle with the soil (*Mason* v. *Cæsar*, 2 Mod. 65; 2 Inst. 88; Litt. Rep. 38). And yet, as the lord may approve, leaving a sufficiency of common, the commoner acts at the peril of being punished in an action of trespass, provided the lord has left a sufficiency of common. When a part and not the whole of a common had been inclosed, a commoner in asserting his right of common may throw down the whole of the hedge erected on the common (*Arlett* v. *Ellis*, 7 B. & C. 346; 9 B. & C. 671; see *Robertson* v. *Hartopp*, 43 Ch. D. 496). But where a hedge or erection is made upon other land, which is no part of the common, but surrounds the common, the commoner can only abate so much of the erection as to make a way for his cattle to go into the common (15 Hen. 7, 10 b, pl. 18; 29 Edw. 3, 6; 2 Inst. 88; *Mason* v. *Cæsar*, 2 Mod. 65; see 1 Wms. Saund. 353, a). If the lord of a manor plant trees upon a common, a commoner has no right to cut them down; his remedy is only by an action (6 T. R. 483).

Actions in Chancery Division.

Before the Jud. Acts, it was held that where there had been possession of a fishery for a considerable length of time, a person claiming a *sole* right to it might bring a bill to be quieted in the possession of it, though he had not established his right at law (*York* v. *Pilkington*, 1 Atk. 282). And if the persons who disputed the right were numerous, so that it could not be determined in one action at law, the party claiming an exclusive right might go to a court of equity first, which would direct an issue for *settling* the right, as in disputes between the lords of manors and their tenants, or the tenants of different manors (*Tenham* v. *Herbert*, 2 Atk. 483). But if the question about a right of fishing arose between two lords of manors, neither of them could go into equity for relief until the right had been established at law (*Ib.*; *Whitchurch* v. *Hyde*, *Id.* 391; *Welby* v. *Rutland*, 6 Br. P. C. 575; see 1 Br. C. C. 40, 572).

An action may be brought in the Chancery Division against the lord by one copyholder, on behalf of himself and the other copyholders, to have their rights of common ascertained: but one copyholder not suing on behalf of all cannot maintain such an action (*Phillips* v. *Hudson*, 2 Ch. 243). An action for the purpose of establishing a right of common over the wastes of a manor may be maintained by a copyhold and freehold tenant of the manor on behalf of himself and all other copyhold and freehold tenants (*Smith* v. *Brownlow*, 9 Eq. 241; *Robertson* v. *Hartopp*, 43 Ch. D. 484); and by one freehold tenant of a manor on behalf of himself and all other freehold tenants (*Warrick* v. *Queen's College*, 6 Ch. 716; *Betts* v. *Thompson*, 6 Ch. 732). An action for the purpose of establishing a right of common over the wastes of a forest may be maintained by an owner and occupier of land within the forest on behalf of all the owners and occupiers (*Commrs. of Sewers* v. *Glasse*, 7 Ch. 456). The decree in such an action is given (19 Eq. 164).

As to production of documents in a suit instituted to establish a right

of common, see *Minet* v. *Morgan*, 11 Eq. 284; *Warrick* v. *Queen's College*, 3 Eq. 683. **Of Rights of Common.**

As to the law of common in general, see Bac. Abr. Common; Com. Dig. Common; Cruise's Dig. tit. XXIII.; Woolrych on Rights of Common, 2nd ed.

(3.) OF THE PRESUMPTION OF GRANTS OF EASEMENTS; AND OF LICENCES.

Presumption at common law of grant of incorporeal rights from exercise during twenty years.

For a long series of years prior to the passing of the act 2 & 3 Will. 4, c. 71, judges have been in the habit, for the furtherance of justice, and for the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years, by analogy to the Statute of Limitations, 21 Jac. 1, c. 16 (*Holcroft* v. *Heel*, 1 Bos. & P. 460; 2 Saund. 175 a; *Campbell* v. *Wilson*, 3 East, 294; *Read* v. *Brookman*, 8 T. R. 151; Cowp. 110; *Hillary* v. *Waller*, 12 Ves. 266). Such presumption did not always proceed on a belief that the thing presumed had actually taken place, but, as said by a learned author (2 Stark. on Ev. 669), "a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation; and though in theory it was mere presumptive evidence, in practice and effect it was a bar." The act 2 & 3 Will. 4, c. 71, is intended to make that possession a bar or title of itself, which was so before only by the intervention of a jury (*Bright* v. *Walker*, 1 C. M. & R. 217; see *ante*, p. 8).

A presumption of a grant is raised upon the general principle, that what has been done should be presumed to be rightly done; *ex diuturnitate temporis omnia presumuntur solemniter esse acta* (Co. Litt. 6 b). In applying this principle to a right of way, if it be found that the act has been often repeated, with the knowledge of the persons acting upon an adverse right, it affords a strong presumption in favour of the right so exercised. The same principle is applied to presumption in the case of light or of flowing water (3 B. & C. 621, 622). If there has been an uninterrupted possession of light, water, or any other easement for twenty years, it affords a ground for presuming a right by grant, covenant or otherwise, according to the nature of the easement, and if there is nothing to rebut the presumption, a jury may be directed to act upon it (*Yard* v. *Ford*, 2 Wms. Saund. n. (2); *Cross* v. *Lewis*, 2 B. & C. 686; *Livett* v. *Wilson*, 3 Bing. 115; see *Williams* v. *Morland*, 2 B. & C. 914, and the cases there cited). The rule was subject to this qualification, that the possession was with the acquiescence of him who was seised of an estate of inheritance; for a tenant for life or years has no power to grant any such right for a longer period than during the continuance of his particular estate (2 Wms. Saund. 174, n. (2); *Daniel* v. *North*, 11 East, 372; *Barker* v. *Richardson*, 4 B. & Ald. 579; *Wood* v. *Veal*, 5 B. & Ald. 454). But if the easement existed previously to the commencement of the tenancy, the fact of the premises having since been for a long period in the possession of a tenant will not defeat the presumption of a grant (*Cross* v. *Lewis*, 2 B. & C. 686).

A grant of mines will not be presumed against an express reservation of them, although the owner had allowed the person in possession of the surface to expend money in working them (*Norway* v. *Rowe*, 19 Ves. 156). The production of an express grant of the right to hold a market on Thursdays and Saturdays, precluded the presumption of a lost grant of a right to hold the market on other days (*A. G.* v. *Horner*, 14 Q. B. Div. 245).

Pleading a non-existing grant.

In order to obviate the difficulty of proving an immemorial usage, it formerly became a practice to plead a right of way by what was termed a *non-existing grant* (*Blewitt* v. *Tregonning*, 3 Ad. & Ell. 554); that is, a *feigned* grant by deed (supposed to be lost) from a former freeholder of

Presumption of Grants.

the land, in or upon which the easement was exercisable, to a former freeholder of the tenements in respect of which it was claimed, but it was necessary that the names of the parties to, and the date of, such supposed grant should be stated (*Hendy* v. *Stephenson*, 10 East, 55); but profert of the deed was excused if it was averred that the deed had been lost by time and accident (*Read* v. *Brookman*, 3 T. R. 151; see further as to such pleas, *Livett* v. *Wilson*, 3 Bing. 115; *Doe* v. *Read*, 5 B. & Ald. 232; *Cowlisham* v. *Cheslyn*, 1 Cr. & Jerv. 48; Chitty, Pl. 597, 6th edit.; *Mounsey* v. *Ismay*, 3 H. & C. 486; *Bryant* v. *Foot*, L. R. 2 Q. B. 181).

The doctrine of presuming a lost grant was recognised by Lord *Blackburn* in *Angus* v. *Dalton* (6 App. Cas. 811; see *Bass* v. *Gregory*, 25 Q. B. D. 484). The growth of the doctrine was traced in the same case when before the Queen's Bench by *Cockburn*, C. J. (3 Q. B. D. 103 *et seq.*), who treated it as a presumption liable to be rebutted by evidence. The question what evidence is admissible for this purpose was considered in the same case by the Court of Appeal (4 Q. B. Div. 162); *Thesiger* and *Cotton*, L. JJ., holding that the presumption could not be rebutted by mere proof that no grant was in fact made (4 Q. B. Div. 172, 186); *Brett*, L. J., holding that such evidence would be admissible (4 Q. B. Div. 201; see opinion of *Bowen*, J., on this point, 6 App. Cas. 783). As to the application of the doctrine to the case of a faculty, see *Halliday* v. *Phillips*, 23 Q. B. Div. 48.

How far Prescription Act has superseded common law.

There is nothing in the act 2 & 3 Will. 4, c. 71, to interfere with a claim of a right of way or other easement by express grant (*Bright* v. *Walker*, 1 C. M. & R. 223, *ante*, p. 8; *Livett* v. *Wilson*, 3 Bing. 115; *Plant* v. *James*, 4 Ad. & Ell. 749, 765; *Blewitt* v. *Tregonning*, 3 Ad. & Ell. 554). Although that statute has facilitated the proof of profits *à prendre* and easements, it does not appear to have superseded the common law, so that a party may elect to proceed either under the statute or according to the common law (See *Holford* v. *Hankinson*, 5 Q. B. 584; *Aynsley* v. *Glover*, 10 Ch. 283). In *Onley* v. *Gardiner* (4 M. & W. 496), where the defendant failed in proving a sufficient title under the statute, in consequence of an unity of possession, the court after argument, in which it was held that such unity defeated the title under the statute, allowed the defendant to amend his plea, by pleading a right of way immemorially (See *Richards* v. *Fry*, 3 Nev. & P. 72; *Welcome* v. *Upton*, 5 M. & W. 403, 404; *Parker* v. *Mitchell*, 11 Ad. & Ell. 788; *Lowe* v. *Carpenter*, 6 Ex. 825). In the case of light, where unity of possession was raised as an objection to the plaintiff's title under the statute, it was held that he had established his title independently of the statute by proof of enjoyment from time immemorial (*Aynsley* v. *Glover*, 10 Ch. 283; *Lanfranchi* v. *Mackenzie*, 4 Eq. 426). See, however, *Tapling* v. *Jones* (11 H. L. C. 290), where Lord *Westbury* laid down that the right to what is called an ancient light now depends upon positive enactment. It is a matter *juris positivi*, and does not require, and therefore should not be rested on, any presumption of a grant. (See also *Truscott* v. *Merchant Taylors' Co.*, 11 Exch. 855; *Frewen* v. *Phillips*, 11 C. B. N. S. 449.)

It is frequently advisable to plead together in the same case pleas of prescription by the statute, of prescription at common law, and of a non-existing grant (Bullen & Leake, Prec. Plead. 517, 4th ed.) These pleas were pleaded together in *Bailey* v. *Stevens*, 12 C. B. N. S. 91; *Norfolk* v. *Arbuthnot*, 4 C. P. D. 293.

In the case of tithes, where a party pleads a modus existing from time immemorial, he may proceed just in the same way as he might have done before 2 & 3 Will. 4, c. 100, was passed (*Stamford* v. *Dunbar*, 13 M. & W. 822).

Necessity of a deed to pass incorporeal rights and easements.

A right of way, or a right of passage for water (where it does not create an interest in land) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and a freehold interest therein cannot be created or passed otherwise than by deed (*Hewlins* v. *Shippam*, 5 B. & C. 221). A term for years cannot be created without

Presumption of Grants.

deed in an incorporeal hereditament (14 Vin. Abr. tit. Grant (G a); 2 Roll. Abr. 63, tit. Grant (G); Co. Litt. 85 a; 5 B. & C. 882; *Wood* v. *Leadbitter*, 13 M. & W. 842, 843), such as a several fishery (*Somerset* v. *Fogwell*, 5 B. & C. 875; *Neill* v. *Devonshire*, 8 App. Cas. 135), or a right of sporting (*Bird* v. *Higginson*, 6 Ad. & Ell. 824). Where by a written agreement not under seal, the plaintiff agreed to let land to the defendant, with a right of sporting, the defendant to make satisfaction for the damage done by game, it was held that the right of sporting did not pass, but that the agreement to make compensation was good ground for an action, the defendant having had the full benefit of such agreement. An agreement to execute a conveyance of an incorporeal hereditament is valid as an agreement, though it does not operate to pass an estate (*Thomas* v. *Fredericks*, 10 Q. B. 775; see *Smart* v. *Jones*, 33 L. J. C. P. 154). A licence to a stranger to use a common can only be by deed (*Hoskins* v. *Robins*, 2 Wms. Saund. 328, and n. 12; Shep. Touch. 330; *Monk* v. *Butler*, Cro. Jac. 574). A licence or liberty cannot be created and annexed to an estate of inheritance or freehold without deed (Shep. Touch. 231). Whatever may be the effect of a parol licence by the owner of land to fence off part of a common and to build a house thereon as against such owner, it is clear that a grant of a freehold interest running with the inheritance cannot be binding on a stranger to the grantor, unless the grant was by deed (*Perry* v. *Fitzhowe*, 8 Q. B. 757; see *Ramsey* v. *Rawson*, 1 Vent. 18—25). It seems questionable whether a custom to demise by parol a right of common can be supported at law (*Lathbury* v. *Arnold*, 1 Bing. 219; see *R.* v. *Lane*, 5 B. & Ald. 488). It requires a deed to create the right to have light and air come unobstructed from the land of one owner to the newly-opened window of an adjoining owner (*Blanchard* v. *Blanchard*, 1 Ad. & Ell. 536; *Blanchard* v. *Bridges*, 4 Ad. & Ell. 195; see *post*, note on lights). Where a landlord by letter authorized a tenant whose term had expired to enter on the land for the purpose of removing certain articles: it was held, that the landlord's letter, not being under seal, was no valid grant of such privilege as against a new tenant in possession, and not party to the licence (*Roffey* v. *Henderson*, 17 Q. B. 574). See also *Corcor* v. *Payne*, I. R. 4 C. L. 380.

By sect. 49 of the Conv. Act, 1881, the word "grant" is not necessary to convey incorporeal hereditaments; and by sect. 62, easements may be granted by way of use.

Nature of a licence.

In *Thomas* v. *Sorrell* (Vaugh. 351), *Vaughan*, J., says:—"A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which, without it, would have been unlawful. As a licence to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants." A mere licence is revocable, but that which is called a licence is often something more than a licence; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident. It may further be observed, that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol; and on the other hand, a licence by parol, coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a licence by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the licence is a mere licence; it is not an incident to a valid grant, and it is therefore revocable. Thus a licence by A. to hunt in his park, whether given by deed or by parol, is revocable: it merely renders the act of hunting lawful, which, without the licence, would have been unlawful. If the licence be, as put by Chief Justice *Vaughan*, a licence not only to hunt, but also to take away the deer when

Presumption of Grants.

killed to his own use, this is in truth a grant of the deer, with a licence annexed to come on the land: and supposing the grant of the deer to be good, then the licence would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol licence to come on my lands, and there to make a watercourse, to flow on the land of the licensee, in such a case there is no valid grant of the watercourse, and the licence remains a mere licence, and therefore capable of being revoked. On the other hand, if such a licence were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the licence would be irrevocable (*Per Alderson*, B., *Wood* v. *Leadbitter*, 13 M. & W. 844, 845).

Parol licence for easement now enforceable where part performance.

A verbal agreement or licence for an easement may now be enforced where there has been part performance (*McManus* v. *Cooke*, 35 Ch. D. 681; see the earlier cases in equity deciding that a parol licence was irrevocable where expense had been incurred and there had been acquiescence, *Devonshire* v. *Eglin*, 14 Beav. 530; *Moreland* v. *Richardson*, 22 Beav. 596; *Mold* v. *Wheatcroft*, 27 Beav. 510; *Laird* v. *Birkenhead R. Co.*, Johns. 500; *Bell* v. *Midland R. Co.*, 3 De G. & J. 673; *Bankart* v. *Tennant*, 10 Eq. 141; *Newby* v. *Harrison*, 1 J. & H. 393; and see as to mining leases, *Carr* v. *Benson*, 3 Ch. 524).

Earlier cases in equity.

Cases at law.

Formerly at common law a parol licence was as a rule revocable at any time, although the licence had been executed and expense incurred by the licensee (*R.* v. *Horndon-on-the-Hill*, 4 M. & S. 565; see *R.* v. *Geddington*, 2 B. & C. 129; *R.* v. *Hagworthingham*, 1 B. & C. 634; *R.* v. *Warblington*, 1 T. R. 241; *R.* v. *Standon*, 2 M. & S. 461). An agreement to let a party have a trench for water, though given for a valuable consideration, if there was no conveyance, was held a parol licence (*Fentiman* v. *Smith*, 4 East, 107; *Hewlins* v. *Shippam*, 5 B. & C. 221; *Cocker* v. *Cowper*, 1 C. M. & R. 418). The right to be buried in a particular vault was held to be an easement capable of being created by deed only; and therefore a parol agreement not under a seal was held to confer no right, though the plaintiff had paid a valuable consideration on the faith of its validity (*Bryan* v. *Whistler*, 8 B. & C. 298; see *Adams* v. *Andrews*, 15 Q. B. 284).

Parol licence in some cases irrevocable at law.

But even at law it was formerly held that a man might in some cases by parol licence relinquish irrevocably a right which he had acquired in addition to the ordinary rights of property. Thus a parol licence to put a skylight over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window), could not be recalled at pleasure, after it had been executed at the defendant's expense, at least not without tendering the expenses he had been put to (*Winter* v. *Brockwell*, 8 East, 308). So where the plaintiff's father gave the defendant leave, by parol, to lower the bank of a river and to erect a weir, whereby a part of the water which before flowed to the plaintiff's mill was diverted: it was held that his son could not maintain an action against the defendants for continuing the weir (*Liggins* v. *Inge*, 7 Bing. 682; see *Blood* v. *Keller*, 11 Ir. C. L. R. 124). A licence was also irrevocable when connected with a grant (*Wood* v. *Leadbitter*, 13 M. & W. 844). A licence to dig for tin and to dispose of the tin obtained was held to be irrevocable on account of its carrying an interest in the ore (*Doe* v. *Wood*, 2 B. & Ald. 738; see *Northam* v. *Bowden*, 11 Exch. 70; and as to the nature and effect of a licence to dig coal, see *Sutherland* v. *Heathcote*, 1892, 1 Ch. 475).

Licence irrevocable when connected with grant.

Mode of revocation.

A parol licence from A. to B. to enjoy an easement over A.'s land is countermandable at any time whilst it remains executory; and if A. conveys the land to another, the licence is determined at once, without notice to B. of the transfer (*Wallis* v. *Harrison*, 4 M. & W. 538). A licence for the free admission to a theatre is determined by an assignment of the subject-matter in respect of which the privilege is to be enjoyed (*Coleman* v. *Foster*, 1 H. & N. 37). The locking a gate, through which parol leave has been given to pass, is of itself sufficient notice of revocation of the leave (*Hyde* v. *Graham*, 1 H. & C. 593; see *Russell* v. *Harford*, 2 Eq. 507).

Presumption of Grants.

A licensee who has placed goods on the land with reference to which the licence has been granted, is entitled upon revocation of the licence to a reasonable time to remove the goods (*Cornish* v. *Stubbs*, L. R. 5 C. P. 334; *Mellor* v. *Watkin*, L. R. 9 Q. B. 400).

What will operate as a licence.

A parol agreement which is void under the Statute of Frauds, 29 Car. 2, c. 3, s. 4, may operate as a licence so as to excuse what would otherwise be a trespass; as where the purchaser entered to take away a crop (*Carrington* v. *Roots*, 2 M. & W. 257; *Crosby* v. *Wadsworth*, 6 East, 602). Goods which were upon the plaintiff's land were sold to the defendant; by the conditions of sale, to which the plaintiff was a party, the buyer was to be allowed to enter and take the goods: it was held, that after the sale the plaintiff could not countermand the licence. And though the plaintiff had, after the sale, locked the gates and forbidden the defendant to enter, the defendant could break down the gates and enter to take the goods (*Wood* v. *Manley*, 11 Ad. & Ell. 34; see Vaugh. 351, and *ante*, p. 47). This case was analogous to that of a man taking another's goods and putting them on his land, in which case the owner is justified in going on to the land and removing them (*Wood* v. *Leadbitter*, 13 M. & W. 853; citing Vin. Abr. Trespass, H. a. 2, pl. 12; *Patrick* v. *Colerich*, 3 M. & W. 483; see *Williams* v. *Morris*, 11 L. J. Exch. 126).

Where a personal licence of pleasure is granted, it extends only to the individual, and cannot be exercised with or by servants; but if there is a licence of profit and not of pleasure, it may (*Norfolk* v. *Wixman*, cited 7 M. & W. 77).

It seems that the Crown may, by parol, confer privileges over land so as to deprive itself of the power of treating the party exercising the privilege as a wrong-doer; the actual possession of Crown lands, under a parol licence from the Crown, entitles the party in possession to maintain trespass against a wrong-doer. Generally speaking, trespass may be maintained by a person in the actual possession of land against a wrong-doer, even where that possession may be wrongful as against a third person (*Harper* v. *Charlesworth*, 4 B. & C. 590).

(4.) OF RIGHTS OF WAY, PUBLIC AND PRIVATE.

1. *Public Rights of Way and Highways.*

Highways.

A right of way may be either public or private. Ways common to all the king's subjects are called highways (1 Ventr. 189; 1 T. R. 570). Whether a way be a public or private way is a matter of fact, and depends much on common reputation (1 Ventr. 189; Hawk. P. C. b. 1, c. 76, s. 1). The public may have a right to a road as a common street, although the road does not terminate in a town or public road, but terminates in a common (*R.* v. *Wandsworth*, 1 B. & Ald. 63), and although there be no thoroughfare (*Rugby Charity* v. *Merryweather*, 11 East, 375; *Bateman* v. *Bluck*, 18 Q. B. 870; *Campbell* v. *Lang*, 1 Macq. H. L. C. 451; *Souch* v. *East London R. Co.*, 16 Eq. 108; *Vernon* v. *S. James*, 16 Ch. D. 449). See *Woodyer* v. *Hadden* (5 Taunt. 125), where a court, which was no thoroughfare, was held not a highway. There may be a highway over a *cul de sac* in a town, which is repaired by the public: but *quære* whether the doctrine applies to a long tract of land in the country, on which public money has not been expended (*Bourke* v. *Davis*, 44 Ch. D. 123). So a road may be a highway, although it is circuitous (*R.* v. *Lloyd*, 1 Camp. 261; 3 T. R. 265). A road is not necessarily a highway, although it does lead from one market town to another, or connect any two points by a line which might be advantageously used by the public, or is used by them under certain restrictions (11 East, 376, n. (a)). A footpath across a churchyard may be a "churchway," to which the right is in the parishioners, or else a common highway (*Batten* v. *Gedye*, 41 Ch. D. 507).

Rights of Way.

When an ordinary highway runs between two fences, one on each side, the right of passage which the public has along it extends *primâ facie*, and unless there is evidence to the contrary, over the whole space between the fences (*R.* v. *U. K. Electric Telegraph Co.*, 31 L. J. M. C. 166; *Turner* v. *Ringwood Board*, 9 Eq. 418). Where, by an inclosure award, a way was set out fifteen feet wide as a public bridlepath and footway, the public were held entitled to use the whole width for those purposes (*Pullin* v. *Deffel*, 64 L. T. 134).

A question having arisen whether a road admitted to exist was public or private, evidence was offered that a person, since deceased, had planted a willow on a spot adjoining the road, on ground of which he was tenant, saying, at the same time, that he planted it to show where the boundary of the road was when he was a boy: held, that such declaration was not evidence either as showing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest (*R.* v. *Bliss*, 7 Ad. & Ell. 550; see *Papendick* v. *Bridgwater*, 5 Ell. & Bl. 166). On an issue, whether land was a highway, it is admissible evidence of reputation that the inhabitants held a meeting to consider of repairing such way, and that several, since dead, signed a paper, stating that the land was not a highway, there being at the time no litigation (*Barraclough* v. *Johnson*, 8 Ad. & Ell. 99; see *Nicholls* v. *Parker*, 14 East, 331, n. to *Outram* v. *Moorewood*).

Creation of highways.

There are two ways by which highways may be created—(1) by statute, (2) by dedication (*Cubitt* v. *Maxse*, L. R. 8 C. P. 714).

A highway may be created by statute, *e.g.*, the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 154; the Inclosure Acts, 41 Geo. 3, c. 109; 6 & 7 Will. 4, c. 115; or the Settled Estates Acts, 40 & 41 Vict. c. 18, s. 20; 45 & 46 Vict. c. 38, s. 16.

Where a highway is created by dedication, there must be both dedication by the owner and user by the public (*Cubitt* v. *Maxse*, L. R. 8 C. P. 715; *A. G.* v. *Biphosphated Guano Co.*, 11 Ch. Div. 327). User by the public is evidence of the *animus dedicandi;* but a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment (*Poole* v. *Huskinson*, 11 M. & W. 830, adopted *Healey* v. *Batley*, 19 Eq. 388; *Vernon* v. *S. James*, 16 Ch. D. 456; *Mann* v. *Brodie*, 10 App. Cas. 386). The effect of interruptions was considered in *Healey* v. *Batley*, *sup.* As to the particulars which will be ordered when dedication as a highway is set up as a defence to an action of trespass, see *Spedding* v. *Fitzpatrick*, 38 Ch. Div. 410.

Presumption of dedication of ways to the public.

If a man opens his land, so that the public pass over it continually, the public, after a user of a very few years, will acquire a right of way; and a party not meaning to dedicate a way, but only to give a licence, should do some act to show that a licence only is intended. The common course is to shut up the way one day in every year (*British Museum* v. *Finnis*, 5 C. & P. 460; *R.* v. *Broke*, 1 F. & F. 514). The presumption of a dedication may be rebutted by proof of a bar having been placed across the street soon after the houses forming the street were finished; though the bar was soon afterwards knocked down, and the way had been since used as a thoroughfare (*Roberts* v. *Carr*, 1 Camp. N. P. C. 262, n.; and see *Lethbridge* v. *Winter*, *Id.* 263, n.) But a gate being kept across a way is not conclusive that it is not a public way, as the way may have been granted to the public with the reservation of the right of keeping a gate across it to prevent cattle from straying (*Davies* v. *Stephens*, 7 C. & P. 570; *R.* v. *Bliss*, 2 Nev. & P. 464).

In determining whether or not a way has been dedicated to the public, the proprietor's intention must be considered. If it appear only that he has suffered a continual user, that may prove a dedication; but such proof may be rebutted by evidence of acts showing that he contemplated only a licence resumable in a particular event (*Barraclough* v. *Johnson*, 8 Ad. & El. 99). The mere setting out of an intended road, even where the public have traversed it, is not an irrevocable dedication (*Hall* v. *Bootle*, 44 L. T. 873). A dedication to the public may be presumed from a shorter time

than is necessary to establish a right of possession to land; and it has been presumed from an user by the public during a period of eight years, and even six years (*Rugby Charity* v. *Merryweather*, 11 East, 376). So where a court on one side of a public street in London was left open to the public, and occasionally used as a communication from one part of the street to another, a dedication to the public was presumed (*R.* v. *Lloyd*, 1 Camp. 268; 3 T. R. 265). Where a canal company originally erected a bridge for the use of the tenants of particular lands, but for ten years the public had crossed it without interruption: it was properly left to the jury to say, whether the company intended or not to dedicate it to the public (*Surrey Canal Co.* v. *Hall*, 1 M. & Gr. 382; see *R.* v. *Wright*, 3 B. & Ad. 681). The same evidence of user will raise a presumption of a dedication of a right of way over a sea wall or embankment by the owner of the soil, as in any other case of open and uninterrupted user by the public (*Greenwich* v. *Maudslay*, L. R. 5 Q. B. 397). A dedication to the public will not be presumed in the case of a wood with a path or track through it leading in different directions where people have wandered at pleasure and made tracks, and in dry weather have used such tracks, which were never repaired, and which in wet weather were hardly passable (*Chapman* v. *Cripps*, 2 F. & F. 864; *Schwinge* v. *Dowell*, *Ib.* 845). As to a footpath over a mountain, see *Macpherson* v. *Scottish Society*, 13 App. Cas. 744. Rights of Way.

If a road has been used by the public for a great number of years, a dedication by the owner of the soil may be presumed, whoever he may be; and it is not material to inquire who the precise owner was, or whether he intended to dedicate the road to the public (*R.* v. *East Mark*, 11 Q. B. 877; *R.* v. *Petrie*, 4 El. & Bl. 737). Thus long user of a way across copyholds is evidence of dedication by both lord and copyholder (*Powers* v. *Bathurst*, 42 L. T. 123).

Land acquired by a company for statutory objects may be dedicated if the public user be not inconsistent with those objects (*Grand Junction Co.* v. *Petty*, 21 Q. B. Div. 273; see *Mulliner* v. *Midland R. Co.*, 11 Ch. D. 611, the case of a private right of way). The Crown may dedicate (*R.* v. *East Mark*, 11 Q. B. 877; *Turner* v. *Walsh*, 6 App. Cas. 636; but see *Harper* v. *Charlesworth*, 4 B. & C. 591). A tenant for ninety-nine years cannot dedicate a way to the public, without the consent of the owner of the fee; and permission by such tenant will not bind the landlord after the expiration of the term (*R.* v. *Bliss*, 7 Ad. & Ell. 555; *Barraclough* v. *Johnson*, 7 Ad. & Ell. 104; *Pryor* v. *Pryor*, 26 L. T. 760). In *Wood* v. *Veal* (5 B. & Ald. 454), the public had used a way over the *locus in quo* as long as could be remembered; but the land had been under a lease for ninety-nine years during the whole time, and it was left as a question for the jury, whether there had been a dedication to the public before the term commenced (8 Ad. & Ell. 104; see *R.* v. *Lloyd*, 1 Camp. 260; *Baxter* v. *Taylor*, 1 Nev. & M. 13; *Bermondsey* v. *Brown*, 1 Eq. 204). However, after a long lapse of time, and a frequent change of tenants, and from the notorious and uninterrupted use of a way by the public, it may be presumed that the landlord had notice of the way being used, and that it was so used with his concurrence (*R.* v. *Barr*, 4 Camp. N. P. C. 16; *Davies* v. *Stephens*, 7 C. & P. 570; see *Deeble* v. *Lineham*, 12 Ir. C. L. Rep. N. S. 1). Notice to the steward is notice to the landlord (*R.* v. *Barr*, *sup.*; *Doe* v. *Wilson*, 11 East, 56). And where a lease was granted of certain ground to be a passage for fifty-six years, evidence of the user of the road by the public three or four years after the expiration of the lease was held to be evidence of a gift to the public (*R.* v. *Hudson*, Str. 909). Where evidence was given of acts of user extending over nearly seventy years, but during the whole period the land crossed by the way had been on lease, it was held that the jury might presume from these acts a dedication at a time anterior to the lease (*Winterbottom* v. *Derby*, L. R. 2 Ex. 316). The question whether a termor could dedicate was raised, but not decided, in *A. G.* v. *Biphosphated Guano Co.*, 11 Ch. Div. 335. Who can dedicate. Acts of tenants not binding.

It seems that there may be a partial dedication of a highway to the public; but where the owner of lands had, on the making a new road Limited dedication.

Rights of Way.

over his property, given his consent thereto on condition of its not being used for coal carts, it was held, that if by law there could not be a restriction to a public way, the grant amounted only to a licence, which was revocable, and that, after notice, a person using such way with coal carts would be a trespasser (*Stafford* v. *Coyney*, 7 B. & C. 257; see *Roberts* v. *Carr*, 1 Camp. 262; *R.* v. *Northamptonshire*, 2 M. & S. 262). Although the dedication of a way to the public may be *partial* or limited as to the sort of way (as to a horseway, &c.), yet there cannot be a *qualified* dedication to the public, subject to a power of resumption to the grantor; for that would be the reservation of a right inconsistent with the dedication to the public (*Fitzpatrick* v. *Robinson*, 1 Hudson & Brook, 585; see *Blundell* v. *Catterall*, 5 B. & Ald. 315; *Lade* v. *Shepherd*, 2 Str. 1004; *Barraclough* v. *Johnson*, 3 Nev. & P. 233). Nor can there be a dedication to a *limited part* of the public, as to a parish; and such a partial dedication is simply void, and will not operate in law as a dedication to the whole public (*Poole* v. *Huskinson*, 11 M. & W. 827; *Bermondsey* v. *Brown*, 1 Eq. 204). There can be no dedication to the public of land as a highway, with a reservation of a right of making cuts through the land when wanted for the purpose of drainage (*R.* v. *Leake*, 5 B. & Ad. 469). There can be no dedication of a way to the public for a limited time, certain or uncertain; if dedicated at all, it must be dedicated in perpetuity (*Dawes* v. *Hawkins*, 8 C. B. N. S. 848). A highway may be dedicated to the public, subject to a pre-existing right of user by the occupiers of adjoining land, for the purpose of depositing goods thereon (*Morant* v. *Chamberlin*, 6 H. & N. 541). Where an erection or an excavation exists upon land, and the land upon which it exists or to which it is contiguous is dedicated to the public as a highway, the dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things (*Fisher* v. *Prowse*, 2 B. & S. 770). If a highway is dedicated to the public with a dangerous obstruction upon it, such as would have been a nuisance if placed upon an ancient way, no action can be maintained against the person dedicating it for the injury caused thereby (*Robbins* v. *Jones*, 15 C. B. N. S. 221). There may in law be a dedication to the public of a right of way, such as a footpath across a field, subject to the right of the owner of the soil to plough it up in due course of husbandry, and destroy all trace of it for the time (*Mercer* v. *Woodgate*, L. R. 5 Q. B. 26; *Arnold* v. *Blaker*, L. R. 6 Q. B. 433). In such a case the public have no right to deviate (*Arnold* v. *Holbrook*, L. R. 8 Q. B. 96).

Assent of parish.

In the case of dedications before the Highway Act, 1835, it was once contended that the assent of the parish was requisite to make a road a highway repairable by the parish (*R.* v. *St. Benedict*, 4 B. & Ald. 447; *R.* v. *Mellor*, 1 B. & Ad. 32; *R.* v. *Edge Lane*, 6 N. & M. 81). It has been held, however, that in these cases the assent of the parish is not requisite (*R.* v. *Leeke*, 5 B. & Ad. 469). Nor does the fact of an award directing repairs to be made by adjoining landowners prevent the road from becoming a highway repairable by the parish (*R.* v. *Bradfield*, L. R. 9 Q. B. 52). In the case of dedications since the Highway Act, 1835, parishes are not liable to repair the highway unless it is made to the satisfaction of the surveyor of the highways, and of two justices of the peace, who are to give a certificate to this effect, which certificate is to be enrolled (5 & 6 Will. 4, c. 50, s. 23). The section applies to roads which, on the 31st of August, 1835, were made and in progress of dedication (*R.* v. *Westmark*, 2 N. & Rob. 235). A road, however, may be a highway over which the public have the right of passing even in the case where the formalities of this section have not been complied with so as to throw the burden of repair on the parish (*Roberts* v. *Hunt*, 15 Q. B. 17).

Repair of public ways.

Under the 9th section of the General Inclosure Act, 41 Geo. 3, c. 109, a road continued as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in special sessions to be fully completed and repaired, before the inhabitants of the district are liable to repair (*R.* v. *Hatfield*, 4 Ad. & Ell. 156).

Rights of Way.

See further as to the repair of highways, *R.* v. *Cricklade*, 14 Q. B. 735; *Gwyn* v. *Hardwicke*, 1 H. & N. 49; *Dovaston* v. *Payne*, 2 Smith's L. C. 154, 9th ed.; *R.* v. *Stoughton*, 2 Wms. Saund. 462, edit. 1871.

Extinction of public ways.

Where there has been a public king's highway, no length of time during which it may not have been used will prevent the public from resuming the right, if they think proper (*R.* v. *St. James's*, Selw. N. P. 1264, 13th ed.; see 2 B. & Ald. 662; *R.* v. *Montague*, 4 B. & C. 598). The public cannot release their right to a public highway by non-user (*Dawes* v. *Hawkins*, 8 C. B. N. S. 848; see *Freeman* v. *Tottenham R. Co.*, 13 W. R. 335), or by acquiescence in an obstruction (*Pullin* v. *Deffel*, 64 L. T. 134). A highway may be destroyed by the sea (*R.* v. *Hornsea*, 23 L. J. M. C. 59), or by a landslip (*R.* v. *Greenhow*, 1 Q. B. D. 703); and a way ceases to be a public highway when the access to it at both ends has become impossible (*Bailey* v. *Jamieson*, 1 C. P. D. 329). A public right of way may be extinguished by statute, either by express words (*Wells* v. *London and Tilbury R. Co.*, 5 Ch. D. 126), or by implication (*Yarmouth* v. *Simmons*, 10 Ch. D. 518). The mere construction of a railway across a public footpath will not extinguish it (*Cole* v. *Miles*, 60 L. T. 145). A public right of way to a towing-path on the banks of a navigable tide river, is not destroyed by that part of the river adjoining the towing-path having been converted by statute into a floating harbour, although the user of the towing-path has been thereby increased (*R.* v. *Tippett*, 3 B. & Ald. 193).

Where an inclosure act directs that all ways not set out shall be deemed part of the lands to be allotted, an ancient towing-path upon the banks of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction (*Simpson* v. *Scales*, 2 Bos. & P. 496; see *Thackrah* v. *Seymour*, 1 C. & M. 18). The 10th and 11th sections of the stat. 41 Geo. 3, c. 109, do not extinguish a right to take water from a well which the inhabitants of a parish had immemorially exercised before an inclosure act upon land formerly common which had been inclosed, although the ancient way to the well which existed before the inclosure had been extinguished under it (*Race* v. *Ward*, 7 Ell. & Bl. 384).

The Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), sect. 16, does not empower a railway company to divert a public footpath so as to place it upon land of which the company has not acquired the ownership (*Rangeley* v. *Midland R. Co.*, 3 Ch. 306).

Remedy for disturbance of public ways:

The stopping of a highway is an ordinary case of a public nuisance; and in the case of of a public nuisance the remedy is by indictment, or by information at the suit of the Att. Gen. In the case of a private nuisance the remedy is by action. But where that which is a public nuisance is also a private nuisance to an individual by inflicting on him some special damage, the individual may have his private remedy by action (*Soltau* v. *De Held*, 2 Sim. N. S. 143, 145; see *Wallasey Board* v. *Gracey*, 36 Ch. Div. 593).

By indictment.

Instances of indictments for public nuisances, caused by the obstruction of highways, will be found in *R.* v. *Train*, 2 B. & S. 640; *R.* v. *U. K. Telegraph Co.*, 2 B. & S. 647, n.; *R.* v. *Longton Gas Co.*, 29 L. J. M. C. 118.

By action for damage.

A private person cannot sue for damage arising from the disturbance of a highway, unless he has sustained some special damage (Co. Litt. 56 a; 5 Rep. 73 a; 2 Bing. 263, 266; *Rose* v. *Groves*, 5 M. & G. 613; *Dobson* v. *Blackmore*, 9 Q. B. 1002; *Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 369). When the plaintiff proved no damage peculiar to himself, beyond being delayed on several occasions in passing along the road, he was not entitled to maintain the action (*Winterbottom* v. *Derby*, L. R. 2 Ex. 316). So, an individual cannot maintain an action where the obstruction is temporary and the injury sustained by the plaintiff is only in common with others (*Ricket* v. *Metropolitan R. Co.*, L. R. 2 H. L. 175; overruling *Wilks* v. *Hungerford Co.*, 2 Bing. N. C. 281; *Metropolitan Board of Works* v. *M'Carthy*, L. R. 7 H. L. 243; *Biggs* v. *London*, 15 Eq. 376). But if the plaintiff can prove a particular damage to himself beyond the general damage to the public, and that such damage is direct and

Rights of Way.

substantial, an action can be maintained (*Benjamin* v. *Storr*, L. R. 9 C. P. 400). In *Iveson* v. *Moore* (1 Lord. Raym. 186), it was held, that the preventing of colliers from coming to a colliery by obstructing a public highway, by which the benefit of the colliery was lost, was such a damage as would enable a man to maintain an action for the nuisance (See *Rose* v. *Miles*, 4 M. & S. 101; *Rose* v. *Groves*, 5 M. & G. 620, *post*). And damages may be recovered on the ground of an unreasonable use of a highway either occasioning loss of custom to the plaintiff (*Fritz* v. *Hobson*, 14 Ch. D. 542), or rendering the plaintiff's dwelling uncomfortable (*Benjamin* v. *Storr*, L. R. 9 C. P. 400). As to the reasonable user of a highway, see remarks of *Jessel*, M. R., *Original Hartlepool Co.* v. *Gibb*, 5 Ch. D. 721. As to pleadings and evidence where a public right of footway is raised as a defence to an action of trespass, see *Webber* v. *Sparkes*, 10 M. & W. 485; *Wood* v. *Wedgewood*, 1 C. B. 273; and *Bracegirdle* v. *Peacock*, 8 Q. B. 174.

Statutory penalties are imposed on persons committing specified nuisances on a highway by 5 & 6 Will. 4, c. 50, s. 72.

Remedy for disturbance of public ways by injunction.

The Att. Gen. can obtain an injunction to restrain interference with a highway without showing actual injury (*A. G.* v. *Shrewsbury*, 21 Ch. D. 752). Where a plaintiff suffers a particular injury from the obstruction of a public way, an action for an injunction will lie, and the Att. Gen. need not be a party (*Cook* v. *Bath*, 6 Eq. 177). The vestry of a parish cannot sustain a suit to restrain the infringement of a public right of way, except as relators on an information by the Att. Gen. (*Bermondsey* v. *Brown*, 1 Eq. 204; see *Wallasey Board* v. *Gracey*, 36 Ch. D. 593). The remedy of a parishioner in respect of interference with a "churchway" is in the ecclesiastical court (*Batten* v. *Gedye*, 41 Ch. D. 507).

A local authority cannot restrain the placing of telephone wires over a highway (*Wandsworth* v. *United Telephone Co.*, 13 Q. B. Div. 904). The breaking up of the pavements of a town by an individual for the purpose of laying gas pipes, may be the subject of an indictment (*R.* v. *Longton Gas Co.*, 29 L. J. M. C. 118); but it will not be restrained by injunction as a public nuisance, the injury not being either irreparable or continuous (*A. G.* v. *Cambridge, &c. Co.*, 4 Ch. 71). Damages in a proper case may be awarded in substitution for an injunction (*Wedmore* v. *Bristol*, 11 W. R. 13), the jurisdiction of the court under Lord Cairns' Act not being affected by its repeal (*Sayers* v. *Collyer*, 28 Ch. Div. 103).

As to the law of highways, see further, Shelford's Law of Highways, 3rd ed.; Glen on Highways.

Ownership of soil in highway.

The freehold of the highway is in the owner of the freehold of the soil, although the public may pass and repass at their pleasure (2 Inst. 705; *Lade* v. *Shepherd*, 2 Str. 1044). The owner of the soil is entitled to all profits, trees and mines upon or under the highway (1 Roll. Abr. 392; 1 Burr. 143). In the 82nd section of the stat. 5 & 6 Will. 4, c. 50, there is a saving of mines to the owner of lands taken for widening narrow roads. The soil in turnpike roads does not vest in the trustees thereof, who have only the control of the highway, without a special clause for that purpose (*Davison* v. *Gill*, 1 East, 69; see also *R.* v. *Mersey Navigation*, 9 B. & C. 95; *R.* v. *Thomas*, *Id.* 114; *Salisbury* v. *G. N. R. Co.*, 5 C. B. N. S. 174). The owner of land adjoining only one side of the highway may maintain an action of trespass against one who suffers his cattle to depasture along the highway (*Dovaston* v. *Payne*, 2 H. Bl. 527; *Stevens* v. *Whistler*, 11 East, 51); or an action of ejectment for land over which there is a public right of way (*Goodtitle* v. *Atker*, 1 Burr. 133; *Doe* v. *Wilkinson*, 3 B. & C. 413; and see *Scales* v. *Pickering*, 4 Bing. 448). And the owner of the soil can obtain an injunction to restrain a stranger from laying down pipes under the highway (*Goodson* v. *Richardson*, 9 Ch. 221). The principle of the ownership of the soil being in the owner of the adjoining land is carried so far that a man may be a trespasser on land where the public have a right to pass and repass, where he is on the highway not for that but for other and different purposes, *e. g.*, sporting. Though the public have a right of passage over land which is a highway, they have no right to use it except as a highway (See *Dovaston* v. *Payne*, 2 H. Bl.

627; *R.* v. *Pratt*, 4 El. & Bl. 860). The owner who dedicates to public use as a highway a portion of his land parts with no other right than a right of passage to the public, and may exercise all other rights of ownership not inconsistent with such dedication; and the appropriation, made to and adopted by the public, of a part of the street to one kind of passage and another part to another, does not deprive him at common law of any rights as owner of the land which are not inconsistent with the right of passage by the public (*St. Mary, Newington* v. *Jacobs*, L. R. 7 Q. B. 47). **Rights of Way.**

The soil in roads set out under an inclosure act does not by presumption of law belong to the adjoining owners (*R.* v. *Edmonton*, 1 M. & Rob. 24; *R.* v. *Wright*, 3 B. & Ad. 681). Where the herbage of a road becomes vested by the General Inclosure Act, 41 Geo. 3, c. 109, s. 11, in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietor (*R.* v. *Hatfield*, 4 Ad. & Ell. 156). The ownership of the soil in a road set out under an inclosure act was held to remain in the lord of the manor, for that portion of the soil only is taken from him for which he received compensation and which is allotted to others (*Poole* v. *Huskinson*, 11 M. & W. 827; see *R.* v. *East Mark*, 12 Jur. 332).

The Public Health Act, 1875, s. 149, enacts that all streets within any urban district shall vest in the urban authority. The effect of this section is to vest in the local board or other authority the surface of the street, *i. e.*, a surface of such a thickness as the local board may require, for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the street (*Coverdale* v. *Charlton*, 4 Q. B. Div. 118). The property passes to a certain depth, which may be called the area of the ordinary user (See 13 Q. B. Div. 913). The effect of sect. 96 of 18 & 19 Vict. c. 120, is the same (*Wandsworth* v. *United Telephone Co.*, 13 Q. B. Div. 904; and see *Curtis* v. *Kesteven Council*, 45 Ch. D. 504). But the property of the local board ceases when the highway ceases to be a highway (*Rolls* v. *St. George's Vestry*, 14 Ch. Div. 783).

The right of the owner of land abutting on a highway to the soil of the highway *ad medium filum viæ* is founded on a presumption of law which exists only in the absence of evidence of ownership (*Beckett* v. *Leeds*, 7 Ch. 421). The presumption applies equally to a private as to a public road (*Holmes* v. *Bellingham*, 7 C. B. N. S. 329).

The ordinary rule of law is, that in the case of the conveyance of land adjoining a highway, the soil of the highway, *ad medium filum viæ*, passes by the conveyance; and the fact that the land is set forth by admeasurement and referred to in a plan, which *includes* no portion of the highway, does not prevent the operation of such rule (*Berridge* v. *Ward*, 10 C. B. N. S. 400; and see *R.* v. *Strand Board*, 4 B. & S. 526; 12 W. R. 828; where the boundary of a parish was defined by statute; and *Micklethwait* v. *Newlay Co.*, 33 Ch. Div. 145, a case of land bounded by a river). But the soil of the highway will not pass if it appears from a map annexed to the conveyance, or from the form of the conveyance, that such soil was not intended to pass (*Salisbury* v. *G. N. R. Co.*, 5 C. B. N. S. 174; 28 L. J. C. P. 40; *Plumstead* v. *British Land Co.*, L. R. 10 Q. B. 16; *Landrock* v. *Metropolitan R. Co.*, 1886, W. N. 195, where it was doubted whether the presumption applied to a lease). And where a conveyance described land as bounded by a street, which at that time was intended to be used as a highway, but had not been dedicated, the soil of the street did not pass. (*Leigh* v. *Jack*, L. R. 5 Ex. Div. 264). Cotton, L. J., doubted whether the rule would ever apply to cases where land is sold in plots for building purposes, even although the roads had been actually laid out (*Ib.*) As to the effect of subsequent circumstances not contemplated at the time of the grant, see *Micklethwait* v. *Newlay Co.*, 33 Ch. Div. 133. **When soil in highway passes by conveyance.**

Strips of land lying along a highway, even though indirectly connected with parts of a waste, may well pass under a conveyance of the adjacent inclosure, though the deed purports to state the quantity of acres within the fences that were therein conveyed, if the words "more or less" were

Rights of Way.

added (*Dendy* v. *Simpson*, 7 Jur. N. S. 1058; 9 W. R. 743; *Simpson* v. *Dendy*, 8 C. B. N. S. 433).

Ownership of waste adjoining highways.

The presumption at law is, that waste land adjoining a road belongs to the owner of the soil of the adjoining inclosed land, and not to the lord of the manor (*Steel* v. *Prickett*, 2 Stark. 463; *Scoones* v. *Morrell*, 1 Beav. 251); whether such owner be a freeholder, copyholder, or leaseholder (*Doe* v. *Pearsey*, 7 B. & C. 304). The right to land adjoining either side of the road extends to the centre (*Cooke* v. *Green*, 11 Price, 736).

The presumptive right of the owner of the adjoining land may be repelled by evidence of acts of ownership by the lord of the manor (*Anon.*, Lofft, 358). And if the narrow strip be contiguous to, or communicate with, open commons or larger portions of land, the presumption is either done away, or considerably narrowed; for the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them (*Grose* v. *West*, 3 Taunt. 39; *Headlam* v. *Hedley*, Holt, N. P. C. 463). Upon this question the lord may give evidence of grants by him of the waste between the road and the other inclosures of other persons at a distance from the spot claimed by the plaintiff, provided such evidence is confined to the road which passes by the spot claimed by the plaintiff (*Doe* v. *Kemp*, 7 Bing. 332; 2 Bing. N. C. 102; see *Stanley* v. *White*, 14 East, 332; *Dendy* v. *Simpson*, 18 C. B. 831).

The presumption may also be rebutted by the owner of the adjoining land accepting an allotment of the strip in question from commissioners appointed to inclose and allot the wastes of the manor (*Gery* v. *Redman*, 1 Q. B. D. 161). Where the lord has conveyed land to A. and other land to B., and it appears that a strip passed by one of these conveyances, but it is doubtful by which; no presumption arises in favour of A. from the fact that the strip lies between a highway and land indisputably comprised in the conveyance to A. (*White* v. *Hill*, 6 Q. B. 787). The presumption in favour of the adjoining owner may be rebutted by showing that the strip adjoins other land occupied adversely to such owner (*Doe* v. *Hampson*, 4 C. B. 267; 17 L. J. C. P. 225).

On the question whether these spaces form part of the highway so as to preclude any inclosure or obstruction, see *Turner* v. *Ringwood Board*, 9 Eq. 418; *Nicol* v. *Beaumont*, 50 L. T. 112; and as to the application of the fifteen feet rule, see *Easton* v. *Richmond Board*, L. R. 7 Q. B. 69. Strips of grass bordering a main road are "roadside wastes" within 51 & 52 Vict. c. 41, sect. 11, sub-sect. 1 (*Curtis* v. *Kesteven Council*, 45 Ch. D. 504).

By an inclosure act waste lands of a manor were to be allotted in certain proportions. A part of the waste land was not portioned out in the award of the commissioners: it was held, that the freehold of such land remained in the lord of the manor, as there was nothing in the act to transfer such freehold (*Packe* v. *Mee*, 9 W. R. 335; *Ewart* v. *Graham*, 5 Jur. N. S. 773).

Balks and ditches.

Balks are strips of land lying between lands which are private property. In presumption of law, balks belong to the owners of the adjacent land, unless the contrary is proved (*Godmanchester* v. *Phillips*, 4 Ad. & Ell. 560).

Where two adjacent fields are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership (*Guy* v. *West*, Selw. N. P. 1218; see as to acts of ownership of a ditch, *Searby* v. *Tottenham R. Co.*, 5 Eq. 409; *Norton* v. *L. & N. W. R. Co.*, 13 Ch. Div. 268). The rule about ditching is this: no man making a ditch can cut into his neighbour's soil, but usually he cuts to the very extremity of his own land; he is of course bound to throw the soil which he digs out upon his own land, and after, if he likes it, he plants a hedge upon the top of it; therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser; no rule about four feet or eight feet has anything to do with it (*Vowles* v. *Miller*, 3 Taunt. 138; see the judg-

ment of *Holroyd*, J., 7 B. & C. 307, 308). If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of the land in which the tree was first sown or planted (*Holder* v. *Coates*, M. & M. 112; see *Waterman* v. *Soper*, 1 Lord Raym. 737; *Masters* v. *Pollie*, 2 Roll. R. 141; *Anon.*, 2 Roll. R. 255). **Rights of Way.**

2. *Private Rights of Way.*

There are four kinds of ways (Co. Litt. 56 a):—1, a foot-way—2, a horse-way, which includes a foot-way—3, a carriage-way, which includes both horse-way and foot-way—4, a drift-way. Although a carriage-way comprehends a horse-way and a foot-way (*Davies* v. *Stevens*, 7 C. & P. 570), yet it does not necessarily include a drift-way (1 Taunt. 279); but evidence of a carriage-way is strong presumptive evidence of the grant of a drift-way (*Ibid.*) As to the meaning of a right of way to "lead manure," see *Brunton* v. *Hall*, 1 Q. B. 792. A way may be granted for agricultural purposes only (*Reynolds* v. *Edwardes*, Willes, 282); or for the carriage of coals only (*Iveson* v. *Moore*, 3 Ld. Raym. 291; 1 Salk. 15); or for the carriage of all other articles except coals (*Stafford* v. *Coyney*, 7 B. & C. 257; *Jackson* v. *Stacey*, Holt, N. P. C. 455). There may be a private right of way over a *cul de sac* (*Roe* v. *Siddons*, 22 Q. B. Div. 234). **Different kinds of ways.**

There may be both an occupation way and a public highway over the same road (*Brownlow* v. *Tomlinson*, 1 M. & G. 484). The acquiring a right of way by the public does not destroy a previously-existing right of way over the same line; but the private way must be previously existing (*Duncan* v. *Louch*, 6 Q. B. 904). If the owner of land has granted to an individual an occupation way the subsequent absolute dedication by him of a footway to the public, in the same place, cannot be presumed, without also presuming, or proving, a release of the way by the individual; for without the release the owner can only be supposed to have given what he himself had, a right not inconsistent with the easement (*R.* v. *Chorley*, 12 Q. B. 515). The court acted on an enclosure award which set out the same way as a bridle and footpath for the public, and as a carriage-way for particular persons (*Pullin* v. *Deffel*, 64 L. T. 134). **Public and private ways co-existing.**

The right of a person who has land abutting on a highway to pass from one to the other is incontrovertible (*Burgess* v. *Northwich*, 6 Q. B. D. 275). It is something quite different from the public right of using the highway (*Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 676; *Fritz* v. *Hobson*, 14 Ch. D. 554). **Private access to highway.**

A private way is a right which one or more persons have of going over the land of another. This may be claimed by express reservation, or by grant, or as necessarily incident to a grant of land: or it may be claimed by prescription, custom, or by virtue of an inclosure act (Selw. N. P. 1266, 13th ed.) **Acquisition of private rights of way.**

A right of way may be claimed by express reservation; as where A. grants land to another, reserving to himself a way over such land (1 Roll. Abr. 109, pl. 45; Com. Dig. Chimin (D. 2); and see *Cardigan* v. *Armitage*, 2 B. & C. 197). *Tindal*, C. J., in *Durham R. Co.* v. *Walker* (2 Q. B. 967), observed, "A right of way cannot in strictness be made the subject either of exception or reservation. A right of way *reserved* to a lessor is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same way as the right of sporting or fishing" (See *Doe* v. *Lock*, 2 Ad. & Ell. 705; *Wickham* v. *Hawker*, 7 M. & W. 63). In order to establish an easement claimed by lessors, as in the nature of a grant from the lessee, it would in general be essential to show the execution of the lease by the lessees (*Durham R. Co.* v. *Walker*, 2 Q. B. 967; *Corcor* v. *Payne*, I. R. 4 C. L. 380). The effect of such a reservation, operating as a re-grant, was considered (*Dynevor* v. *Tennant*, 33 Ch. Div. 420; 13 App. Cas. 279). A right of access stipulated for by a contract was extinguished by a conveyance which did not reserve it (*Teebay* v. *Manchester R. Co.*, 24 Ch. D. 572). **Acquisition of private rights of way by express reservation.**

Rights of Way.

Acquisition of private rights of way by express grant.

A way may be claimed by grant, as where an owner of land grants to another person a way through or over a particular close (Com. Dig. Chimin, D. 3). But the word "way" in a grant is not an apt word to create a new right of way. It is a word descriptive of an existing right —a right of way over the land of another person (*Roe* v. *Siddons*, 20 Q. B. Div. 236). A covenant by an owner of land that another person shall have and use a way amounts to a grant (*Holme* v. *Seller*, 3 Lev. 305). A contract to grant a right of way was held equivalent to a contract for sale of real estate, so that no damages were given for breach (*Rowe* v. *London School Board*, 36 Ch. D. 619; see *Jones* v. *Watts*, 43 Ch. Div. 574). Where the plaintiff claimed a right of way over the defendant's soil, and it appeared that in the defendant's lease, granting him all ways, without exception or qualification, there was a covenant for contributing with other occupiers of the lessor's property to the keeping up paths, &c. used in *common* by them, and it was proved that the plaintiff had always used the path in question, and that there was no other path to which the covenant could apply, it was held that it might be inferred that the defendant took the soil demised to him, subject to the plaintiff's right of way (*Oakley* v. *Adamson*, 8 Bing. 356). Where certain houses, with a piece of ground, part of an adjoining yard, were leased to a tenant, together with all ways with the said premises or any part thereof *used or enjoyed before;* and at the time of the grant of the lease the whole of the yard was in the occupation of one person who had always used and enjoyed a right of way to every part of that yard; it was held that the lessee was entitled to such right of way to the part of the yard demised to him (*Kooystra* v. *Lucas*, 5 B. & Ald. 830; *Staple* v. *Haydon*, 6 Mod. 3). If a right of way is appurtenant to a piece of land which is demised, the right of way passes also without any special mention of such right (*Skull* v. *Glenister*, 7 L. T. 827). Where an *underlease* described the ground demised and the ways granted by the words "always thereunto appertaining," a road over the soil of the original lessor was held not to pass by those words, although it might have done so by the words "heretofore used" (*Harding* v. *Wilson*, 2 B. & C. 96). Under a reversionary lease of a messuage granted by one who was entitled in reversion both to the messuage and also to the soil of an adjoining passage, a right of way over the passage was held to pass as being not merely convenient but necessary for the enjoyment of the messuage (*Hinchliffe* v. *Kinnoul*, 5 Bing. N. C. 1; see *Kavanagh* v. *Coal Mining Co.*, 14 Ir. C. L. R. 82). The conveyance of an inland farm with the "appurtenances" did not pass the right to take sea-weed from the neighbouring sea-shore (*Baird* v. *Fortune*, 7 Jur. N. S. 926; 10 W. R. 2). Now by Conv. Act, 1881, a conveyance of land includes all ways at the time of the conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land (sect. 6). Easements may be granted by way of use (sect. 62).

A railway company cannot grant a private right of way over land required for the purposes of its undertaking (*Mulliner* v. *Midland R. Co.*, 11 Ch. D. 611).

Effect of plan.

A grant of a private right of way was inferred from the description of boundaries in a lease together with the indorsed plan (*Espley* v. *Wilkes*, L. R. 7 Ex. 298). As to the effect of a plan, see *Bayley* v. *G. W. R. Co.*, 26 Ch. Div. 441, 457; *Randall* v. *Hall*, 4 D. G. & Sm. 343; *Roe* v. *Siddons*, 22 Q. B. D. 228.

Where there is unity of seisin, what words will pass ways which existed before the unity of seisin.

Where there is an unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and after such extinguishment, or during such suspension of the right, the way cannot pass as an *appurtenant* under the ordinary legal sense of that word. In the case of an unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed with the land" which forms the subject-matter of the convey-

Rights of Way.

ance (*James* v. *Plant*, 4 Ad. & Ell. 761; *Barlow* v. *Rhodes*, 1 C. & M. 439). Nothing is more clear than that under the word "appurtenances," according to its legal sense, an easement which has become extinct, or which does not exist in point of law, by reason of unity of ownership, does not pass (*Grimes* v. *Peacock*, 1 Bulst. 17; *Saundeys* v. *Oliff*, Sir T. Moore, 467; *Whalley* v. *Thompson*, 1 Bos. & P. 371; *Phesey* v. *Vicary*, 16 M. & W. 484; *Clements* v. *Lambert*, 1 Taunt. 295; *Barlow* v. *Rhodes*, 1 C. & M. 439; see *Worthington* v. *Gimson*, 6 Jur. N. S. 1053; and *Tatton* v. *Hammersley*, 3 Ex. 279; *Wardle* v. *Brocklehurst*, Ell. & Ell. 1058; *Bolton* v. *Bolton*, 11 Ch. D. 968; *Brett* v. *Clowser*, 5 C. P. D. 376).

Where there are two adjoining closes belonging to one owner, and there exists over one of them a formed road which is in fact used for the purposes of the other, and that other is granted with the general words "together with all ways now used or enjoyed therewith," a right of way over the formed road will pass to the grantee, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously (*Barkshire* v. *Grubb*, 18 Ch. D. 622). *Thompson* v. *Waterlow* (6 Eq. 36) and *Langley* v. *Hammond* (L. R. 2 Ex. 161), so far as contrary to this view, have been overruled by *Watts* v. *Wilson* (6 Ch. 166) and *Kay* v. *Oxley* (L. R. 10 Q. B. 360) (See *Barkshire* v. *Grubb*, *sup.*; see further *Bayley* v. *G. W. R. Co.*, 26 Ch. Div. 457; *Roe* v. *Siddons*, 22 Q. B. Div. 226; and *Geoghegan* v. *Fegan*, I. R. 6 Ch. 139). The court will in these cases put such a construction upon general words, which *primâ facie* might apply to rights and not to ways enjoyed *de facto* only, as is to be gathered from the true intention of the parties (*Bayley* v. *G. W. R. Co.*, 26 Ch. Div. 455). As to the construction in such cases of the words "now or heretofore enjoyed," see *Roe* v. *Siddons*, 22 Q. B. Div. 224.

Acquisition of private rights of way by implied grant upon severance of tenements.

The rule about rights of way which arise from implication is simply this, that on a severance of two properties anything like a right of way which is used and which is reasonably necessary for the reasonable and comfortable use of the part granted is intended to be granted too. The principle is that the grantor is assumed to have intended that his grant shall be effectual (*Bayley* v. *G. W. R. Co.*, 26 Ch. Div. 452). The doctrine of an implied grant of easements is only applicable to such as are apparent and continuous; and where contiguous premises held under the same title are at the time of the division of title in such an unfinished state that there are no indications of definite ways or windows, &c. there will be no such implied grant (*Glave* v. *Harding*, 27 L. J. Ex. 286). It was said that in this matter there is a distinction between easements such as a right of way or easements used from time to time, and easements of necessity or continuous easements. It is clear law that upon a severance of tenements, easements used as of necessity or in their nature continuous, will pass by implication of law without any words of grant: but with regard to easements which are used from time to time only, they do not pass unless the owner by appropriate language shows an intention that they should pass (*Polden* v. *Bastard*, L. R. 1 Q. B. 161, where the right to go to a well and take water was held not to be a continuous easement). And where the owner of two adjoining tenements A. and B., who from time to time used a paved passage across A. to reach B., mortgaged A. without any reservation, the mortgage extinguished all right of way through the passage (*Taws* v. *Knowles*, 1891, 2 Q. B. 564). A grant, however, was implied of a right of way as being in the nature of a continuous and apparent easement in *Ford* v. *Met. R. Co.*, 17 Q. B. Div. 12 (where there were no words of grant); and in *Brown* v. *Alabaster*, 37 Ch. D. 490 (where "appurtenances" occurred). In *Thomas* v. *Owen* (20 Q. B. Div. 231), *Fry*, L. J., laid down that an exception to the principle of *Polden* v. *Bastard* (*sup.*) existed in the case of a formed road made over an alleged servient tenement to, and for the apparent use of, the dominant tenement; in which case a grant may be implied. The exception applies not only to the case of a grant, but also to the case of a reservation implied to support an earlier grant (20 Q. B. Div. 231). The reservation of an easement of necessity was implied in *Shurbrook* v. *Tufnell*, 46 L. T. 886.

Rights of Way.

Implied grant of ways of necessity.

As a right of way may be created by an express grant, so it may also arise by an implied grant, where the circumstances are such that the law will imply such grant. This right of way has been commonly termed a way of *necessity*, but it is in fact only a right of way by implied grant; for there seems to be no difference where a thing is granted by express words, and where it passes as incident to the grant by operation of law (1 Wms. Saund. 323, n.; see 4 M. & S. 387). Where property devised or granted is landlocked, and there is no other way of getting at it without being a trespasser, so that it cannot be enjoyed without a way of some sort over the lands of the testator or grantor, it is clear that a way of necessity is created *de novo* (*Pearson* v. *Spencer*, 1 B. & S. 583; *Pinnington* v. *Galland*, 9 Exch. 1; *Pyer* v. *Carter*, 1 H. & N. 916; see *Beaudely* v. *Brook*, Cro. Jac. 189; *Howton* v. *Fearon*, 8 T. R. 50). So if the owner of two closes, having no way to one of them but over the other, part with the latter without reserving a right of way, it will be reserved to him by operation of law (*Clarke* v. *Cogg*, Cro. Jac. 170; *Jordan* v. *Attwood*, Owen, 121; *London* v. *Rigg*, 13 Ch. D. 798). On the sale of land to a purchaser who has notice that the adjoining land is to be laid out in building in a manner which will make a right of way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication, as a way of necessity (*Davies* v. *Sear*, 7 Eq. 427).

A way of necessity cannot be pleaded generally, without showing the manner in which the land over which the way is claimed is charged with it (*Bullard* v. *Harrison*, 4 M. & S. 387; see 1 Wms. Saund. 323, n. 6).

Instances of ways of necessity.

Where there is a private road through a farm, the parson may use it for carrying away his tithe, though there is another public way equally convenient (*Cobb* v. *Selby*, 6 Esp. 103; see *James* v. *Dodds*, 2 C. & M. 266). Where a man leases lands, reserving the timber, he may enter to show it to a purchaser (2 Rol. Abr. 74, 1, 41; 1 Rol. Abr. 109, 1, 5). So if a man grants to another certain trees in his wood, the grantee may go with carts over the grantor's lands to carry away the trees (*Liford's case*, 11 Rep. 52 a; Vin. Abr. Incident). A man having a right to wreck thrown on another man's land, has necessarily a right of way over such land to take the wreck (*Anon.*, 6 Mod. 149). Where at the time of the grant in respect of which a right of way was claimed, there was a way which continued to exist, another way could not be claimed as a way of necessity, on the ground of its being more convenient than the former way (*Dodd* v. *Burchall*, 1 H. & C. 113). As to a right of way by necessity to land which had escheated to the lord of the manor, see *Proctor* v. *Hodgson*, 10 Exch. 824.

Nature of a way of necessity.

Where a grantee is entitled to a way of necessity over another tenement belonging to the grantor, and there exist to the tenement granted more ways than one, the grantee is entitled to one way only, which the grantor may select (*Bolton* v. *Bolton*, 11 Ch. D. 968). A way of necessity, once created, must remain the same way as long as it continues at all (*Pearson* v. *Spencer*, 1 B. & S. 584). The lessee of an inner close has by necessity a right of way suitable to the business for which the lease was made, over an outer close which belongs to the same landlord (*Gayford* v. *Moffatt*, 4 Ch. 133). So where land was taken compulsorily for sewage works, the local board acquired a way of necessity for all purposes connected with these works (*Serff* v. *Acton*, 31 Ch. D. 679). In general, however, a way of necessity is not created for all purposes for which the close to which the way leads may at any time be used; but only such a right of way as will enable the owner of the close to enjoy it in the condition it was in at the time of the creation of the way (*London* v. *Rigg*, 13 Ch. D. 798).

Duration of a way of necessity.

A way of necessity is limited by the necessity which created it; and when such necessity ceases, the right of way also ceases; therefore if, at any subsequent period, the party formerly entitled to such way can approach the place to which it led by passing over his own land, by as direct a course as he would have done by using the old way, the latter will cease to exist (*Holmes* v. *Goring*, 2 Bing. 76; *Reynolds* v. *Edwards*, Willes,

262; but see *Buckley* v. *Coles*, 5 Taunt. 311, and the remarks of *Purke*, B., *Proctor* v. *Hodgson*, 10 Ex. 828; see also *Pheysey* v. *Vicary*, 16 M. & W. 491). **Rights of Way.**

Acquisition of rights of way by grant presumed from user.

A right of way (where it does not create an interest in the land) is an incorporeal right, and stands upon the same footing as other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and neither a freehold nor a chattel interest in it can be created or passed otherwise than by deed (5 B. & C. 229; see *ante*, p. 46). Grants of rights of way are presumed from long enjoyment, where its commencement cannot be accounted for, unless a grant has been made (3 B. & Ald. 237). The uninterrupted enjoyment of a right of way for twenty years, in the absence of evidence that it had been used by leave or favour, or under a mistake, was held sufficient to leave to a jury to presume a grant, although the road in question had been extinguished about twenty-six years before, under the award of the commissioners of an inclosure act (*Campbell* v. *Wilson*, 3 East, 294). So where there had been an absolute extinguishment of a right of way for many years by unity of possession, but the way had been used for thirty years preceding an action for its obstruction, the jury were directed to presume a grant from the defendant (*Keymer* v. *Summers*, Bull. N. P. 74, cited 3 T. R. 157; see also *Livett* v. *Wilson*, 3 Bing. 115). Though an uninterrupted possession for twenty years and upwards be a bar to an action on the case, yet the rule must be taken with this qualification, that the possession was with the acquiescence of the person seised of an estate of inheritance. The mere knowledge of the tenant is not sufficient (*Daniel* v. *North*, 11 East, 372); but if the user has been for a great length of time, it may be presumed that the landlord was aware of it (*Davies* v. *Stephens*, 7 C. & P. 570; *Jamieson* v. *Coulter*, 21 W. R. 852; *Gray* v. *Bond*, 2 Brod. & Bing. 667; see *Dawson* v. *Norfolk*, 1 Price, 247). A grant, however, may be presumed from one tenant to another (*Timmons* v. *Hewitt*, 22 L. R. Ir. 627).

Knowledge of owner of fee.

Acquisition of right of way by prescription at common law.

A private way may be claimed by prescription; as that a man is seised in fee of a certain messuage, and that he, and all those whose estate he has in the same messuage, have from time immemorial had a way (describing it, as the case may be) from —— to ——. A way being only an easement, and not an interest, should not be laid as appendant or appurtenant (Yelv. 159). Where a particular tenant relied on a prescriptive right, he must, before the act 2 & 3 Will. 4, c. 71, s. 5, *ante*, p. 16, have set forth the seisin in fee of the owner, and then have traced his own title from the owner of the fee (2 Salk. 562; Com. Dig. Chimin (D. 2)). Where in trespass *quare clausum fregit*, the defendant prescribed in a *que estate* for a right of way over the *locus in quo*, and it appeared that the defendant's land had, within fifty years, been part of a large common, and afterwards inclosed under the provisions of an act of parliament, and allotted to the defendant's ancestor, it was held, that notwithstanding this evidence the right claimed by the defendant's plea might in law exist (*Codling* v. *Johnson*, 9 B. & C. 933). If the lessor enjoy a prescriptive right of way, or any other easement, by virtue of the demised premises, such right will pass to the tenant for life or years. Before the act 2 & 3 Will. 4, c. 71 (see *ante*, s. 5, p. 16), the only distinction between a tenant for years and a tenant for life was that the former in pleading could not prescribe in his own right; but he must have asserted the right through his landlord, or the owner of the freehold (*Cantrell* v. *Stephens*, Styl. 300; *Dawney* v. *Cashford*, Carth. 432). The user on which the prescription is based must be uninterrupted. Locking a gate across the way is interruption, although the claimant is given a key (*Barry* v. *Lowry*, I. R. 11 C. L. 483). As to claim to private rights of way under 2 & 3 Will. 4, c. 71, see *ante*, pp. 7, 8.

Acquisition by custom.

A custom that every inhabitant of a certain village shall have a way over certain land, either to church or to market, is good, because it is only an easement, but not a profit (6 Rep. 60 b.; Co. Litt. 110 b.; Cro.

Rights of Way.

Eliz. 180; see 2 H. Bl. 393; *ante*, pp. 23, 24). See, as to a church way, *Batten* v. *Gedye*, 41 Ch. D. 507.

Acquisition by statute.

By an inclosure act, all ways over West Field, allotted to B., were to be extinguished from the time of the completion of a new road, with a proviso that nothing in the act should deprive A. of the right of ingress, egress, and regress, to and from a watercourse, for the purpose of rebuilding, or to cleanse the same; this reserved to A. his right of way unimpaired over West Field, for the purposes mentioned in the act (*Adeane* v. *Mortlock*, 5 Bing. N. C. 236). A private estate act authorizing the appropriation of land as a way for the general improvement of the estate and the accommodation of tenants and occupiers, was held to authorize the creation of exclusive private rights of way (*White* v. *Leeson*, 5 H. & N. 53). Commissioners of partition may award a right of way over the lands of one party to the lands of another party interested in the partition (*Lister* v. *Lister*, 3 Y. & C. 140).

Nature and extent of rights of way acquired by express grant.

Primâ facie, the grant of a right of way is the grant of a right of way having regard to the nature of the *locus in quo* over which it is granted and to the purpose for which it is intended to be used. Both these circumstances may be called in aid in determining whether it is a general right of way, or a footway, or a driftway (*Cannon* v. *Villars*, 8 Ch. D. 421; see *Osborn* v. *Wise*, 7 C. & P. 761, *post*). On this principle, a way was held to be a footway in *Cousens* v. *Rose*, 12 Eq. 366; and a way for all purposes in *Watts* v. *Nelson*, 6 Ch. 166; see also *Wood* v. *Stourbridge Co.*, 16 C. B. N. S. 222. A way over a private road to land abutting on the private road was not limited to a way through gates which existed at the time of the grant (*South Metropolitan Co.* v. *Eden*, 16 C. B. 42).

Where there is an express grant of a private right of way to particular land, to the unrestricted use of which land the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant (*Finch* v. *G. W. R. Co.*, 5 Ex. D. 254; *United Land Co.* v. *G. E. R. Co.*, 10 Ch. 586; *Newcomen* v. *Coulson*, 5 Ch. D. 133). In *Allan* v. *Gomme* (11 Ad. & E. 759), the grantee of a right of way was confined to the use of a way to a place which should be in the same predicament as it was at the time of the grant. This ruling, however, was not approved of by *Parke*, B. (*Hening* v. *Burnett*, 8 Exch. 192), and the case was treated by *Stephen*, J., as turning on the construction of the particular deed (*Finch* v. *G. W. R. Co.*, 5 Ex. D. 259). On the construction of a lease the grant of a right of way was restricted to the way existing at the date of the lease (*Collins* v. *Slade*, 23 W. R. 199). Where a lease reserved to the lessor and his assigns a right of way for the purpose of rebuilding erections on adjoining premises, which belonged to the lessor, and the defendants, who claimed under the lessor, had erected a dispensary on the adjoining premises, and proposed to use the way as an access to such dispensary, the user was restrained (*Ardley* v. *St. Pancras*, 1870, W. N. 203; 39 L. J. Ch. 871; see *Sloan* v. *Holliday*, 30 L. T. 757). Compare the ruling as to the extent of an easement to discharge drainage over another's land (*Wood* v. *Saunders*, 10 Ch. 582).

Under a grant of a free and convenient horse and foot way, and for carts, &c., "to carry stones, timber, coals, and other things whatsoever," the grantee may lay a framed way across the land for carrying coals as being most convenient (*Senhouse* v. *Christian*, 1 T. R. 560). In 1630 land was granted excepting and reserving out of the grant all mines of coal with sufficient way leave to the said mines. It was questioned whether under this reservation the coal-owner had now a right to make a railway. It was held, however, that the right was not confined to such ways as were in use at the time of the grant (*Dand* v. *Kingscote*, 6 M. & W. 174; see *Newcomen* v. *Coulson*, 5 Ch. D. 139). Where a lease reserved minerals with authority to work and carry away the same with free way leave to and from the same or to or from any other mines, the reservation only included way leave for the purpose of getting the excepted minerals, and a

railway having been made, the proper question for the jury was whether when the road was formed it had become necessary or expedient to make a road for the purpose of getting the excepted minerals; and, if so, whether the road was a proper one for that purpose (*Durham R. Co.* v. *Walker*, 2 Q. B. 940; *Farrow* v. *Vansittart*, 1 Ry. Cas. 614). Where, however, A. granted land excepting and reserving a waggon or cart road of the width of eighteen feet, to be at all times thereafter kept in repair at his own cost, this reservation did not enable A. to lay down a railroad for carrying coals raised from his neighbouring colliery (*Bidder* v. *North Staffordshire R. Co.*, 4 Q. B. Div. 212). Where a lease of premises described them as abutting on an intended way, thirty feet wide, not then set out, the soil of which was the property of the lessor: and the lessee granted an underlease, describing the premises as abutting on an intended way, without specifying the breadth: the sublessee was entitled to a *convenient* way only (*Harding* v. *Wilson*, 2 B. & C. 96; see *Espley* v. *Wilkes*, L. R. 7 Ex. 298). **Rights of Way.**

A grant of a right of way over a private road only confers a right to a reasonable use of such road, and not necessarily over the whole surface of the road (*Clifford* v. *Hoare*, L. R. 9 C. P. 362). So in the case of a private way over waste land (*Hulton* v. *Hamboro*, 2 F. & F. 218). Where premises are conveyed with a right of way thereto, it may be a question for the jury what is a reasonable use of such right (*Hawkins* v. *Carbine*, 27 L. J. Exch. 44). Where a right of way was expressed to be "through the gateway of the plaintiff" (which gateway led to other premises of the plaintiff), and, at the time of the lease, carts could come in to load, but through alterations of the premises could not do so without slightly trenching upon the plaintiff's premises: it was held, that, in the reasonable use of the right of way, the defendant had a right to do this (*Ib.*) As to the construction of "the exclusive use of the gateway," see *Reilly* v. *Booth* (44 Ch. Div. 12). Where a right of way is granted for the occupation of a dwelling-house, the grantee ought to have everything needful for the occupation of the house. Such a grantee was held entitled to put down a flagstone in front of a door opened by him out of his house into the land over which the right existed (*Gerrard* v. *Cooke*, 2 Bos. & P. N. R. 109). **Reasonable user.**

On the construction of the devise of a right of way, it was held limited to the lifetime of the devisee (*Pym* v. *Harrison*, 33 L. T. 796). General words reserving a wayleave to a bishop for coal got out of any land were restricted by the context to land belonging to the See (*Midgley* v. *Richardson*, 14 M. & W. 495; see *Hedley* v. *Fenwick*, 3 H. & C. 349).

A right of way cannot be so granted as to pass to the successive owners of land as such, in cases where the way is not connected in some manner with the enjoyment of the land to which it is attempted to make it appurtenant. It is not competent to a vendor to create rights unconnected with the use and enjoyment of land and to annex them to it, neither can the owner of land render it subject to a new species of burden, so as to be binding in the hands of the assignee (*Ackroyd* v. *Smith*, 10 C. B. 164; 19 L. J. C. P. 315; see *Thorpe* v. *Brumfitt*, 8 Ch. 650).

A grantor having once defined a way cannot alter it (*Deacon* v. *S. E. R. Co.*, 1889, W. N. 79).

In an action for obstructing a way, granted by a lease from the defendant to the plaintiff, the judge will receive evidence of the state of the premises at the time of granting the lease, and will then put a construction on the lease as to the line along which the way is granted: but he will not receive evidence of the declarations or acts of the parties, either before or after the lease, as showing where the way is or was intended to be; but if it be uncertain on the words of the grant which of two ways is intended, the judge will receive parol evidence to show which the grantor meant to grant (*Osborn* v. *Wise*, 7 C. & P. 761). In order to prove a grant of an occupation way through a lane to the defendant's premises, he offered two deeds, which purported to be grants by the owners of the soil of an occupation way through the lane, to tenants of premises situated on the **Evidence as to grants.**

Rights of Way.

opposite side of the lane from the defendant's premises: it was held, that the deeds were wrongly admitted for that purpose (*R.* v. *Chorley*, 12 Q. B. 515; and see *Baird* v. *Fortune*, 10 W. R. 2).

Nature and extent of rights of way acquired by user.

Where there is a right of way proved by user, the extent of the right must be measured by the extent of the user (*Finch* v. *G. W. R. Co.*, 5 Ex. D. 258; see *Williams* v. *James*, L. R. 2 C. P. 577; *Wimbledon Conservators* v. *Dixon*, 1 Ch. D. 362; *Bradburn* v. *Morris*, 3 Ch. D. 812). Evidence of an user of a road with horses, carts, and carriages, for certain purposes, does not necessarily prove a right of road for all purposes, but the extent of the right is a question for the jury under all the circumstances. If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, the jury may be warranted in finding a way for all (*Cowling* v. *Higginson*, 4 M. & W. 245; see *Dare* v. *Heathcote*, 25 L. J. Ex. 245; 26 *Ib.* 164; *Hawkins* v. *Carbines*, 27 L. J. Ex. 44; *Ballard* v. *Dyson*, 1 Taunt. 279; *Jackson* v. *Stacey*, Holt, N. P. C. 455; *Higham* v. *Rabbett*, 5 Bing. N. C. 622). When a way to a dwelling-house had been acquired by user, it was held there was no excess of user by reason of a small shop having been opened in the house (*Sloan* v. *Holliday*, 30 L. T. 757). The defendant, being entitled by user to a right of way over the plaintiff's land from field N., used the way for the purpose of carting from field N. some hay stacked there, which had been grown partly on the land adjoining. The jury found that the defendant in so doing had used the way *bonâ fide*, and for the ordinary and reasonable use of field N. as a field. Held, that there was no excessive user (*Williams* v. *James*, L. R. 2 C. P. 577).

Right to deviate.

A person having a private way over the land of another cannot, when the way is become impassable by the overflowing of a river, justify going on the adjoining land, although such land, as well as the land over which the way runs, belongs to the grantor of the way (*Taylor* v. *Whitehead*, 2 Dougl. 475; *Bullard* v. *Harrison*, 4 M. & S. 387; 1 Wms. Saund. 322 a, n. (3); *Duncombe's case*, Cro. Car. 366; see *Robertson* v. *Gauntlett*, 16 M. & W. 289). But where a private way has been obstructed by the grantor, the grantee may deviate over the grantor's land (*Selby* v. *Nettlefold*, 9 Ch. 111).

Repair of way.

The grantee of a way has a right to repair it, as incident to the grant (Com. Dig. Chimin (D. 6); Godb. 53; *Gerrard* v. *Cooke*, 2 Bos. & P. N. R. 108; Vin. Abr. Incidents (A.); *Newcomen* v. *Coulson*, 5 Ch. D. 143), and the grantor is not bound to repair (Com. Dig. Chimin (D. 6)), unless by express stipulation or prescription (1 Saund. 322 a, n.; *Rider* v. *Smith*, 3 T. R. 766). The grantee of a private way is to make it (*Osborn* v. *Wise*, 7 C. & P. 764). By common law he who has the use of a thing ought to repair it, unless the grantor has bound himself to do so (*Taylor* v. *Whitehead*, 1 Doug. 720; *Pomfret* v. *Ricroft*, 1 Wms. Saund. 557). Although at common law the grantee of a way ought to repair it, that is not a condition incident by law to the grant of a right of way; it is not even an obligation to which the grantee is subject; it is no more than this, that if he wants the way to be repaired he must repair it himself (*Duncan* v. *Louch*, 6 Q. B. 909, 910; see *Ingram* v. *Morecraft*, 33 Beav. 49).

Liability for negligence.

Where an owner of the soil permits others to pass over it, he is liable for an accident caused by the negligence of himself or his servants to a person lawfully availing himself of such permission, though he would not be liable for an accident caused by the ordinary risks attaching to the nature of the place, or the business there carried on (*Gallagher* v. *Humphrey*, 10 W. R. 664). An owner of land, having a private road for the use of persons coming to his house, gave permission to a builder who was engaged in building on the land to place materials upon the road. The builder availed himself of such permission, by placing a quantity of slates there in such a manner that the plaintiff in using the road sustained damage: it was held that the builder was liable to an action (*Corby* v. *Hill*, 4 C. B. (N. S.) 556; *Belch* v. *Smith*, 7 H. & N. 736). The possessors of a cutting, and a bridge over the cutting, who allowed the public to use

the bridge, were held not liable for the death of a person who fell into the cutting through the defective condition of the bridge (*Gautret* v. *Egerton*, L. R. 2 C. P. 371; see *Gwinnell* v. *Eames*, L. R. 10 C. P. 658; *Tarry* v. *Ashton*, 1 Q. B. D. 314). **Rights of Way.**

Where a person having a right of way over the land of another purchases such land, the right of way is extinguished by the unity of seisin and possession (*Heigate* v. *Williams*, Noy, R. 119; see *James* v. *Plant*, 4 Ad. & El. 761, *ante*, p. 58). **Extinction of rights of way: By unity of seisin.**

A long forbearance to exercise a right of way may reasonably be accounted for by supposing a release of the right (*Doe* v. *Hilder*, 2 B. & Ald. 791; see *Moore* v. *Rawson*, 3 B. & C. 339). But a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it (*Crossley* v. *Lightowler*, 2 Ch. 482). It is the nature of the act done, or of the adverse act acquiesced in by the owner of the easement, and the intention thereby indicated, which are material (*R.* v. *Chorley*, 12 Q. B. 519; *Mulville* v. *Fallon*, I. R. 6 Eq. 458). **By abandonment.**

It was laid down in another case, that where a right of way has been once established by clear evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in; an unsuccessful attempt on the part of the occupiers of the land, over which the way ran, from time to time to interrupt such right, will not be sufficient to get rid of it (*Harvie* v. *Rogers*, 3 Bligh, N. S. 444—447; see 12 Ves. 265; *Norbury* v. *Meade*, 3 Bligh, 211, 241).

The discontinuance for upwards of twenty years of the use of an immemorial right of way to a close, because the occupiers had a more convenient access to it over another close, is not evidence of an intention to abandon the right (*Ward* v. *Ward*, 21 L. J. Exch. 334). *Alderson*, B., observed in this case, "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user." A parol agreement for the substitution of a new way for an old prescriptive way, and the consequent discontinuance to use the old highway, afford no evidence of the abandonment thereof (*Lovell* v. *Smith*, 3 C. B. N. S. 120). In this case the plaintiff, having a right of way by prescription more than thirty years previously, agreed with the owner and occupier of the servient tenement that the use of a portion of that way should be discontinued, and a new one equally convenient substituted for it; *Willes*, J., said, "I do not think that this court means to lay down that there can be an abandonment of a prescriptive easement like this without a deed or evidence from which the jury can presume a release of it" (*Ib.* pp. 126, 127). A right of way may be abandoned, and it is always a question of fact, to be ascertained by a jury or by the court from the surrounding circumstances, whether the act amounts to an abandonment or was intended as such (*Cook* v. *Bath*, 6 Eq. 179).

Where the mode of enjoyment of an easement has been more or less altered, and where an attempt has been made to usurp a greater right than the party was entitled to, it appears that in the case of those easements which depend upon repeated acts of man and require no permanent alteration in the dominant tenement as rights of way, the previously-existing right will not be affected by acts of usurpation (Gale on Easements, 514, 6th ed.; and see *Luttrell's case*, 4 Rep. 86 a). There does not appear to be any direct authority to show whether, if the use of a place, to and from which a way is by express words reserved or granted, be completely changed, the way can still be continued to be used. It has been held, that if a man has a right of way to a close called A., he cannot justify using the way to go to A., and from thence to another close of his own adjoining to A. (1 Roll. Abr. 391, pl. 3; *Howell* v. *King*, 1 Mod. 191; *Lawton* v. *Ward*, 1 Ld. Raym. 75; and 1 Lutw. 111; *Skull* v. *Glenister*, 16 C. B. N. S. 81). If a right of way be granted for the purpose **By alteration of dominant tenement.**

Rights of Way.

of being used as a way to a cottage, and the cottage is changed into a tan yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered (*Henning* v. *Burnet*, 8 Exch. 192; see *Sloan* v. *Holliday*, 30 L. T. 757).

By statute.

By the 10th section of the General Inclosure Act (41 Geo. 3, c. 109), the commissioners are directed to set out private roads; and by the 11th section of that act it is declared that all roads, ways, and paths, over, through and upon such lands and grounds, which shall not be set out, shall be extinguished. Where a private inclosure act does vary the terms of the above act, if the commissioners in their award do not notice a road running over the inclosed lands, it is, by the operation of that act, extinguished, and the proprietor of the lands over which it runs may stop it up (*White* v. *Reeves*, 2 B. Moore, 23; *Holden* v. *Tilley*, 1 F. & F. 650; see *Turner* v. *Crush*, 4 App. Cas. 221). As to the construction of local inclosure acts giving powers to stop up roads, see *Logan* v. *Burton* (5 B. & C. 513); *Harber* v. *Rand* (9 Price, 58); *R.* v. *Hatfield* (4 Ad. & El[1]. 156).

Remedy for disturbance of right of way by abatement.

It would seem that the owner of a right of way may, after proper notice requesting the removal of an obstruction, himself remove it, even if the obstruction is a house which is inhabited (*Lane* v. *Capsey*, 1891, 3 Ch. 411). The refusal by the court to grant a mandatory injunction would not interfere with such a right (*Ib.*); and leave was given to exercise the right where the house was in the possession of a receiver appointed by the court (*Ib.*)

Remedy by action.

An action lies for the disturbance of a right of way, created either by reservation, grant, or prescription (Com. Dig. Action on the Case for Disturbance (A. 2); 1 Roll. Abr. 109); and such disturbances may be either by absolutely stopping up the way, or by ploughing up the land through which the way passes (2 Roll. Abr. 140), or by damaging the way with carriages, so that it is of no use (*Lawton* v. *Ward*, 1 Lutw. 111). A

Action by reversioner.

reversioner cannot sue for the obstruction of a right of way unless the obstruction be such as either permanently injures the estate, or operates in denial of the right (*Hopwood* v. *Scholfield*, 2 M. & Rob. 34; see *Young* v. *Spencer*, 10 B. & C. 145; *Baxter* v. *Taylor*, 4 B. & Ad. 72; *Jackson* v. *Pesked*, 1 M. & S. 234; *Alston* v. *Scales*, 2 M. & Scott, 5; *Mott* v. *Shoolbred*, 20 Eq. 22; *Kidgill* v. *Moor*, 9 C. B. 364). Where the plaintiff had, under the special act of a railway company, acquired the use of a siding, which he leased to tenants, and the company denied the plaintiff's right, and obstructed the siding by carriages constantly kept there, the obstruction was sufficiently permanent to give the plaintiff a right of action as reversioner (*Bell* v. *Midland R. Co.*, 10 C. B. N. S. 287).

The Railway Clauses Act, 1845, s. 53, takes away the common law right of action for an interference under the powers of a railway company with a private right of way, except when special damage has been sustained (*Watkins* v. *G. N. R. Co.*, 16 Q. B. 961).

Pleading.

In all cases for disturbance of a way, the obstruction ought to be alleged as occurring in the way itself to which the party has a right (*Tebbutt* v. *Selby*, 6 Ad. & Ell. 786). Where in an action for wrongfully stopping up a way the precise locality of the way is material to the defence, the defendant is bound to show it in his pleadings (*Ellison* v. *Iles*, 11 Ad. & Ell. 665).

In an action brought since the Jud. Acts for obstructing a private way the pleading should, under the R. S. C., show the termini of the way and its course; and whether the plaintiff claims by prescription or grant (*Harris* v. *Jenkins*, 22 Ch. D. 481). And where the defendant in an action of trespass pleads that the *locus in quo* was a highway, he must now state how it became a highway (*Spedding* v. *Fitzpatrick*, 38 Ch. Div. 410; see under the old law, *Williams* v. *Wilcox*, 8 Ad. & El. 331). As to variances under the old law, see *Duncan* v. *Louch* (6 Q. B. 904); *Colchester* v. *Roberts* (4 M. & W. 769).

Actions in the Chancery Division.

Where a bill was filed by a lessee to establish a right of way, an objection for want of parties, because the plaintiff's lessor was not before the

court, was allowed under the Chancery practice before the Jud. Acts (*Poore* v. *Clark*, 2 Atk. 515). As to the certainty required in such bills, see *Gell* v. *Hayward* (1 Vern. 312); *Cresset* v. *Mitton* (3 Bro. C. C. 481; 1 Ves. jun. 449). Agreements as to right of way were enforced by injunction in *Newmarch* v. *Brandling* (3 Swan. 99); *Phillips* v. *Treeby* (3 Giff. 632); *Collins* v. *Slade* (23 W. R. 199). Rights of Way.

As to the remedy in equity, in the case of a licence for a right of way which has been executed, and where expense has been incurred, see *Mold* v. *Wheatcroft* (27 Beav. 510), and the cases quoted *ante*, p. 48.

An injunction will be granted to restrain the obstruction of a right of way by the acts of several persons, although the damage occasioned by the acts of one of them, if taken alone, would be inappreciable (*Thorpe* v. *Brumfitt*, 8 Ch. 650). Injunctions have been granted to restrain interference with the private access of the owner of property abutting on the highway to and from the highway (*Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; *Original Hartlepool Co.* v. *Gibb*, 5 Ch. D. 713; see *Fritz* v. *Hobson*, 14 Ch. D. 542). In a proper case a mandatory injunction will be granted (*Krehl* v. *Burrell*, 7 Ch. D. 551; 11 Ch. Div. 146). The remedy of a parishioner in respect of a churchway is in the Ecclesiastical Court (*Batten* v. *Gedye*, 41 Ch. D. 507). See further the forms of injunctions, Seton, 5th ed. 505 *et seq.*

(5.) OF WATERCOURSES.

The right of conducting water through one estate for the use and convenience of an adjoining estate, is an incorporeal hereditament of the class of easements, or a prædial service, which was known to the civilians under the name of service *aquæ ductus* (Domat's Civil Law, L. 1, T. 12); and is of use when Seius has a scarcity of water, and requires it for watering his cattle, or his lands, or for making his mill go, or for any other such advantage to his ground (2 Frederican Code, 144).

Origin of law governing natural streams.

The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued —in ordinary cases, indeed, time out of mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law (which would seem to be the opinion of *Fleta* and of *Blackstone*), the origin of which is lost by the progress of time; or it may not be unfitly treated, as laid down by Mr. Justice *Story*, in his judgment in the case of *Tyler* v. *Wilkinson* (4 Mason's American Rep. 401), in the courts of the United States, as "an incident to the land; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law" (*Acton* v. *Blundell*, 13 M. & W. 349, 350).

Natural right of riparian proprietor to the use and to the flow of water in natural streams.

"*Primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors, who may be affected by his operations. No proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above" (*Wright* v. *Howard*, 1 Sim. & Stu. 203; adopted by Lord *Tenter-*

Of Watercourses.

den, C. J., *Mason* v. *Hill*, 3 B. & Ad. 312, 313; and see 5 B. & Ad. 18; *Ennor* v. *Barwell*, 2 Giff. 426, 427; *Embrey* v. *Owen*, 6 Exch. 369). "The flow of a natural stream creates mutual rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality" (*Gaved* v. *Martyn*, 19 C. B. N. S. 732). "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of water flowing past his land; for instance, to the reasonable use of the water for domestic purposes and for his cattle; and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, for what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to intercept the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury" (*Per* Lord *Kingsdown*, *Miner* v. *Gilmour*, 12 Moo. P. C. 156; adopted in *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1; see *A. G.* v. *G. E. R. Co.*, 6 Ch. 572; *Buccleuch* v. *Metropolitan Board*, L. R. 5 H. L. 418). The question what is an extraordinary use may depend on the development of trade in the neighbourhood, and on the use to which the water of rivers is put in the adjoining district (*Ormerod* v. *Todmorden Co.*, 11 Q. B. Div. 168). A riparian proprietor must not scour the bed so as to alter the flow of the water (*Withers* v. *Purchase*, 60 L. T. 819).

Appropriation not necessary.

In *Williams* v. *Morland* (2 B. & C. 910), *Bayley*, J., said: "Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it: subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public." The same doctrine of appropriation was laid down in the earlier cases (*Rutland* v. *Bowler*, Palm. 290; *Bealey* v. *Shaw*, 6 East, 208; *Saunders* v. *Newman*, 1 B. & Ald. 258; *Liggins* v. *Inge*, 7 Bing. 692; *Frankum* v. *Falmouth*, 6 C. & P. 529). Lord *Denman*, however, said: "It appears to us that there is no authority in our law, nor, as far as we know, in the Roman law (which, however, is no authority in ours), that the first occupant, though he may be the proprietor of the land above, has any right by diverting the stream to deprive the owner of the land below of the special benefit and advantage of the natural flow of water therein" (*Mason* v. *Hill*, 5 B. & Ad. 24). In *Arkwright* v. *Gell* (5 M. & W. 220), *Parke*, B., said: "The object of the judgment in *Mason* v. *Hill* was to set right the mistaken notion which had got abroad in consequence of certain *dicta* in *Williams* v. *Morland* (2 B. & C. 910), that flowing water is *publici juris*, and that the first occupant of it for a beneficial purpose may appropriate it." And in *Sampson* v. *Hoddinott* (1 C. B. N. S. 590), it was said: "It appears to us that all persons having land on the margin of a flowing stream have by nature certain rights to use the water of the stream, whether they exercise their rights or not" (adopted by *Wood*, V.-C., in *Crossley* v. *Lightowler*, 3 Eq. 296; see *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 854).

Channel must be defined.

The right of a riparian owner to the lateral tributaries or feeders of the main stream applies to water flowing in a defined and natural channel or watercourse, and does not extend to water flowing over or soaking through land previous to its arrival at such watercourse (*Broadbent* v. *Ramsbottom*, 25 L. J. Ex. 115). The owner of land has an unqualified right to drain it for agricultural purposes, in order to get rid of mere surface water, the supply of the water being casual and its flow following no regular definite course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water, which otherwise would have

come to his land (*Rawstron* v. *Taylor*, 11 Exch. 369). The water from a spring flowed in a gully or natural channel to a stream on which was a mill. The spring having been cut off at its source, and the water received into a tank as it rose from the earth, by the licence of the owner of the soil on which the spring rose, it was held, that an action lay by the mill-owner against the person so abstracting the water (*Dudden* v. *Clutton Union*, 1 H. & N. 627; see *Van Breda* v. *Silberbauer*, L. R. 3 P. C. 84). As to what is a defined channel, see *Briscoe* v. *Drought* (11 Ir. C. L. R. N. S. 250; *Ennor* v. *Barwell*, 2 Giff. 410).

In the case of a natural stream flowing through an artificial channel, the riparian proprietors may possess rights similar to those which they would have possessed if the channel had been a natural one (*Holker* v. *Parritt*, L. R. 8 Ex. 116; *Roberts* v. *Richards*, 44 L. T. 271; *Sutcliffe* v. *Booth*, 32 L. J. Q. B. 136; see also *Nield* v. *L. & N. W. R. Co.*, L. R. 10 Ex. 4; and *post*, p. 72.

Stream changing its course.

In a case where a stream had from time to time changed its course, it was laid down that the accustomed course of a natural stream which a riparian owner is entitled to have preserved is the natural and apparently permanent course existing when the right is asserted or called in question (*Withers* v. *Purchase*, 60 L. T. 819).

Natural rights with regard to subterranean water:

where course is known and defined;

If the course of a subterranean stream be well known, as is the case with many, which sink underground, pursue for a short space a subterraneous course and then emerge again, it never would be considered that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground (*Per Pollock*, C. B., *Dickenson* v. *Grand Junction Co.*, 7 Ex. 300; *Chasemore* v. *Richards*, 7 H. L. C. 349; see also *Dudden* v. *Clutton Union*, 1 H. & N. 630).

where course is undefined.

The owner of land, through which water flows in a subterraneous course, has no natural right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations on his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry. In *Acton* v. *Blundell* (12 M. & W. 353), *Tindal*, C. J., thought the case fell within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil and part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action. The same principle was laid down by the House of Lords in *Chasemore* v. *Richards*, 7 H. L. C. 349; see also *Hammond* v. *Hall*, 10 Sim. 551; *Dickenson* v. *Grand Junction Co.*, 7 Ex. 282. It is now settled by several authorities that no action will lie against a man who, by digging or cutting drains in his own land, thereby drains his neighbour's land either by intercepting the flow of the water percolating through the pores of the soil, and which but for such digging or draining would have reached his neighbour's land, or by causing the water already collected, in fact, on his neighbour's soil to percolate away from and out of it (*New River Co.* v. *Johnson*, 6 Jur. N. S. 374; 7 W. R. 179; see also *South Shields Co.* v. *Cookson*, 15 L. J. Ex. 315; *R.* v. *Metropolitan Board*, 3 B. & S. 710; *Ballacorkish Co.* v. *Harrison*, L. R. 5 P. C. 60). The ultimate decision in *Dickenson* v. *Grand Junction Co.* (7 Exch. 282), and the *dictum* of Lord *Ellenborough* in *Balston* v. *Benstead* (1 Camp. 463), have been overruled by *Chasemore* v. *Richards*, 7 H. L. C. 349.

On the other hand, a landowner will be restrained from making a drain in his own land by which water flowing in a defined surface channel

Of Water-courses.

through adjoining land is withdrawn (*Grand Junction Co.* v. *Shugar*, 6 Ch. 483).

Natural right of riparian proprietors to divert flood water.

A proprietor of land adjoining a river has a right to raise the banks upon his own land, so as to prevent the water from overflowing his land, with this restriction, that he does not occasion injury to the property of others (*R.* v. *Trafford*, 1 B. & Ad. 874; 8 Bing. 204; 2 Cr. & Jerv. 265; *Menzies* v. *Breadalbane*, 3 Bligh, N. S. 414, 418; *A. G.* v. *Lonsdale*, 7 Eq. 377). If, however, an extraordinary flood is seen to be coming on land, the owner may protect his land from it without being responsible for consequences, although his neighbour may be injured (*Nield* v. *L. & N. W. R. Co.*, L. R. 10 Ex. 4; see *Whalley* v. *Lancashire R. Co.*, 13 Q. B. Div. 136, 140. Compare the similar right on the sea-shore: *R.* v. *Pagham*, 8 B. & C. 355). But if the flood has already come, the owner must not, for the purpose of getting rid of the mischief, injure his neighbour (*Whalley* v. *Lancashire R. Co.*, *sup.*) As to the duties in respect of a river-wall incumbent on the owner of land on a tidal navigable river, see *Nitro-Phosphate Co.* v. *London and S. Katharine's Docks*, 9 Ch. Div. 524; *Burt* v. *Victoria Co.*, 47 L. T. 378.

Natural right of riparian proprietor to purity of water of natural stream.

A riparian proprietor has a right to the natural stream of water flowing through the land in its natural state; and if the water is polluted by a proprietor higher up the stream so as to occasion damage in law, though not in fact, to the inferior proprietor, it gives him a good cause of action against the superior proprietor, unless the latter has gained by long enjoyment or grant a right to pollute (*Wood* v. *Waud*, 3 Ex. 748; see *Weeks* v. *Heward*, 10 W. R. 557). The natural right to purity extends to subterranean water when appropriated (*Hodgkinson* v. *Ennor*, 4 B. & S. 229; *Turner* v. *Mirfield*, 34 Beav. 390; *Ballard* v. *Tomlinson*, 29 Ch. Div. 115).

Alienation of natural (or riparian) rights.

If land with a run of water upon it be sold, the water passes with the land (*Canham* v. *Fisk*, 2 Cr. & Jer. 126). The rights of a riparian proprietor cannot be granted so as to entitle the grantee as against the other riparian proprietors, even to the rights in respect of the ordinary use of water possessed by the grantor. The only right acquired by the grantee would be as against the grantor himself (*Ormerod* v. *Todmorden Co.*, 11 Q. B. Div. 155; *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1; *Stockport Co.* v. *Potter*, 3 H. & C. 300; *Jones* v. *Dorothea Co.*, 58 L. T. 80; see *Insole* v. *James*, 1 H. & N. 243).

Acquired rights with regard to water in natural stream.

Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of the proprietors above or below him on the stream. By usage he may acquire a right to use the water in a manner not justified by his natural rights; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement (*Sampson* v. *Hoddinott*, 1 C. B. N. S. 590). Independently of any particular enjoyment which another has been accustomed to have, every person is entitled to the benefit of a flow of water in his own lands, without diminution or alteration; but an adverse right may exist, founded on the occupation of another; and although the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it hath existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right. Before the stat. 2 & 3 Will 4, c. 71, twenty years' exclusive enjoyment of water in any particular manner afforded a strong presumption of right in the party so enjoying it, derived from grant or act of parliament (*Bealey* v. *Shaw*, 6 East, 208; *Cox* v. *Matthews*, 1 Vent. 237; 2 Wms. Saund. 113 b.; see *Dewhirst* v. *Wrigley*, 1 C. P. Coop. 329).

Right to uninterrupted

No right to the uninterrupted flow of subterranean water which percolates in an undefined course can be acquired by prescription (*Chasemore* v.

Richards, 7 H. L. C. 349; where it was said that "Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters depending upon the quantity of rain falling, or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the plaintiff's mill would be affected by any water percolating in and out of the defendant's or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of water?")

flow of subterranean water cannot be acquired by prescription;

Where, however, a grant was made of all streams of water that might be found in certain closes, it was held that the grantor and those claiming under him could not work mines so as to divert underground water from wells in the closes (*Whitehead* v. *Parkes*, 2 H. & N. 870).

but may be acquired by express grant.

In *Prescott* v. *Phillips* (cited 6 East, 213; 5 B. & Ad. 23) it was ruled, "that nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious; and that a possession of above nineteen years, which was shown in that case, was not sufficient" (See *Cox* v. *Matthews*, 1 Ventr. 237, cited 5 B. & Ad. 25). Previously to the stat. 2 & 3 Will. 4, c. 71 (*ante*, pp. 1—21), the acquiescence of lessees would not bind the landlord, nor that of tenants for life, the reversioner. Thus A., who was tenant for life with a power of jointuring, which he afterwards executed, in 1747 gave a licence to B. to erect a weir on a river in A.'s soil, then A. died and the jointress entered, and continued seised till 1799, when the tenant of A.'s farm diverted the water from the weir, upon which the tenant of B.'s farm brought an action on the case for diverting the water; the court were of opinion that the uninterrupted possession of the water for so many years, with the acquiescence of the particular tenants for life, would not affect the reversioner (*Bradbury* v. *Grinsell*, 2 Wms. Saund. 516). Evidence of user for twenty years of a head stock to pen up a rivulet was held insufficient evidence for raising the presumption of a grant to warrant its continuance to the injury of church land; for if the preceding vicar had made such a grant, it would not have bound his successor (*Wall* v. *Nixon*, 3 Smith's R. 316; see *Barker* v. *Richardson*, 11 East, 372). The right of diverting water, which in its natural course would flow over or along the land of a riparian owner, and of conveying it to the land of the party diverting it, can be created according to the law of England only by grant, or by long-continued enjoyment from which the existence of a former grant may be reasonably presumed, or by statute. Such an easement exists for the benefit of the dominant owner alone, and the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment (*Per Cockburn*, C. J., *Mason* v. *Shrewsbury R. Co.*, L. R. 6 Q. B. 587).

Prescriptive right to divert acquired by user for twenty years.

The right to a fishing weir may be acquired in non-navigable rivers by grant from other riparian owners, or by enjoyment, or by any means by which such rights may be constituted (*Rolle* v. *Whyte*, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657). And a right to pen back a stream may be acquired by prescription (*Cooper* v. *Barber*, 3 Taunt. 99).

Right to obstruct.

An action may be maintained for the erection of a roof with eaves projecting over another's land, and discharging rain water on to it, without proof that rain has actually fallen (*Fay* v. *Prentice*, 1 C. B. 828). The reversioner may sue (*Tucker* v. *Newman*, 11 Ad. & Ell. 40). Although, however, every one in building is bound so to construct his house as not to overhang his neighbour's property, and to construct his roof in such a manner as not to throw the rain water upon the neighbouring land (11 Hen. 7, f. 257); yet a right by user for twenty years and upwards for the owner to project his wall or eaves over the boundary line of his property, or to discharge the rain running from the roof of his house upon the ad-

Prescriptive right to discharge water upon adjoining land.

Of Water-courses.

joining land, has been recognized (*Thomas* v. *Thomas*, 2 C. M. & R. 34; see *Wright* v. *Williams*, 1 M. & W. 77; *Lady Browne's case*, cited in *Slaney* v. *Pigott*, Palm. 446; Com. Dig. Action on Case for Nuisance (A.); *Baten's case*, 9 Rep. 50, n. (*b*); Vin. Abr. Nuisance (G. 5)). Such a right will not be lost by raising the house (*Harvey* v. *Walters*, L. R. 8 C. P. 162). The occupier of a house who has a right to have the rain fall from the eaves of it upon another man's land, cannot put up spouts to collect that rain and discharge it upon such land in a body (*Reynolds* v. *Clarke*, Ld. Raym. 1399). If one had a right to enter into the yard of another, and he fixed a spout there to discharge water upon the plaintiff's land, trespass would not lie, but case (*Reynolds* v. *Clarke*, 1 Str. 634; 8 Mod. 272; Fort. 212). The flow of water for twenty years from the eaves of a house will not give a right to the neighbour to insist that the house shall not be pulled down or altered so as to diminish the quantity of water flowing from the roof (*Wood* v. *Waud*, 3 Exch. 748; *Greatrex* v. *Hayward*, 8 Exch. 293, 294; *Arkwright* v. *Gell*, 5 M. & W. 233).

Prescriptive right to pollute.

A right to pollute a stream can be acquired by prescription (*Baxendale* v. *McMurray*, 2 Ch. 790), but only through the continuance of perceptible injury for twenty years (*Goldsmid* v. *Tunbridge Commissioners*, 1 Ch. 349; see *Millington* v. *Griffiths*, 30 L. T. 65; *Murgatroyd* v. *Robinson*, 7 E. & B. 391; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 611; *O'Brien* v. *Enright*, I. R. 1 Ch. 718). And there can be no prescriptive right to justify a public nuisance (*A. G.* v. *Barnsley*, 1874, W. N. 37).

Prescriptive right to discharge sewage.

A right to discharge sewage through a drain can be acquired by prescription (*A. G.* v. *Dorking*, 20 Ch. Div. 601; see *Wright* v. *Williams*, 1 M. & W. 77). As to such a right being binding on a local authority, see *R.* v. *Staines*, 60 L. T. 261; *Ogilvie* v. *Blything*, 65 L. T. 338.

Artificial watercourses of a permanent character.

The natural rights of a riparian proprietor are limited to natural streams, and do not attach in the case of artificial watercourses (*Sampson* v. *Hoddinott*, 1 C. B. N. S. 590). Prescriptive rights, however, may be acquired in artificial watercourses of a permanent character (*Rameshur, &c.* v. *Koonj &c.*, 4 App. Cas. 121; *Wood* v. *Waud*, 3 Exch. 777; *Blackburne* v. *Somers*, 5 L. R. Ir. 1). The enjoyment must be as of right (*Chamber Co.* v. *Hopwood*, 32 Ch. Div. 549; see also *Beeston* v. *Weate*, 5 El. & Bl. 986; *Gaved* v. *Martyn*, 19 C. B. N. S. 732; *Ivimey* v. *Stocker*, 1 Ch. 396; *Powell* v. *Butler*, I. R. 5 C. L. 309, and *ante*, p. 9).

Of a temporary character.

Where the enjoyment of an artificial watercourse depends on temporary circumstances, no right to the uninterrupted flow of water can be acquired by prescription against the creator of the stream. Thus, it was held that a party receiving water drained from a mine has no right to compel the owners of the mine to continue such discharge. The right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a watercourse, at common law, independently of the effect of user under the stat. 2 & 3 Will. 4, c. 71, was to use it for any purpose to which it was applicable so long as it continued there. An user for twenty years, or a longer time, would be no presumption of the right to the water in perpetuity; for such a grant would in truth be neither more nor less than an obligation on the mine owner not to work his mines by the ordinary mode of getting minerals below the bed drained by that watercourse, and to keep the mines flooded up to that level, in order to make the flow of water constant for the benefit of those who had used it for some profitable purposes (*Arkwright* v. *Gell*, 5 M. & W. 203; see *Magor* v. *Chadwick*, 11 Ad. & Ell. 571). The right of a party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse, and the circumstances under which it was created. The flow of water from a drain, made for the purpose of agricultural improvements, does not give a right to the neighbour so as to preclude the proprietor from altering the level of his drain for the improvement of his land (*Greatrex* v. *Hayward*, 8 Exch. 291).

No right to uninterrupted flow can be acquired by prescription against creator of stream;

nor against a superior proprietor.

Where the owners of a colliery had suffered the water pumped out of their colliery to flow along an artificial channel, it was held, that in the absence of any grant or prescriptive title, no action lay by the owner of

land through which the water had been so accustomed to flow against an owner of land above, and through whose land the sough likewise passed, for diverting such water; for the owners of a colliery thus getting rid of a nuisance to their works, by discharging the water into such sough, could not be considered as giving it to one more than to others of the proprietors of the land through which such sough had been constructed, but that each might take and use what passed through his land, and the proprietor of the land below had no right to any part of that water until it had reached his own land, nor had he any right to compel the owners above to permit the water to flow through their land for his benefit (*Wood* v. *Waud*, 3 Exch. 748; see *Wardle* v. *Brocklehurst*, Ell. & Ell. 1058; *Mason* v. *Shrewsbury R. Co.*, L. R. 6 Q. B. 584). **Of Watercourses.**

Where mine owners made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery, through whose premises the water flowed for twenty years after the working had ceased, had during that time used it for brewing; it was held, that he thereby gained a right to the enjoyment of the water in an unpolluted state (*Magor* v. *Chadwick*, 11 Ad. & El. 586; *Blackburne* v. *Somers*, 5 L. R. Ir. 1). **Right to purity of water in artificial watercourse.**

As to the effect of a grant of an artificial watercourse, see *Taylor* v. *S. Helens*, 6 Ch. Div. 264. **Grant of artificial watercourse.**

Before the statute 2 & 3 Will. 4, c. 71, twenty years' exclusive enjoyment of water in any particular manner afforded a strong presumption of right in the party so enjoying it derived from grant or act of parliament (*Bealey* v. *Shaw*, 6 East, 208). The long enjoyment of a watercourse is the best evidence of right and raises a presumption of an agreement: and proof of a special licence, or that it was limited in point of time, must come from the party who opposes the right (*Finch* v. *Resbridger*, 2 Vern. 390; Gilb. Eq. C. 3). The enjoyment of water drawn from a brook along an artificial channel, and acts done by the owner of the dominant tenement upon the servient tenement, which, without the existence of an easement, would be tortious and actionable, may be evidence of a right in the owner of the dominant tenement to the use of the water (*Beeston* v. *Weate*, 5 El. & Bl. 986). In *Deeble* v. *Lineham*, 12 Ir. C. L. N. S. 1, there was sufficient evidence of enjoyment to support the presumption of a grant. If, however, such a grant would be void by statute, it cannot be presumed (*Rochdale Co.* v. *Radcliffe*, 18 Q. B. 287; where the supposed grantor was a canal company incorporated by statute). **Modes of acquisition of rights with regard to water.** **Grant presumed from enjoyment.**

For the nature of the enjoyment requisite for obtaining under the Prescription Act acquired rights with regard to water, see the note to 2 & 3 Will. 4, c. 71, s. 2, *ante*, p. 7. **Acquisition under Prescription Act.**

In *Northam* v. *Hurley* (1 El. & Bl. 665), it was held on the construction of the grant of a watercourse from the land of the grantor to the land of the grantee, that the grantor could not alter the channel on his own land although no damage had occurred to the grantee. The effect of special words in an express grant or reservation of water was also considered in *Rawstron* v. *Taylor*, 11 Exch. 369; *Lee* v. *Stevenson*, 27 L. J. Q. B. 263; *Finlinson* v. *Porter*, L. R. 10 Q. B. 188. The privilege of a watercourse is not confined to private individuals; it may be vested in a corporation, as where there was a grant to the corporation of Carlisle of water, for the purpose of turning the city mills (8 East, 487). As to the effect of conveyances of land since 1881 in carrying rights of water and watercourses, see Conv. Act, 1881, s. 6, *post*. **By express grant.**

By the grant of part of a tenement, there will pass by implication to the grantee all those continuous and apparent easements over the other part which are necessary to the enjoyment of the part granted and have been hitherto used therewith (*Wheeldon* v. *Burrows*, 12 Ch. Div. 31). And this principle has been applied to a watercourse (*Watts* v. *Kelson*, 6 Ch. 166; see *Pullan* v. *Roughfort*, 21 L. R. Ir. 73). As a general rule, however, there is no corresponding implication in favour of the grantor (*Wheeldon* v. *Burrows*, *sup.*, disapproving of *Pyer* v. *Carter*, 1 H. & N. 916, in which **By implied grant.**

Of Water-courses.

case the grant of a right to a drain by the grantee of land had been implied in favour of the grantor). *Pyer* v. *Carter* had been approved in *Ewart* v. *Cochrane*, 4 Macq. H. L. C. 117; *Watts* v. *Kelson*, *sup.*; but had been disapproved by Lord *Westbury* in *Suffield* v. *Brown*, 33 L. J. Ch. 249. A grant of the right to pollute a stream was implied in *Hall* v. *Lund* (1 H. & C. 676).

By licence.

As a general rule, it requires a deed to create a right and title to have a passage for water (4 East, 107; 5 B. & C. 233). As to creating rights with regard to water by parol licence, see *Liggins* v. *Inge* (7 Bing. 682), and the note on licences, p. 47, *ante*.

By custom.

As to the acquisition by custom of a right to divert water in Devonshire, see *Bastard* v. *Smith* (2 M. & Rob. 129); and in Cornwall, *Gaved* v. *Martyn* (19 C. B. N. S. 732; 14 W. R. 62). For a customary right to pollute water, see *Carlyon* v. *Lovering* (1 H. & N. 784); and for a customary right to the use of water, see *Harrop* v. *Hirst* (L. R. 4 Ex. 43).

Extent and mode of enjoyment of rights with regard to water.

Irrigation, &c.

Whether a riparian proprietor may use the water of a stream for the purpose of irrigation, if he again return it into the river with no other diminution than that caused by the absorption and evaporation attendant on the irrigation, depends on the circumstances of each particular case. The right of taking water for such a purpose is a question of degree, and it is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application. If the irrigation take place not continuously but only at intermittent periods, when the river is full, and no damage is done thereby to the working of a mill on the stream, and the diminution of water is not perceptible to the eye, it is such a reasonable use of the water as is not prohibited by law (*Embrey* v. *Owen*, 6 Exch. 372; see *Sampson* v. *Hoddinott*, 1 C. B. N. S. 603; *Wood* v. *Waud*, 3 Exch. 748). As to the circumstances which may be taken into account in determining a reasonable user, see *Ormerod* v. *Todmorden, &c. Co.*, 11 Q. B. Div. 168.

Where one riparian proprietor had by means of a water-wheel diverted about one-fortieth part of the volume of a stream, it was for the jury to consider whether he had thereby inflicted on the other any sensible or material injury (*Norbury* v. *Kitchin*, 3 F. & F. 292). The diversion of the water of a river by means of pipes, for the use of a lunatic asylum and county gaol, was a user more extensive than that to which a riparian proprietor as such was entitled (*Medway Co.* v. *Romney*, 9 C. B. N. S. 575). So also where a waterworks company collected water in a permanent reservoir for the supply of an adjacent town (*Swindon, &c. Co.* v. *Wilts., &c. Co.*, L. R. 7 H. L. 697). The taking by a railway company of water to supply their locomotives was restrained where such abstraction interfered with navigation (*A. G.* v. *G. E. R. Co.*, 6 Ch. 572); but was permitted where it interfered very slightly with an inferior riparian proprietor (*Sandwich* v. *G. N. R. Co.*, 10 Ch. D. 707). See also as to reasonable user, *Belfast Co.* v. *Boyd* (21 L. R. Ir. 560).

Where land and buildings were demised, together with the free passage of water and soil to a cesspool, the easement was restricted to a reasonable use for the purposes of the premises in the condition in which they were at the time of the demise, and was not extended to buildings subsequently erected (*Wood* v. *Saunders*, 10 Ch. 582; see *New Windsor* v. *Stovell*, 27 Ch. D. 665; *Metropolitan Board* v. *L. & N. W. R. Co.*, 17 Ch. Div. 246). When a lease reserved the free running of water and soil through the demised premises from other contiguous lands, the reservation was extended to water and soil coming from contiguous lands whether arising thereon or not, but was not extended to the refuse of tan pits (*Chadwick* v. *Marsden*, L. R. 2 Ex. 285).

By an award made under an inclosure act, drains were set out, and it was ordered that the occupiers of the land over which such drains passed should make and cleanse, and keep the same of sufficient width and depth to carry off the water intended to run down such drains: it was held, that the plaintiff was not thereby authorised to make an underdrain

on his land, so as to cause an increased quantity of water to pass into one of the awarded drains (*Sharpe* v. *Hancock*, 8 Scott, N. R. 46). Inclosure commissioners were empowered to set out and make such ditches, &c., as they should deem necessary in the lands to be inclosed: and also to enlarge, cleanse, or alter the course of, and improve any of the existing ditches, &c., as well in and on the same lands, as also in any ancient inclosures, or other lands in the township as they should deem necessary: held, that the act did not empower the commissioners to alter the drains in the common lands, so as to overload an ancient drain which flowed through the common lands from another township (*Dawson* v. *Paver*, 5 Hare, 415; affirmed by L. C., 30th July, 1847).

Extent of right to pollute.

Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people (*Crossley* v. *Lightowler*, 2 Ch. 478). Where sewage of a town had for years been drained into a stream passing through the plaintiff's land, without perceptibly polluting it, but for some time before action, in consequence of the increase of the town, the stream became perceptibly polluted; an injunction was granted, restraining the pollution (*Goldsmid* v. *Tunbridge Commissioners*, 1 Ch. 349; *A. G.* v. *Barnsley*, 1874, W. N. 37). Defendant, owner of a mill, where paper had been made from rags, introduced a new material. For more than twenty years before the change the refuse had been discharged into a stream which ran past the plaintiffs' house. The court presumed the defendant to be entitled to an easement to foul the stream by washings produced by the manufacture of paper in the reasonable and proper course, using any proper materials for the purpose, but not increasing the pollution; and the onus lay upon the plaintiffs to prove any increase (*Baxendale* v. *M'Murray*, 2 Ch. 790). But the discharge of the refuse of a different business was held unjustifiable (*Clark* v. *Somersetshire*, 36 W. R. 890; see *Wood* v. *Saunders*, 10 Ch. 582; compare *Metropolitan Board* v. *L. & N. W. R. Co.*, 17 Ch. Div. 249; *A. G.* v. *Acton Board*, 22 Ch. D. 221).

Alteration in mode of enjoyment.

If one has anciently pits which are supplied by a rivulet, he may cleanse them, but cannot change or enlarge them (*Brown* v. *Best*, 1 Wils. 174; see *Wood* v. *Saunders*, 10 Ch. 582; *New Windsor* v. *Stovell*, 27 Ch. D. 665), nor change the channels from a river to the prejudice of another owner (*Duncombe* v. *Randall*, Hetl. 32). It is not necessary that the mode of enjoying a watercourse should always have been precisely the same; for where, in an action for a nuisance to a watercourse, the plaintiff declared on his possession, and stated the mill to be an ancient one, it was held to be no defence, that he had within twenty years somewhat altered the wheels (*Saunders* v. *Newman*, 1 B. & Ald. 258). In which case it was said by *Abbott*, J., "that the owner is not bound to use the water in the same precise manner, or to apply it at the same mill; if he were, it would stop all improvement in machinery. If indeed the alterations made from time to time prejudiced the right of the lower mill, the case would be different; but here the alteration is by no means injurious, the old wheel drew more water than the new one" (*Ib.*; see *Luttrell's case*, 4 Rep. 87 a).

A right to a watercourse is not destroyed by the owners altering the course of the stream. Where the plaintiff had a right to water flowing from the defendant's land across a lane to his own land, and it appeared that "formerly the stream meandered a little down the lane before it flowed into the plaintiff's land, and that in the year 1835 the plaintiff, in order to render its enjoyment more commodious to himself, a little varied the course, by making a straight cut direct from the opening or spout under the defendant's hedge across the lane to his own premises," and this, it was contended, negatived the right claimed in the declaration, *Tindal*, C. J., said, "If such an objection as this were allowed to prevail, any right, however ancient, might be lost by the most minute alteration in the mode of enjoyment; the making straight a crooked bank or foot-path would have this result. No authority has been cited, nor am I aware of any principle of law or common sense upon which such an

Of Watercourses.

argument could base itself" (*Hall* v. *Swift*, 4 Bing. N. C. 381). To hold that the slightest variation in the enjoyment of an easement would destroy the easement, would virtually do away with all easements, as by the effect of natural causes some change must take place. There must be an additional or different servitude, and the change must be material either in the nature or in the quantum of the servitude imposed (*Per Grove*, J., *Harvey* v. *Walters*, L. R. 8 C. P. 166). A right to a watercourse which had been used to supply cattle sheds was held not to be lost by the erection of cottages in the place of cattle sheds (*Watts* v. *Kelson*, 6 Ch. 166). Where a person, who had a right to send down clean water through a gutter, sent down foul water, so that it was impossible to stop the nuisance without altogether interfering with his enjoyment, it was held that the whole enjoyment might be obstructed (*Cawkwell* v. *Russell*, 26 L. J. Ex. 34; see *Hill* v. *Cock*, 26 L. T. 185).

Extinction by abandonment.

If an ancient ditch has at one end anciently opened into a stream, and the owner of a mill on the stream has kept the opening at the end of the ditch closed for twenty years and more, without interruption, that would give the mill-owner such a right to keep it shut up, that the owner of the land adjoining the ditch would not be justified in reopening the communication, although it might appear that the communication between the ditch and stream was ancient (*Drewett* v. *Sheard*, 7 C. & P. 465). If the owner of a water-mill worked by a ground-shot wheel at a low head of water alter the wheel to a breast-shot wheel, which requires a high head of water, and after that for twenty years and more discontinue the use of the breast-shot wheel, and resume the use of the ground-shot wheel, his discontinuance will cause the mill-owner to lose his right to the high head of water (*Ib.*) The right to the overflow of water into an old pond is not lost by discontinuing the use of such pond, and obtaining the same or a greater advantage from the use of three new ponds; a substitution of such a nature, and the exercise of the right in a different spot, not being an abandonment of the right (*Hale* v. *Oldroyd*, 14 M. & W. 789). The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right without some evidence of an intention to abandon it: but where dye-works had not been used for more than twenty years, and had been allowed to go to ruin, it was held that any right of fouling a stream attached to them was lost (*Crossley* v. *Lightowler*, 2 Ch. 478). As to non-user of a well, see *Millington* v. *Griffith*, 30 L. T. 65. In a case depending on Roman Dutch law a prescriptive right to water was held not lost by the owner applying for a licence (*Commrs. of French Hoek* v. *Hugo*, 10 App. Cas. 336).

By unity of ownership.

It seems that nothing of necessity to a building, *e. g.* a gutter *in alieno solo*, to carry off water, &c., is extinguished by unity of ownership (*Pheysey* v. *Vicary*, 16 M. & W. 484). In *Shury* v. *Piggott* (3 Bulstr. 339; Poph. 166; W. Jones, 145), which was an action on the case for stopping a watercourse, the court held, that the right to the flow of water is not extinguished by unity of ownership, in which respect it is distinguished from a way. *Whitlock*, J., says (3 Bulstr. 340), "There is a difference between a way, a common, and a watercourse. Bracton (lib. 4, fol. 221-2) calls them *servitutes prædiales;* those which begin by private right, by prescription, by assent, as a way or common, being a particular benefit to take part of the profits of the land. This is extinct by unity, because the greater benefit shall drown the less. A watercourse does not begin by prescription, nor yet by assent, but the same doth begin *ex jure naturæ*, having taken this course naturally, and cannot be averted" (See *Pyer* v. *Carter*, 1 H. & N. 916). The acquisition of a right to an artificial watercourse may be prevented by unity of possession (*Outram* v. *Maude*, 17 Ch. D. 391).

Remedies for disturbance of rights with regard to water.

Abatement.

A party entitled to a watercourse may legally enter the land of a person who has occasioned a nuisance to a watercourse, to abate it (2 Smith's R. 9; Com. Dig. Pleader, 3 M. 41). Where there is excessive user by the owner of the dominant tenement, the owner of the servient tenement, if he abates the nuisance, is bound to do so in the most reasonable manner

(*Hill* v. *Cock*, 26 L. T. 185). An abatement was held reasonable in *Roberts* v. *Rose*, L. R. 1 Ex. 82. An individual cannot abate a nuisance if he be not otherwise injured by it than as one of the public (*Colchester* v. *Booke*, 7 Q. B. 339). **Of Watercourses.**

When the injury from a nuisance in respect of water is an injury to all the Queen's subjects, there is no remedy by action without proof of individual damage. The remedy is by indictment (*R.* v. *Bristol Dock Co.*, 12 East, 429). When, however, the inhabitants of a district had by custom a right to water one inhabitant could sue without proving individual damage, on the ground of interference with right (*Harrop* v. *Hirst*, L. R. 4 Ex. 47). **Remedy by indictment.**

Proof of actual damage is not necessary to enable a riparian proprietor to maintain an action for the obstruction or diversion of a natural stream (*Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; *Harrop* v. *Hirst*, L. R. 4 Ex. 43; *Ormerod* v. *Todmorden, &c. Co.*, 11 Q. B. D. 159). For the older law, see *Palmer* v. *Keblethwaite*, 1 Show. 64; *Glynne* v. *Nicholas*, 2 Show. 507; *Mason* v. *Hill*, 5 B. & Ad. 26; *Williams* v. *Morland*, 2 B. & C. 915. Whenever an injury is done to a right, actual perceptible damage is not indispensable as the foundation of an action, but it is sufficient to show the violation of the right, and the law will presume damage (*Embrey* v. *Owen*, 6 Ex. 353). In the absence of actual damage, however, it is necessary to prove interference with the right; and where water was taken from a river and afterwards returned unpolluted and undiminished, it was held that the right of a lower riparian proprietor had not been interfered with, and an injunction was refused (*Kensit* v. *G. E. R. Co.*, 27 Ch. Div. 122). **Remedy by action.** **Proof of actual damage not necessary in actions for diversion and obstruction.**

If the nuisance be of a permanent nature, and injurious to the reversion, an action may be brought by the reversioner as well as by the tenant in possession, each of them being entitled to recover his respective loss (*Biddlesford* v. *Onslow*, 3 Lev. 209; *Queen's College* v. *Hallett*, 14 East, 489; 1 Wms. Saund. 567, ed. 1871; *Jesser* v. *Gifford*, 4 Burr. 2141; Com. Dig. Action on the case for Nuisance (B.); see *Brown* v. *Mallett*, 5 C. B. 599; *Bell* v. *Twentyman*, 1 Q. B. 766; *Peter* v. *Daniel*, 5 C. B. 568; *Eyremont* v. *Pulman*, 1 Moo. & M. 403). **Actions by reversioner.**

It has been held that an action will lie for the continuance of a nuisance (*Todd* v. *Flight*, 9 C. B. N. S. 377; *R.* v. *Bradford Navigation*, 6 B. & S. 631); but the owners of the soil of a stream were not liable for the continuance of an obstruction which had been erected by another without their authority and against their will, and where they had offered permission to the plaintiff to remove it (*Saxby* v. *Manchester, &c. R. Co.*, L. R. 4 C. P. 198). **Action for continuance of nuisance.**

A riparian owner cannot, by scouring, remove gradual accretions to the bed of a river so as to restore its original flow, and such scouring will be restrained (*Withers* v. *Purchase*, 60 L. T. 819). **Scouring.**

Diversion of water is actionable without proof of actual damage where the defendant might thereby acquire a right injurious to the plaintiffs (*Wilts, &c. Co.* v. *Swindon, &c. Co.*, 9 Ch. 961), and will be restrained (*Ib.*) **Diversion.**

Obstruction is also actionable irrespective of actual damage (*Norbury* v. *Kitchin*, 15 L. T. 501; *McGlone* v. *Smith*, 22 L. R. Ir. 559); and will be restrained (*Dewhirst* v. *Wrigley*, 1 C. P. Coop. 319; see *Elwell* v. *Crowther*, 31 Beav. 163; *Belfast Co.* v. *Boyd*, 21 L. R. Ir. 560). **Obstruction.**

The owner of both banks of a non-tidal river may build on the bed provided he do not alter the natural flow of the water above or below his property, nor, in the case of a navigable river, interfere with the navigation (*Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 839). But the owner of one bank only is not entitled to build on his moiety of the bed in such a manner as to interfere with the natural flow of the stream; and a perpetual interdict was granted to restrain such encroachment, although there was no proof that damage had been sustained or was likely to be sustained (*Birkett* v. *Morris*, L. R. 1 H. L. Sc. 47); and this principle has been extended to tidal navigable rivers (*A. G.* v. *Lonsdale*, 7 Eq. 377; *A. G.* v. *Terry*, 9 Ch. 423; see *Exeter* v. *Devon*, 10 Eq. 232). It would seem that a riparian

Of Watercourses.

owner may erect a post for a ferry or for mooring a boat, or plant stakes to prevent poaching (*Withers* v. *Purchase*, 60 L. T. 821).

Damages and costs.

A right to take water from a well by reason of the occupation of a dwelling-house is an interest in land; and nominal damages having been recovered in an action for disturbing such a right, which was certified to be under forty shillings, the plaintiff was entitled to his full costs under 43 Eliz. c. 6, s. 2 (*Tyler* v. *Bennett*, 4 Ad. & E. 377; see 3 & 4 Vict. c. 24; *Shuttleworth* v. *Cocker*, 2 Sc. N. R. 47; *Thompson* v. *Gibson*, 5 Jur. 390). The expenses of the surveying in order to ascertain whether a weir had been improperly used to the prejudice of the plaintiff's water-mill will not be allowed on taxation (*Ormerod* v. *Thompson*, 16 M. & W. 860).

Relief in the Chancery Division.

Before the Jud. Acts, it was held that a bill in equity would lie for the establishment of the enjoyment of a watercourse, and for the performance of a covenant to cleanse it (*Holmes* v. *Buckley*, 1 Eq. Cas. Abr. 27, pl. 4; 2 Vern. 390; Gilb. Eq. C. 3; *New River Co.* v. *Graves*, 2 Vern. 431). And it was held, that a man who had been in possession of a watercourse sixty years might bring a bill against a mortgagee, who foreclosed the equity of redemption, to be quieted in the possession, although he had not established his right at law (*Bush* v. *Western*, Prec. Ch. 530; see *Dorset* v. *Girdler*, *Ib.* 531). The diversion of watercourses, or the pulling down their banks, and causing inundation, were nuisances against which a court of equity would protect parties by injunction (*Martin* v. *Stiles*, Mos. 144; see 1 Ves. sen. 476; 2 Atk. 302; 3 Atk. 726; 1 Vern. 120, 129). An injunction might be granted on the ground of danger to property (*Robinson* v. *Byron*, 1 Br. C. C. 588; see *Anon.*, 1 Ves. jun. 140; *Crowder* v. *Tinkler*, 19 Ves. 620); or on account of the irreparable injury (*Chalk* v. *Wyatt*, 3 Mer. 688). Forms of injunctions as to water rights are given, Seton, 5th ed. 510.

Interlocutory application for mandatory injunction.

The object of an interlocutory injunction is to keep matters in the suit *in statu quo* until the hearing of the cause (*Lawrence* v. *Austin*, 13 W. R. 981). An injunction, therefore, which virtually directs the defendant to perform an act, will not, except under very special circumstances, be granted on an interlocutory application before decree (*Blakemore* v. *Glamorganshire Navigation*, 1 M. & K. 154). The effect of an order specifically to repair the banks of a canal and other works has been obtained upon an interlocutory application by an order to restrain a party using and enjoying a canal from impeding the navigation, by continuing to keep the canal, banks, or works out of repair; or by diverting the water, or preventing it, by the use of locks, from remaining in the canals, or by continuing the removal of a stopgate (*Lane* v. *Newdigate*, 10 Ves. 192; see *Blakemore* v. *Glamorganshire Navigation*, 1 M. & K. 183). The tenant of a mine was restrained upon motion from permitting a communication with an adjoining mine to continue open, and water to flow through the same, the intended effect being to compel the defendants to close the communication (*Mexborough* v. *Bower*, 7 Beav. 127). An interlocutory application for a mandatory injunction was granted to prevent irreparable damage from water escaping into a mine (*Westminster Co.* v. *Clayton*, 36 L. J. Ch. 476).

Laches and acquiescence.

As to the effect of laches and acquiescence in depriving parties of their remedy by injunction, see *Weller* v. *Smeaton* (1 Br. C. C. 572; 1 Cox, 102); *Birmingham Canal Co.* v. *Lloyd* (18 Ves. 515; Coop. C. C. 77, 193); *Blakemore* v. *Glamorganshire Navigation* (1 M. & K. 154).

Lord Cairns' Act.

Whenever the Court of Chancery had jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it might award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance (21 & 22 Vict. c. 27, s. 2). This act has been repealed by 46 & 47 Vict. c. 49, but the repeal has not affected the jurisdiction of the Chancery Division (*Sayers* v. *Collier*, 28 Ch. Div. 103); as to which see now *Elmore* v. *Pirrie*, 57 L. T. 333.

Of Watercourses.

A riparian proprietor has a right of action for pollution of the water of a stream, except a right to pollute has been acquired by user (*Wood* v. *Waud*, 3 Exch. 748; *Magor* v. *Chadwick*, 11 Ad. & Ell. 571; see *Moore* v. *Webb*, 1 C. B. N. S. 673). And it is no defence that the pollution arises from a trade carried on in a reasonable and proper manner (*Stockport Co.* v. *Potter*, 7 H. & N. 160; see *Bamford* v. *Turnley*, 3 B. & S. 66). As to whether a person having permission from an owner of land on the bank of an artificial watercourse to take water thereout, can sue for pollution, see *Whaley* v. *Laing* (2 H. & N. 476; 3 H. & N. 675).

Pollution.

Action for damages.

An action may be maintained for the pollution of underground water (*Hodgkinson* v. *Ennor*, 4 B. & S. 229; *Ballard* v. *Tomlinson*, 29 Ch. Div. 115).

Having regard to the nature of the injury caused by pollution of water, an injunction, rather than damages, is the appropriate remedy (*Pennington* v. *Brinsop, &c. Co.*, 5 Ch. D. 769). For the general grounds upon which such an injunction will be granted, see the remarks of *Kindersley*, V.-C., in *Wood* v. *Sutcliffe*, 2 Sim. N. S. 165. A *quia timet* action to restrain an apprehended pollution may be maintained on proof of imminent danger of a substantial kind, or that the apprehended injury would be irreparable (*Fletcher* v. *Bealey*, 28 Ch. D. 688). Applications to the court to restrain the pollution of a stream should not be made upon trivial matters; but, on the other hand, it does not appear that anything like large or heavy damages must be recovered before the plaintiff can be assisted (*Lingwood* v. *Stowmarket Co.*, 1 Eq. 79; see *Elmhirst* v. *Spencer*, 2 Mac. & G. 45).

Injunctions to restrain pollution.

A riparian proprietor can maintain a suit to restrain the fouling of the water of the river without showing that the fouling is actually injurious to him (*Crossley* v. *Lightowler*, 2 Ch. 478). The fact that the stream is fouled by others is not a defence to a suit to restrain the fouling by one (*Crossley* v. *Lightowler*, 2 Ch. 478; *Blair* v. *Deakin*, 57 L. T. 522; see *Wood* v. *Waud*, 3 Exch. 748; *A. G.* v. *Leeds*, 5 Ch. 583).

Actual injury not necessary.

Previous pollution no justification.

Where there is jurisdiction to grant an injunction damages in substitution therefor may be given for injury which has occurred, whether before or since the commencement of the action (*Chapman* v. *Auckland Union*, 23 Q. B. Div. 298; *Warwick Co.* v. *Burman*, 63 L. T. 673).

A public body exercising its statutory powers so as to create or increase a nuisance by means of the sewage of a town may be made liable in damages or restrained by injunction in the same manner as an individual, unless it can show a statutory justification (*Goldsmid* v. *Tunbridge, &c. Commissioners*, 1 Ch. 349; *Holt* v. *Rochdale*, 10 Eq. 354; *A. G.* v. *Basingstoke*, 24 W. R. 817; *A. G.* v. *Acton*, 22 Ch. D. 221; and see *per James*, L. J., *Glossop* v. *Heston, &c. Board*, 12 Ch. Div. 111). And where the plaintiff has proved his right to an injunction the court does not inquire how the defendant can best remove the nuisance. The plaintiff is entitled to an injunction at once unless the removal of the injury is physically impossible; and it is the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to. In cases of great difficulty, however, the operation of the injunction may be suspended (*A. G.* v. *Colney Hatch*, 4 Ch. 146; *A. G.* v. *Birmingham*, 4 K. & J. 528; and see the orders made in *A. G.* v. *Richmond*, 2 Eq. 306; *A. G.* v. *Acton*, 22 Ch. D. 221). An injunction against a local authority may be enforced by sequestration (*Spokes* v. *Banbury*, 1 Eq. 42; *A. G.* v. *Walthamstow*, 1878, W. N. 90). An injunction to restrain pollution by the sewage of a town will not be granted, unless substantial injury is proved (*A. G.* v. *Kingston*, 34 L. J. Ch. 481; *Lillywhite* v. *Trimmer*, 15 W. R. 763; *A. G.* v. *Gee*, 10 Eq. 131; *A. G.* v. *Cockermouth*, 18 Eq. 172). In *Goldsmid* v. *Tunbridge Commissioners* (1 Ch. 355), *Turner*, L. J., said: "It is not in every case of nuisance that this court should interfere. I think it ought not to do so in cases in which the injury is merely temporary and trifling; but I think that it ought to do so in cases in which the injury is permanent and serious; and in determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it." Where, however, no substantial damage was proved an injunction was granted, on the ground that the defendants,

Public bodies liable.

Of Water-courses.

by their pleading, claimed a right to continue a wrongful act (*A. G.* v. *Acton*, 22 Ch. D. 221); or that they were acting in violation of a statute (*A. G.* v. *Cockermouth*, 18 Eq. 172; see *A. G.* v. *Shrewsbury Co.*, 21 Ch. D. 752).

Where a sewage nuisance has been created by the acts of others, and a local authority is subsequently constituted, but does no act to create or increase the nuisance, it cannot be made liable in damages or restrained by injunction, the remedy being by mandamus (*Glossop* v. *Heston, &c. Board*, 12 Ch. Div. 102; *A. G.* v. *Dorking*, 20 Ch. Div. 595; *A. G.* v. *Clerkenwell*, 1891, 3 Ch. 527). But as soon as the local authority begin to alter the sewers the jurisdiction to grant an injunction and give damages arises (*Warwick Co.* v. *Burman*, 63 L. T. 673). In one case a local authority was restrained from permitting a nuisance caused by another to continue where they could stop the nuisance without inconvenience to others (*Charles* v. *Finchley Board*, 23 Ch. D. 767).

Several forms of injunctions in the case of pollution of water are given in Seton, 528, 5th ed.

The right of a riparian proprietor to immediate relief by injunction is not interfered with by the month's notice required under 25 & 26 Vict. c. 102, s. 106 (*A. G.* v. *Hackney*, 20 Eq. 626); or under 38 & 39 Vict. c. 55, s. 264 (*Flower* v. *Low Leyton*, 5 Ch. Div. 347; *Chapman* v. *Auckland Union*, 23 Q. B. Div. 294, where damages were given in substitution).

Acquiescence and delay in case of pollution.

The doctrine of acquiescence, as applied to the right of riparian proprietors to restrain the pollution of a stream by sewage, was considered in *A. G.* v. *Halifax* (17 W. R. 1088); and as to delay in such a case, see *A. G.* v. *Bradford Canal* (2 Eq. 71); *A. G.* v. *Leeds* (5 Ch. 583).

The Act 39 & 40 Vict, c. 75, provides a summary means of preventing the pollution of rivers; see also Public Health Act, 1875, ss. 68 *et seq.*

Repair of drains.

The cleansing and repairing of drains and sewers is *primâ facie* the duty of him who occupies the premises, and does not devolve upon the owner merely as such (*Brent* v. *Haddon*, Cro. Jac. 555; *Cheetham* v. *Hampson*, 4 T. R. 319; *Boyle* v. *Tamlyn*, 6 B. & C. 329; *Russell* v. *Shenton*, 3 Q. B. 449; see *R.* v. *Kerrison*, 1 M. & S. 435; *Bullard* v. *Harrison*, 4 M. & S. 387; *Tenant* v. *Goldwin*, 1 Salk. 21, 360; 2 Salk. 770; *Payne* v. *Rogers*, 2 H. Bl. 349; *R.* v. *Pedly*, 1 Ad. & E. 822). If the owner of land, on which is a house, construct on other part of the land a sewer, and let the house, and afterwards by reason of the original faulty construction of the sewer, and the continued use of it by the owner in such a faulty state, the house is injured, the owner is liable to his lessee for keeping and continuing the sewer so constructed (*Alston* v. *Grant*, 3 Ell. & Bl. 128). If a lease be made of a house and piece of land, except the land on which a pump stands, with the use of the pump, the lessee may repair the pump, but an action of covenant does not lie against the lessor for not repairing it (*Pomfret* v. *Ricroft*, 1 Saund. 320; see *ante*, p. 64). Where an easement exists giving the owner of a house a right to bring water to his house through a pipe over adjoining land, such owner may go on the adjoining land to repair the pipe (*Goodhart* v. *Hyett*, 25 Ch. D. 182).

Commissioners of sewers.

The commissioners of sewers have not such a possession in their works as to enable them to maintain an action of trespass against wrong-doers; therefore in an action of trespass against the commissioners of a harbour for pulling down a dam erected by the former across a navigable stream, they were nonsuited (*Newcastle* v. *Clark*, 8 Taunt. 602). Commissioners of sewers may now acquire the legal interest and constructive possession of land and works under 3 & 4 Will. 4, c. 22, for amending the laws relating to sewers (See sects. 24, 38, 47, 57; *Stracey* v. *Nelson*, 12 M. & W. 535). The laws relating to sewers are further amended by 12 & 13 Vict. c. 50; 24 & 25 Vict. c. 133.

Action for escape of water.

Where in the ordinary and proper working of the defendant's mine water, which was naturally present there, flowed from his mine into the plaintiff's, the defendant was not liable (*Smith* v. *Kendrick*, 7 C. B. 564; *Clegg* v. *Dearden*, 12 Q. B. 576; compare *West Cumberland, &c. Co.* v. *Kenyon*, 11 Ch. Div. 782). On the other hand, where the defendant, the

Of Watercourses.

owner of an upper mine, pumped water into his mine which flooded a lower mine belonging to the plaintiff, it was held, that the defendant was liable (*Baird* v. *Williamson*, 15 C. B. N. S. 376). These decisions were followed by the House of Lords in a case which arose as to liability for the escape of water from a mine; and it was laid down, that where the owner of land without wilfulness or negligence uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned (*Rylands* v. *Fletcher*, L. R. 3 H. L. 330; see *Carstairs* v. *Taylor*, L. R. 6 Ex. 217; *Nichols* v. *Marsland*, 2 Ex. Div. 1; *Box* v. *Jubb*, 4 Ex. D. 78; *Hurdman* v. *N. E. R. Co.*, 3 C. P. D. 168; *Whalley* v. *Lancashire & Yorkshire R. Co.*, 13 Q. B. D. 131).

The occupier of the upper floor of a house was held not liable to the occupier of the lower floor for escape of water (*Ross* v. *Fedden*, L. R. 7 Q. B. 661).

Actions in respect of water rights arising by contract.

A contract was entered into between a canal company and the plaintiffs, the owners of paper mills, as to the mode of enjoyment of the waters by which both were supplied. The company did acts in violation of the contract, and proposed to continue them, and a bill was filed for an injunction. Held, that it was no answer to say that the acts proposed would not be injurious, or even to prove that they were beneficial to the plaintiffs; and the court, although no evidence was given of any actual damage done, granted an injunction (*Dickenson* v. *Grand Junction Co.*, 15 Beav. 260). In a case where an injunction was granted against heating water contrary to agreement, it was laid down that where the construction of a contract is clear and the breach clear, it is not a question of damage; but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction. And, *semble*, the court may so interfere whether the breach has or has not been actually committed, provided the defendant claims and insists on a right to do the act which would constitute such breach (*Tipping* v. *Eckersley*, 2 K. & J. 264). "There is a manifest distinction between cases depending on nuisance and those depending on contract. It is shown by the case of *Rochdale Co.* v. *King* (2 Sim. N. S. 78), and many other authorities, that where there is a contract the court cannot attach the same importance to the question whether the damage is serious or not, as it does in mere cases of nuisance; but that the main point is whether the contract has been broken" (*A. G.* v. *Mid Kent R. Co.*, 3 Ch. 104; and see, as to damages, *Lord Manners* v. *Johnson*, 1 Ch. D. 679; *Richards* v. *Revitt*, 7 Ch. D. 224). Injunctions were granted to restrain breaches of agreements as to sewage in *Wood* v. *Harrogate*, 1874, W. N. 132, 225; *Nuneaton* v. *General Sewage Co.*, 20 Eq. 127. As to specific performance of a contract to purchase the right to divert the water of a river, see *Wright* v. *Howard*, 1 S. & Stu. 190; *Shackelton* v. *Sutcliffe*, 1 De G. & S. 609; and of a contract to erect a pump and reservoir and supply water, see *Cooke* v. *Chilcott*, 3 Ch. D. 694.

Statutory powers.

Persons obtaining from the legislature powers to interfere with the rights of property are bound strictly to adhere to these powers, and to do no more than the legislature has pointed out (*Liverpool* v. *Chorley Co.*, 2 D. M. & G. 852; *Dawson* v. *Paver*, 5 Hare, 415). Further, if a public body, which has powers given it by a statute for the performance of a particular object, exercises its powers so as to injure the property of others, it is responsible for the injury, unless the act done was absolutely necessary for the performance of the object of the statute (*A. G.* v. *Colney Hatch*, 4 Ch. 146; *Metropolitan Asylum District* v. *Hill*, L. R. 6 H. L. 193; *Truman* v. *L. B. & S. C. R. Co.*, 29 Ch. Div. 89; compare *Vernon* v. *St. James'*, 16 Ch. Div. 449; *A. G.* v. *Hackney*, 20 Eq. 626).

A corporation empowered by statute to improve the navigation of the river were not liable to clear away weeds, &c., which, though injurious

Of Water-courses.

to adjoining lands, were no detriment to navigation (*Parrett Co.* v. *Robins*, 10 M. & W. 593; *Cracknell* v. *Thetford*, L. R. 4 C. P. 629). But the statutory powers may be so framed as to throw on the corporation an obligation to take care that no injury shall be caused to adjoining lands (*Gaddis* v. *Bann Reservoir*, 3 App. Cas. 430).

Where water is diverted in a manner, or to an extent not authorized by statutory powers, the diversion will not be restrained except at the instance of the A. G., or a person having a private interest in the stream (*Liverpool* v. *Chorley Co.*, 2 D. M. & G. 852; *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 212). As to the duty of the A. G. in such a case, see *A. G.* v. *G. E. R. Co.* (11 Ch. Div. 449), and as to private injury, see *Pudsey Co.* v. *Bradford* (15 Eq. 167).

A penalty for suffering washings to flow into and foul a well was held recoverable from a gas company in *Pipkins* v. *Birmingham Gas Co.* (5 H. & N. 74; 6 H. & N. 250). A power for a navigation company to alter a dam was held to continue, although the compensation commission had become extinct (*Kennet Co.* v. *Witherington*, 18 Q. B. 581). The funds of conservators of river banks were allowed to be applied in opposing a bill for a project likely to be injurious to the banks (*Bright* v. *North*, 2 Ph. 216).

Waterworks companies.

The statute 10 & 11 Vict. c. 17, consolidates the provisions usually contained in acts authorizing the making of waterworks for supplying towns with water. This act places the taking of streams upon the same footing as the taking lands under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18; and a waterworks company was restrained from diverting a stream belonging to the plaintiff, without first paying compensation for the same, or making deposit, and giving a bond, in accordance with the provisions of the latter act (*Ferrand* v. *Bradford*, 21 Beav. 412; see *Purnell* v. *Wolverhampton Co.*, 10 C. B. 576; *Hildreth* v. *Adamson*, 8 W. R. 470; *Busby* v. *Chesterfield Co.*, 1 El. Bl. & El. 176). As to compensation, see *Bush* v. *Trowbridge Co.*, 10 Ch. 459. A waterworks company was restrained from polluting a river, its act not authorizing the pollution (*Clowes* v. *Staffordshire Co.*, 8 Ch. 125). The statute 26 & 27 Vict. c. 93, consolidates in one act additional clauses frequently inserted in acts relating to waterworks. For a collection of the cases relating to waterworks companies, see Fisher's Digest, vol. vii. 602.

Navigable rivers.

In general, a riparian proprietor on a navigable river has (subject to the public right of navigation) the same rights of access as such a proprietor on a non-navigable river (*Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 673; *North Shore R. Co.* v. *Pion*, 14 App. Cas. 612). Whether a river be navigable or not is a question of fact for the jury (*Vooght* v. *Winch*, 2 B. & Ald. 662). The test in French law is, the possible use of the river for transport in some practical and profitable manner (*Bell* v. *Quebec*, 5 App. Cas. 84). The flux or reflux of the tide is evidence of a navigable river (*Miles* v. *Rose*, 5 Taunt. 705; *Colchester* v. *Brooke*, 7 Q. B. 373; see *Ilchester* v. *Raishleigh*, 61 L. T. 477). A judgment disaffirming an exclusive right to a river, is strong evidence in another action trying the same right, but not conclusive. On a question whether a creek be a public navigable river or not, instances of persons going up it for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it a public river (*Miles* v. *Rose*, 1 Marsh. 313; 5 Taunt. 705; 4 M. & S. 101).

Right of navigation.

The public right over a navigable river is a right to use the river for the purposes of navigation, similar to the right the public have to passage along a public road or footpath through a private estate (*Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 839; *Original Hartlepool Co.* v. *Gibb*, 5 Ch. D. 713; *Blount* v. *Layard*, 1891, 2 Ch. 689, n.) Windermere is a public highway (*Dixon* v. *Curwen*, 1877, W. N. 4). As to a piece of water which is a *cul de sac*, see *Bourke* v. *Davis* (44 Ch. D. 110). The liberty of passage on a public navigable river is not suspended when the tide is too low for vessels to float. The public right in this respect includes all such rights

Is the public right on the Norfolk broads see Micklethwaite v. Vincent.

Of Watercourses.

as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels along the channel. It is, therefore, no trespass if a vessel, which cannot reach her place of destination in a single tide, remains aground till the tide serves, although, by custom or agreement, a fine may be payable to the lord of the soil for such grounding. If property (as oysters) be placed in the channel of a public navigable river, so as to create a public nuisance, a person navigating is not justified in damaging such property, by running his vessel against it if he has room to pass without so doing; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public. And, therefore, the fact that such property was a nuisance is no excuse for running upon it negligently (*Colchester* v. *Brooke*, 7 Q. B. 339). The public right of navigating a river may be connected with a right of access to a particular part of bank, which latter is a private right (*Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; *Bell* v. *Quebec*, 5 App. Cas. 84). As to the reasonable limits of the right of a riparian owner to moor a vessel alongside his wharf, see *Original Hartlepool Co.* v. *Gibb* (5 Ch. D. 713). The public have a right to use steam power in navigating public canals, provided it occasions no more than the ordinary injury to it (*Case* v. *Midland R. Co.*, 27 Beav. 247).

Extinction of right of navigation.

Although an adverse enjoyment for the space of twenty years is, as against a private individual, evidence of a grant by him, yet it is otherwise in the case of a public river navigable by all the Queen's subjects: for no obstruction for twenty years will bar a public right (*Vooght* v. *Winch*, 2 B. & Ald. 662; *Weld* v. *Hornby*, 7 East, 195). A public right of navigation may be extinguished either by an act of parliament, a writ *ad quod damnum* and inquisition, or, under certain circumstances, by commissioners of sewers, or by natural causes, such as the recess of the sea, or accumulation of silt or mud. And where a public road, obstructing a channel once navigable, has existed for so long a time that the state of the channel when the road was made cannot be proved, it is to be presumed that the right of navigation was legally extinguished (*R.* v. *Montague*, 4 B. & C. 598). The law has made no provision for the clearing of such a highway in the case of accumulation of silt or any other natural cause by which the channel becomes choked up; and in such cases the river ceases to be navigable, at least until such causes are by some means counteracted (*Colchester* v. *Brooke*, 7 Q. B. 374).

Obstructions to navigation.

A corporation, being the conservators of a river, and the owners of the soil between high and low water mark, cannot authorize their lessee to erect a wharf there which produces inconvenience to the public in the use of the river for the purposes of navigation (*R.* v. *Grosvenor*, 2 Stark. N. P. C. 511). Where the declaration stated that the defendant wrongfully placed timber in a certain navigable river, whereby the rightful access to the plaintiff's public-house was obstructed, and divers persons who would otherwise have come to the plaintiff's house, and taken refreshments there, were prevented from so doing: held, that the declaration stated no act on the defendant's part amounting to a public nuisance: but that if it had done so, the plaintiff might nevertheless maintain an action for the particular injury to himself, and that there was a sufficient allegation of special damage (*Rose* v. *Groves*, 5 M. & G. 613; *Dobson* v. *Blackmore*, 9 Q. B. 991). An action will lie for the special damage occasioned to a party conveying goods along a navigation, by its obstruction by a barge moored across, whereby he was compelled to unload and carry his goods overland (*Rose* v. *Miles*, 4 M. & S. 101).

A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the Crown before the commencement of the reign of Edward the First. Such a grant may be inferred from evidence of its having existed before that time. If the weir when so first granted obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. Where the Crown had no right

Of Water-courses.

to obstruct the whole passage of a navigable river it had no right to erect a weir obstructing a part, except subject to the rights of the public; and therefore in such a case the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere (*Williams* v. *Wilcox*, 8 Ad. & Ell. 314; *Rolle* v. *Whyte*, L. R. 3 Q. B. 286; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657). It is not competent, either to the Crown or to a subject, to use the soil of a navigable river for any purpose amounting to a nuisance (*A. G.* v. *Johnson*, 2 Wils. C. C. 87). Where the defendant, as grantee of the Crown, was entitled to the soil of a navigable river, such ownership did not justify him in constructing a jetty which interfered with the navigation (*A. G.* v. *Lonsdale*, 7 Eq. 377).

Conservators empowered by statute to remove obstructions to navigation were held not liable for damage to a barge injured by an obstruction, on the ground that they were unpaid trustees appointed for public purposes and with a discretionary power, but no compulsory duty of removing obstructions (*Forbes* v. *Lea Board*, 4 Ex. D. 116; see also *Jolliffe* v. *Wallasey Board*, L. R. 9 C. P. 62, where a public body was held guilty of negligence in the performance of a public duty with regard to navigation).

Where a vessel is sunk by accident, and without any default in the owner or his servant, in a navigable river, and remains there under water, no duty is ordinarily cast upon the owner to use any precaution, by placing a buoy or otherwise, to prevent other vessels from striking against it (*Brown* v. *Mallett*, 5 C. B. 599).

An owner of land at the side of a public navigable river cannot erect on the bed of the river, for the benefit of his own trade, any structure, whether an actual obstruction to navigation or not (*A. G.* v. *Terry*, 9 Ch. 423; see *Booth* v. *Ratte*, 15 App. Cas. 188). One who erects on the shore of a navigable river between high and low water mark, a work for the more convenient use of his wharf adjoining, which presents a dangerous obstruction to navigation, is responsible for an injury thereby occasioned to a barge coming to the wharf, without any default on the part of the persons in charge (*White* v. *Phillips*, 15 C. B. N. S. 245). As to the liability of wharfingers in respect of the bed of a navigable river adjoining their jetty, see *The Moorcock* (14 P. Div. 64; *The Calliope*, *Id.* 138; and 1891, A. C. 11). As to the right of persons entitled to land from a navigable river on the bank adjoining, to pass over permanent obstructions, see *Eastern Counties R. Co.* v. *Dorling* (5 C. B. N. S. 821); *Marshall* v. *Ulleswater Co.* (L. R. 7 Q. B. 166).

A corporation empowered by statute to improve navigation was held entitled to sue in respect of abstraction of water without proof of actual damage to navigation (*Medway Co.* v. *Romney*, 9 C. B. N. S. 575). The Att. Gen. can restrain interference with the public right of navigation without showing actual injury (*A. G.* v. *Shrewsbury Co.*, 21 Ch. D. 752). As to purpresture and the remedy in that case, see *A. G.* v. *Johnson* (2 Wils. C. C. 87).

Ownership of soil of tidal waters.

The presumption as to the ownership of the soil of rivers depends on whether they are tidal or non-tidal (See *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 847). In the case of navigable tidal waters (including rivers, estuaries, and arms of the sea), the presumption is that the soil is vested in the Crown (*Gann* v. *Free Fisheries of Whitstable*, 11 H. L. C. 192; *A. G.* v. *Tomline*, 14 Ch. Div. 69; *A. G.* v. *Emerson*, 1891, A. C. 649). But the soil of tidal waters may be vested in a subject (*A. G.* v. *Emerson*, *sup.*; *Neil* v. *Devonshire*, 8 App. Cas. 135). So the City of London has been stated to own the soil of the Thames (Dav. 56, b; Com. Dig. Navigation (B.); see, however, *A. G.* v. *London*, 2 Mac. & G. 247; *A. G.* v. *Johnson*, 2 J. Wils. C. C. 87). A title to the foreshore on a tidal navigable river was held established as against the Crown by acts of possession on the part of an adjoining owner, subject however to the public right of navigation (*Lord Adv.* v. *Blantyre*, 4 App. Cas. 770; see *A. G.* v. *Emerson*, *sup.*) As to the duties of an owner of land abutting on a tidal navigable river, in respect of a river wall, see *Nitro-Phosphate Co.* v. *London and*

St. Katharine's Docks (9 Ch. Div. 524); *Burt* v. *Victoria Co.* (47 L. T. 378).

Of Watercourses.

In the case of a non-tidal navigable lake, the Crown has no *de jure* right to the soil (*Bristowe* v. *Cormican*, 3 App. Cas. 641). It is, however, doubtful whether the riparian owners are entitled *ad medium filum* (*Ib.* 666). In the case of non-tidal navigable rivers, the presumption is that the soil is the property of the owners on each side to the middle of the river, and if a man owns the land on both sides, the presumption is that the whole bed of the river belongs to him (*Blount* v. *Layard*, 1891, 2 Ch. 689, n.) And the same presumptions apply in the case of a non-navigable river (Hale de Juré, Maris, Cap. I.; *Carter* v. *Murcot*, 4 Burr. 2162; Harg. L. Tracts, 5; Davies, R. 155; *R.* v. *Wharton*, 12 Mod. 510; *Bickett* v. *Morris*, L. R. 1 H. L. Sc. 58). But in each case it is a question of fact, and the owner of the land on one side of a river only may be entitled to the whole bed (*Jones* v. *Williams*, 2 M. & W. 326); See the evidence of acts of ownership in the last-mentioned case, and in *Smith* v. *Andrews*, 1891, 2 Ch. 678; *Blount* v. *Layard*, *Ib.* 681, n.; *Lord Adv.* v. *Blantyre*, 4 App. Cas. 770, 791.

Soil of non-tidal waters (whether navigable or non-navigable).

The right of ownership of the moiety of the bed of such a river passes, according to a legal presumption, under a conveyance of land on one bank, whether the land is freehold, copyhold, or leasehold (*Tilbury* v. *Silva*, 45 Ch. Div. 98); and this even where the conveyance points to a boundary which would not include any part of the bed (*Crossley* v. *Lightowler*, 3 Eq. 279); or where the quantity specified in the deed and the colouring on the map, excludes the bed (*Micklethwait* v. *Newlay Co.*, 33 Ch. Div. 133); or where the river is of more than ordinary breadth (*Dwyer* v. *Rich*, I. R. 6 C. L. 144). The presumption applies also where the grantor is owner of both banks of the river (*Micklethwait* v. *Newlay Co.*, *sup.*) The presumption may be rebutted by surrounding circumstances (*Devonshire* v. *Pattinson*, 20 Q. B. Div. 263); but not by reason of subsequent circumstances not contemplated at the time of the grant (*Micklethwait* v. *Newlay Co.*, *sup.*)

An act of parliament, passed for the purpose of making navigable a natural river, does not vest in the undertakers of the navigation the bed of the river, but gives them for that purpose the mere privilege of scouring and cleansing it, which is a mere easement (*R.* v. *Mersey Navigation*, 9 B. & C. 114; *R.* v. *Thomas*, *Ib.* 95). The proprietors of a navigation have no property either in the soil over which the water flows or in the adjoining banks under an act of parliament allowing them the use of the land through which the river passes (*Hollis* v. *Goldfinch*, 1 B. & C. 221).

The fee simple in the towing-path by the River Lee remains in the adjoining owner, subject to the rights of the conservators in connection with navigation (*Lee Conservators* v. *Button*, 6 App. Cas. 685). As to the liability of conservators for the condition of a towing-path, see *Winch* v. *Thames Conservators* (L. R. 9 C. P. 378). The public are not entitled at common law to tow on the banks of ancient navigable rivers; the right must be founded on statute or on usage (*Ball* v. *Herbert*, 3 T. R. 256; see 1 Lord Raym. 725; Bull. N. P. 90; 6 Mod. 163, *contra*; see also *Pierce* v. *Falconberge*, 1 Burr. 292).

The use of the banks of the river for more than twenty years by fishermen, who have occasionally sloped and levelled them, is evidence of a grant of a right of landing by the owner of the soil, although both the fishery and landing-place once belonged to the same person, and there was no evidence to show that the former owner, or those who claimed under him, knew that the shore had been so used (*Gray* v. *Bond*, 2 Brod. & Bing. 667).

A right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water (*Lord* v. *Sydney*, 12 Moo. P. C. C. 473).

Rights as to the seashore.

In the absence of all evidence of particular usage, the extent of the right of the Crown to the seashore landwards is *primâ facie* limited by the line of the medium high tide between the springs and the neaps (*A. G.*

Of Water-courses.

v. *Chambers*, 4 D. M. & G. 206; *Lowe* v. *Govett*, 3 B. & Ad. 863; *Ilchester* v. *Raishleigh*, 61 L. T. 479). The foreshore is vested in the Crown subject to an obligation to protect the realm from the inroads of the sea by maintaining natural barriers, and neither the Crown nor a subject claiming under the Crown can remove shingle so as to destroy a natural barrier (*A. G.* v. *Tomline*, 14 Ch. Div. 58; see *A. G.* v. *Emerson*, 1891, A. C. 649).

The seashore between high and low water mark may be parcel of the adjoining manor (*Constable's case*, 5 Rep. 107; Harg. L. Tracts, 12); and where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible in evidence, to show that such seashore is parcel of the manor (*Beaufort* v. *Swansea*, 3 Exch. 413; *A. G.* v. *Jones*, 2 H. & C. 347; *Culmady* v. *Rowe*, 6 C. B. 861; see *A. G.* v. *Emerson*, 1891, A. C. 649). As to the entries on the court rolls, which may be used as evidence in support of the lord's title, see *Ex p. Tomline* (21 W. R. 475). In a dispute between a lord of the manor and the corporation of an adjoining port as to the right of foreshore, a decision between the parties in an action tried 150 years before, followed by a long enjoyment on the part of the winner, and long acquiescence on the part of the loser, was held to be *primâ facie* binding on the latter (*Ib.*) Similarly, usage may explain a grant of wreck (*Chad* v. *Tilsed*, 2 Brod. & Bing. 403).

As to what words in a grant will pass the soil of the foreshore, see *Scratton* v. *Brown* (4 B. & C. 485).

The owner of a tenement adjoining the sea was held to have the same right of access to the sea as a riparian proprietor has to a tidal river (*A. G. Straits Settlement* v. *Wemyss*, 13 App. Cas. 192).

A person in possession of foreshore may maintain trespass against a wrongdoer without displacing the Crown's title (*Hastings* v. *Ivall*, 19 Eq. 558).

The public have no common law right to bathe in the sea, and as incident thereto of crossing the shore on foot or with bathing machines (*Blundell* v. *Catterall*, 5 B. & Ald. 268; see *Mace* v. *Philcox*, 15 C. B. N. S. 600; 12 W. R. 670). So there is no common law right of entering seashore to take seaweed (*Howe* v. *Stowell*, 1 Alcock & Napier, 348); or of drawing up fishing boats on the shore (*Ilchester* v. *Raishleigh*, 61 L. T. 478).

As to the boundary of a parish which lies on the seashore or extends up to a tidal river, see *Bridgwater* v. *Bootle-cum-Linacre* (2 Eq. 4).

Alluvium.

Gradual accretions of land from the sea belong to the owner of the land gradually added to (*R.* v. *Yarborough*, 3 B. & C. 91; 5 Bing. 163; 2 Bligh. N. S. 147; *Doe* v. *East India Co.*, 10 Moo. P. C. 140; see *Scratton* v. *Brown*, 4 B. & C. 485). Similarly in the case of accretions from a non-navigable river (*Ford* v. *Lacey*, 30 L. J. Ex. 351). Conversely land gradually encroached upon by water ceases to belong to the former owner (*Re Hull and Selby R. Co.*, 5 M. & W. 327). This law is based on the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water (See *Foster* v. *Wright*, 4 C. P. D. 446).

The title to alluvium, arising from artificial causes, does not differ as to the rights of landowners, from the title to alluvium arising from natural causes, where the artificial causes arise from a fair use of the land adjoining the seashore, and not from acts done with a view to the acquisition of the seashore. Where the acts of ownership relied on consisted merely of turning cattle upon a marsh which crossed the invisible line of boundary separating the marsh from the seashore, and the cattle were allowed to stray without interruption, Lord *Chelmsford*, C., said, "The effect of acts of ownership must depend partly upon the acts themselves, and partly upon the nature of the property upon which they are exercised. If cattle are turned upon enclosed pasture ground, and placed there to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the

trouble of preventing it; there, mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by the party interested in resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition" (*A. G.* v. *Chambers*, 4 De G. & J. 55, see p. 65; and see *Re Hainault Forest Act*, 9 C. B. N. S. 648, and Lord *Blackburn's* remarks *Lord Adv.* v. *Blantyre*, 4 App. Cas. 791).

Ferries.

A ferry is the exclusive right to carry passengers across a river or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another, and not a servitude imposed upon a district or large area of land, and is wholly unconnected with the ownership or occupation of land (*Newton* v. *Cubitt*, 12 C. B. N. S. 32; see *R.* v. *Matthews*, 5 El. & Bl. 546). All common ferries have their origin in royal grant or in prescription which presumes such grant (*Letton* v. *Goodden*, 2 Eq. 131). A custom of keeping a ferry boat was alleged by a parish (3 Mod. 294). Thirty-five years exercise of the usage was sufficient to show a legal origin (*Trotter* v. *Harris*, 2 Y. & J. 285).

In an action for an evasion of an ancient ferry, by carrying passengers across the river near thereto, the defendant cannot plead circumstances to show that from the altered state of the neighbourhood public convenience required that which the defendant has done (*Newton* v. *Cubitt*, 5 C. B. N. S. 627).

A right of ferry is a matter in which the public are interested, and of which therefore reputation is evidence, and so also is a verdict or judgment of a court of competent jurisdiction, touching the same right, although between other parties (*Pim* v. *Currell*, 6 M. & W. 234).

A ferry forms part of the King's highway, and its owner is bound, under pain of indictment, to maintain the ferry at all times for the use of the public (*Letton* v. *Goodden*, 2 Eq. 131).

(6.) OF THE RIGHT TO PEWS.

General right with regard to pews.

Of common right, the soil and freehold of the church is the parson's; the use of the body of the church, and the repair of it common to the *parishioners;* and the disposing of the seats therein the right of the ordinary (Hob. 69; Gibs. Cod. tit. 9, c. 4).

According to the common law the rector, whether endowed or spiritual only, is entitled to the chief seat in the chancel, unless some other person be in a condition to prescribe for it from time immemorial. The ecclesiastical court, in the exercise of its ordinary authority, would allot to him such sitting and protect him against the disturbance of such right (*Spry* v. *Flood*, 2 Curt. 357). By the general law, and of common right, all the pews in a parish church are the common property of the parish; they are for the use *in common* of the parishioners, who are all entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers, subject to the control of the ordinary (12 Rep. 105; 3 Inst. 202; *Halliday* v. *Phillips*, 23 Q. B. Div. 53; *Blake* v. *Usborne*, 3 Hagg. Eccl. R. 733). The churchwardens have a discretionary power to appropriate the pews in the church amongst the parishioners, and may remove persons intruding on seats already appropriated (*Reynolds* v. *Monkton*, 2 M. & Rob. 384).

Particular rights.

The general right then being in the parish and the ordinary, any particular rights in derogation of these are *stricti juris;* it is the policy of the law that few of these exclusive rights should exist, because it is the object of the law that all the inhabitants should be accommodated; and it is for the general convenience of the parish that the occupation of pews should be altered from time to time, according to circumstances. A possessory

Of the Right to Pews.

right is not good against the churchwardens and the ordinary (*Halliday* v. *Phillips*, 23 Q. B. Div. 53). The churchwardens may displace, and make new arrangements, but they ought not without cause to displace persons in possession; if they do, the ordinary would reinstate them: the possession therefore will have its weight,—the ordinary would give a person in possession, *cæteris paribus*, the preference over a mere stranger (1 Phill. R. 324). The churchwardens are not justified in dispossessing any one of a sitting which he has enjoyed for a time, without giving notice of their intention, and offering an opportunity for explanation (*Horsfall* v. *Holland*, 6 Jur. N. S. 278). A possessory right is sufficient to maintain a suit against a mere disturber (*Spry* v. *Flood*, 2 Curt. 356). The fact of possession implies either the actual or virtual authority of those having power to place. The disturber may show that he has been placed there by this authority, or must justify his disturbance by showing a paramount right,—a right paramount to the ordinary himself; namely, a faculty by which the ordinary has parted with the right; or if there be no proof of a faculty, there may be proof of prescription, and such immemorial usage as presumes the grant of a faculty (1 Phill. R. 324). Such a grant may be presumed although there may be evidence that the pew was originally acquired under circumstances which would not confer a legal right (*Halliday* v. *Phillips*, 1891, A. C. 228). Where the prescription is interrupted, the jury are not bound to presume a faculty from long undisturbed possession (*Morgan* v. *Curtis*, 3 M. & R. 389). On the expiration of a faculty, as where one was granted for ninety-nine years, the right of the parishioners to the use of the pew revives (3 Hagg. Eccl. R. 733). A faculty (for annexing a pew to a messuage) obtained by surprise and undue contrivance may be revoked (2 Hagg. Eccl. R. 417).

Particular rights founded on faculty or prescription.

Prescriptive right to pews, how proved.

Lord *Penzance* expressed an opinion that a prescriptive right to a pew in the nave of a parish church cannot be claimed under sect. 2 of the Prescription Act (*Crisp* v. *Martin*, 2 P. D. 15; see *Halliday* v. *Phillips*, 23 Q. B. Div. 54).

A *prescriptive right* must be clearly proved; the facts must not be left equivocal; and they must be such as are not inconsistent with the general right. In the first place, it is necessary to show that the use and occupation of the seat have been from time immemorial appurtenant to a certain messuage, not to lands; the ordinary himself cannot grant a seat appurtenant to lands. Secondly, it must be shown that if any acts have been done by the inhabitants of such messuage they maintained and upheld the right. At all events, if any repairs have been required within memory, it must be proved that they have been made at the expense of the party setting up the prescriptive right (Compare *Crisp* v. *Martin*, 2 P. D. 15). The *onus* and *beneficium* are supposed to go together; mere occupancy does not prove the right. What might be the effect of very long occupancy, where no repairs have been necessary, does not appear to be decided. It is a common error to suppose that by mere occupancy pews become annexed to particular houses. In country parishes the same families occupy the same pews for a long time, but they still belong to the parish at large; if, however, it is shown that the inhabitants of a particular house *have repaired*, that fact establishes that the burthen and benefit have gone together, and is inconsistent with the right of the parish still to claim the benefit, and is evidence of the annexation of the pew. Thus the uniform and exclusive possession of the inhabitants of a particular messuage connected with the burthen of maintaining and repairing the seat is evidence sufficient to establish a prescriptive title (1 Phill. R. 325-6). To exclude the jurisdiction of the ordinary, the strongest evidence is the building and repairing time out of mind; but mere repairing for thirty or forty years will not exclude the ordinary (*Stocks* v. *Booth*, 1 T. R. 428; *Walter* v. *Gunner*, 1 Hagg. 322). The evidence was considered (*Halliday* v. *Phillips*, 23 Q. B. Div. 54; 1891, A. C. 228). The possession must be ancient, and going beyond memory, though on this subject the high legal memory, even before the act 2 & 3 Will. 4, c. 71, was not required (1 Hagg. Cons. R. 322).

Of the Right to Pews.

Evidence of repair to a pew claimed by prescription is not absolutely necessary, as no repair may have been made within the period of anyone living (*Knapp* v. *Willesden*, 2 Rob. Ec. Rep. 358). Twenty years' adverse possession seems to bar the right to a pew (1 Phill. R. 328).

Where the members of a corporation have as such occupied a particular pew in the parish church, the repairs of it may be properly charged on the borough fund (*R.* v. *Warwick*, 10 Jur. 262; 15 L. J. Q. B. 306).

Extra-parochial persons.

Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title (*Byerly* v. *Windus*, 5 B. & C. 1; as to prohibition against granting a faculty, see *Hallack* v. *Cambridge*, 1 Q. B. 593). A pew in an aisle or chancel may belong to a non-parishioner, for the case of an aisle or chancel depends upon, and is governed by, other considerations (2 Addams, R. 427). A pew in the body of the church may be prescribed for as appurtenant to a house out of the parish (*Davis* v. *Witts*, Forr. R. 14; *Lonsley* v. *Hayward*, 1 Y. & J. 583). A man may prescribe for a chancel or for an aisle, or for a pew in an aisle, or even in the nave of a church, if he prescribes for that he and those whose estate he has, have always had it, and have always repaired it, even though the estate or house in question be out of the parish (*Per Kindersley*, V.-C., *Churton* v. *Frewen*, 2 Eq. 656).

Prescriptive right to pew cannot be severed from occupancy of messuage.

A pew annexed by prescription to a certain messuage cannot, as is often erroneously conceived, be severed from the occupancy of the house, but passes with the messuage, the tenant of which for the time being has *de jure* the prescriptive right to the pew (1 Hagg. Cons. R. 319; 1 T. R. 430; 3 M. & R. 334; 2 Ad. 428); which cannot be sold nor let without a special act of parliament (1 Hagg. Eccl. R. 319, 321); or under the provisions of the Church Building Acts (See 58 Geo. 3, c. 45, ss. 65, 66, 75—79; 59 Geo. 3, c. 134, ss. 26, 32; 8 & 9 Vict. c. 70, s. 11). Where an occupier of a pew ceases to be an inhabitant of the parish, he cannot let the pew with and thus annex it to his house, but it reverts to the disposal of the churchwardens (1 Hagg. Eccl. R. 34). A person who has permission from the churchwardens to sit in a pew temporarily, and in order, by keeping possession for the future tenant, to carry into effect the conditions of sale of a house with which the pew has for above a century been held under an expired faculty, has no possession on which he can bring a suit for perturbation of seat against a mere intruder, such permission by the churchwardens being illegal, as confirming the sale of the pew (*Blake* v. *Usborne*, 3 Hagg. Eccl. R. 726). Customs pleaded, "that pews are appurtenant to certain houses, and are let by the owners to persons who are not inhabitants of the parish," are bad (1 Hagg. Cons. R. 317). Custom, "that persons who had not pews appurtenant pay rent for seats, which is applied in payment of the parish rate," is a practice which has been constantly reprehended by the ecclesiastical courts, and discouraged as often as set up (1 Hagg. Cons. R. 317). But if a house to which a pew is appurtenant be let to a *parishioner*, in that character he is clearly entitled to the pew (2 Add. 428).

32 & 33 Vict. c. 94, contains provisions for the surrender of pews which are private property, or subject to any trust to the bishop of the diocese or the ecclesiastical commissioners. And by 35 & 36 Vict. c. 49, provision is made for the free use of seats in certain churches.

Right to vote in respect of pews.

On the construction of private acts it was held that the proprietors of pews did not acquire such a freehold interest in the soil of the church as entitled them to a county vote; but only a right to sit in it to hear divine service, which right was of the nature of an easement (*Hinde* v. *Chorlton*, L. R. 2 C. P. 104; *Brumfitt* v. *Roberts*, L. R. 5 C. P. 224; *Greenway* v. *Hockin*, *Ib.* 235).

Mortgage of pew rents.

A mortgage of pew rents made by a vicar of a district church is void under 13 Eliz. c. 20 (*Ex p. Arrowsmith*, 8 Ch. Div. 96), where it was said that the pew rents resembled the payment which the lord of a manor received for stallage in a market.

Chancels.

A pew in a chancel may legally belong to a party in respect of the ownership of a house (*Parker* v. *Leach*, 4 Moore, P. C. C. 180).

Of the Right to Pews.

Immemorial repair of a chapel or lesser chancel, which is part of a parish church, coupled with other acts of ownership, is evidence of a freehold of inheritance in it being vested in those who have executed the repairs and exercised the acts of ownership. Such a freehold may be vested in a private person: and the enjoyment of such a chapel or chancel, and the right to its exclusive use is not necessarily annexed to a dwelling-house (*Chapman* v. *Jones*, L. R. 4 Ex. 273). Even though the freehold may not be in the person prescribing, immemorial use and occupation, coupled with reparation, may entitle the lord of the manor by prescription to the perpetual and exclusive use of the chancel, and such a right may be appendant to an estate or house not situate in the parish (*Churton* v. *Frewen*, 2 Eq. 634). On the question whether a building forms part of the chancel of a parish church, or is private property, see *Norfolk* v. *Arbuthnot*, 5 C. P. Div. 390.

Remedy for disturbance of pews by action.

Where a pew is claimed as annexed to a house by faculty or prescription, the courts of common law exercise jurisdiction, on the ground of the pew being an easement to the house, and the proper remedy for a disturbance is an action (*Mainwaring* v. *Giles*, 5 B. & Ald. 361). Where the pew is in a chancel, the freehold of an individual, the right to it is triable at common law (*May* v. *Gilbert*, 2 Bulstr. 151). The ecclesiastical court has jurisdiction in all suits respecting pews; but where prescriptive rights come in question, prohibition will be granted on the application of either party, for the purpose of having the prescription tried by a jury (Report of Eccl. Commrs., p. 49; see *Re Bateman*, 9 Eq. 660). If a man claiming title by prescription to an aisle, chancel, &c., as his freehold, or to a pew or seat in the body of the church, or in an aisle, &c., as appurtenant to a house in the parish, is disturbed therein by the parson, ordinary, or churchwardens, by a suit in the spiritual court, he may have a prohibition, if he suggest as grounds for it that he or those whose estate he hath, built, or time out of mind repaired, and therefore had the sole use of such aisle, or of such pew or seat; for the party has a right to a trial of the prescription in a temporal court (See 1 Burn's Eccl. Law, 8th ed., 366, 367; *Witcher* v. *Cheslam*, 1 Wils. 17; *Corwen* v. *Pym*, 12 Rep. 105; *Jacob* v. *Dalton*, 2 Raym. 1755; *Boothby* v. *Bailey*, Hob. 69; *Francis* v. *Lee*, Cro. Jac. 366; *Day* v. *Beddingfield*, Noy's Rep. 104; *Buxton* or *Bunton* v. *Bateman*, 1 Sid. 89; *S. C.*, 1 Lev. 71; Sir T. Raym. 52; *Crook* v. *Sampson*, 2 Keb. 92; *Brabin* v. *Tradum*, Poph. 140; 2 Roll. Abr. 287, 288).

Evidence.

The uninterrupted possession of a pew in a church for twenty years affords presumptive evidence of a legal title by prescription, or by a faculty against a wrongdoer (*Darwin* v. *Upton*, 2 Wms. Saund. 506, ed. 1871). But if the right was claimed as appurtenant to an ancient messuage the claim would, before the stat. 2 & 3 Will. 4, c. 71, be rebutted by proof that the pew began to exist within time of legal memory (*Griffith* v. *Matthews*, 5 T. R. 296; see *Crisp* v. *Martin*, 2 P. D. 15). In an action on the case for disturbing the plaintiff in the possession of a pew in a church, which the plaintiff and those under whom he claimed had been in the uninterrupted enjoyment of for thirty-six years, but which appeared in evidence to have been an open pew before that period; the judge recommended the jury to presume a title in the plaintiff after so long a possession as thirty-six years, and the Court of King's Bench afterwards, on a motion for a new trial, held the direction of the judge proper (*Rogers* v. *Brookes*, 1 T. R. 431, n.) A pew in a parish church was claimed in respect of an ancient messuage; and it was proved that, so far as living memory extended, the pew in question had been one of three pews adjoining each other, and under one and the same claim of right, viz., in respect of the said ancient messuage: it was held, that proof of repairs done to one of the pews, not that in question, was evidence as to all, and therefore as to that in question (*Pepper* v. *Barnard*, 12 L. J. Q. B. 361). The pew must be laid in the declaration as appurtenant to a messuage in the parish, otherwise a bare possession of the pew for sixty years and more is not sufficient title to maintain an action on the case for disturbing the plaintiff in his enjoyment thereof, but he must

Of the Right to Pews.

prove a prescriptive right or faculty (*Stocks* v. *Booth*, 1 T. R. 428). So where a pew in a chancel, claimed in right of a messuage, was shown to have been erected on the site of old open seats in 1773, and there was no evidence of any faculty on search for one at the proper places; it was held, that the judge rightly directed the jury, that the evidence of the former open state of the seats destroyed the prescription, and left it to them to say whether, upon the evidence merely of long undisturbed possession, any faculty existed (*Morgan* v. *Curtis*, 3 M. & R. 389). See also *Halliday* v. *Phillips*, 1891, A. C. 228.

The grant of part of the chancel of a church by a *lay impropriator* to A., his heirs and assigns, is not valid in law, and therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down his or their pews there erected (*Clifford* v. *Wicks*, 1 B. & Ald. 498).

But the churchwardens have not, as against the incumbent of a church or chapel, a joint possession of it, so as to disable him from maintaining trespass against them for acts of violence in pulling down pews; and a chapelwarden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews without the consent of the perpetual curate (*Jones* v. *Ellis*, 2 Y. & J. 265). The perpetual curate of an augmented parochial chapelry has a sufficient possession whereon to maintain trespass for breaking and entering the chapel and destroying the pews (*Ib.*)

As well priority in a seat as a seat itself in the body of a church may be claimed by prescription, as belonging to a house, by the inhabitants of it, who have repaired the seat time out of mind, and an action on the case for a disturbance lay at common law (*Carleton* v. *Hutton*, Noy, 78; Gibs. 221).

Where the action is brought against a stranger, the plaintiff is not bound to state in his declaration that he has repaired the pew, though it is otherwise when the action is brought against the ordinary; in which case a title or consideration must be shown in the declaration and proved, as the building or repairing of the pew (*Kenrick* v. *Taylor*, 1 Wils. 326; *Ashley* v. *Freckleton*, 3 Lev. 73; see *Fiske* v. *Rovitt*, Lofft, 423; Com. Dig. Action upon the Case for Disturbance (A. 3); Gibs. 197, 198).

The right to sit in a pew may be apportioned (*Harris* v. *Drewe*, 2 B. & Ad. 164).

Remedy in the Chancery Division.

It seems that a bill in equity would not lie to be quieted in the possession of a pew, though there was a decree for it before the ordinary (*Baker* v. *Child*, 2 Vern. 226). A bill was filed by a single parishioner against the churchwardens, alleging an intention on the part of the defendants to execute work in the church which would be injurious to himself, and praying an injunction. It is questionable whether this is a private nuisance, and whether such a bill can be sustained by a single parishioner against the churchwardens (*Woodman* v. *Robinson*, 2 Sim. N. S. 204). See *Cardinall* v. *Molyneux* (7 Jur. N. S. 854), as to proceedings against an incumbent who removed pews and substituted chairs in the church.

Burial.

A man may prescribe that he is tenant of an ancient messuage, and ought to have a separate burial in a particular vault within the church (Com. Dig. Cemetery (B.)). It seems that the same rules are applicable to vaults as to pews (*Bryan* v. *Whistler*, 8 B. & C. 293; see *Francis* v. *Ley*, Cro. Jac. 366; Gibs. Cod. 542). As to rights of burial, see Fisher's Index, tit. Ecclesiastical Law, XXV., Burial.

(7.) OF THE RIGHT TO LIGHT AND AIR.

Acquiring right to light by prescription.

Before the Prescription Act, the modes of acquiring by user the easement of light were (1) by prescription at common law, (2) by presuming a lost grant. The act has provided an additional mode, but the former modes still exist (*Aynsley* v. *Glover*, 10 Ch. 283). See, however, the note, *ante*, p. 11. With regard to the mode of claiming light under the Prescription

Of the Right to Light and Air.

Act, see the note to sect. 3 (*ante*, p. 11), and as to claiming light by presuming a lost grant, see the note, *ante*, p. 11. With regard to prescription at common law, the enjoyment of lights for twenty years, without any obstruction from the party entitled to object, has been long held to be a sufficient foundation for raising the presumption of an agreement not to obstruct them (*Cross* v. *Lewis*, 2 B. & C. 686; *Darwin* v. *Upton*, cited 3 T. R. 159; 2 Wms. Saund. 175).

A right to the enjoyment of light and air may commence by mere occupancy. Every man on his own land has a right to all the light and air which will come to him; and he may erect, even on the extremity of his own land, buildings with as many windows as he pleases, without any consent from the owner of the adjoining lands. After he has erected his building, the owner of the adjoining land may, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy his light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant, for light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant which the law would imply not to interrupt the free use of the light and air (*Moore* v. *Rawson*, 3 B. & C. 240; see *Cross* v. *Lewis*, 2 B. & C. 691).

The act of the owner of the servient tenement, from which the right to light flows, must have reference to the state of things at the time when it is supposed to have taken place; and as the act of the one is inferred from the enjoyment of the other owner, it must in reason be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions and in the same position), which existed at the time when such consent is supposed to have been given (*Blanchard* v. *Bridges*, 4 Ad. & Ell. 192).

The acquisition of a prescriptive right may be prevented by the servient owner erecting a hoarding during the period of enjoyment. Such a hoarding may be erected by a railway company (*Bonner* v. *G. W. R. Co.*, 24 Ch. Div. 1; disapproving on this point of *Norton* v. *L. & N. W. R. Co.*, 9 Ch. D. 623; see *Myers* v. *Catterson*, 43 Ch. Div. 470).

By express grant.

A right to light may be acquired by express grant. A verbal agreement for such a right may be enforced when there has been part performance (*McManus* v. *Cooke*, 35 Ch. D. 681).

Where a landlord had demised premises including lights to A. and subsequently granted a lease of the adjoining premises to B., it was held, that the landlord could not have blocked up the lights, and that B. could stand in no better position (*Davies* v. *Marshall*, 1 Dr. & Sm. 557). The words of a grant, however, must be restricted to what a grantor has power to grant at the time; thus, where A. demised a house with lights to B. for 21 years having at the time an adjoining house for a shorter term, and subsequently acquired the fee of the adjoining house, he was held entitled after the expiration of the shorter term to obstruct B.'s lights (*Booth* v. *Alcock*, 8 Ch. 663). Where a house is demised to a person known to sustain a special character (*e.g.*, a diamond merchant), the landlord cannot obstruct any light necessary to the tenant's enjoyment of the house in that character (*Herz* v. *Union Bank*, 2 Giff. 691). A special right to light may be created by covenant, in which case an injunction will be granted without regard to amount of damage (*Leech* v. *Schweder*, 9 Ch. 463); but the ordinary covenant for quiet enjoyment accompanying a grant of light does not enlarge the rights of the grantee (*Ib.*; see *Potts* v. *Smith*, 6 Eq. 311). The effect of a grant of light contained in a lease

was controlled by a collateral agreement (*Salaman* v. *Glover*, 20 Eq. 444). As to the grant by a railway company on a sale of its surplus lands, see *Myers* v. *Catterson* (43 Ch. Div. 470).

Of the Right to Light and Air.

As a man cannot derogate from his own grant, it is well established, that where the same person possesses a house, having certain lights, and also the adjoining land, and sells the house retaining the land, there, although the lights be new, neither the vendor nor any one claiming under him can build upon the adjoining land, so as to obstruct those lights (*Palmer* v. *Fletcher*, 1 Lev. 122; *Robinson* v. *Grave*, 29 L. T. 7). The same principle applies where at the time of the grant the erection of a particular building is contemplated by both parties, though no building has been actually erected (*Bailey* v. *Icke*, 64 L. T. 789); but not where there is merely an intention on the part of the purchaser to build which is known to the vendor (*Blanchard* v. *Bridges*, 4 Ad. & Ell. 176; see *Robinson* v. *Grave*, 29 L. T. 9). The principle was held not to apply where the vendor had contracted to sell the adjoining land before the sale of the house (*Beddington* v. *Atlee*, 35 Ch. D. 317, 328). A., the owner of two adjoining houses, granted a lease of one of them to B., and afterwards leased the other to C., there then existing in it certain windows. After that B. accepted a new lease of the house from A.: it was held, that B. could not alter his tenement, so as to obstruct the windows existing in C.'s house at the time of his lease from A.: though the windows were not twenty years old at the time of the alteration (*Coutts* v. *Gorham*, 1 M. & M. 396; see *Cox* v. *Matthews*, 1 Ventr. 237; *Jacomb* v. *Knight*, 11 W. R. 585; *Warner* v. *Macbride*, 36 L. T. 360; *Riviere* v. *Bower*, 1 Ry. & M. 24). The extent of the implied grant of light must be measured by circumstances existing at date of lease and known to both parties (*Birmingham Banking Co.* v. *Ross*, 38 Ch. Div. 295). And where A. on taking a lease of a building knew that the adjoining land was being laid out for building and stipulated for a passage twenty feet wide adjoining the demised building, there was no implied grant (*Ib.*)

Implied grant of right to light upon sale of house by owner of adjoining land.

On a sale by a railway company of surplus land with a house thereon, the company can only obstruct the lights by railway constructions, not by a hoarding (*Myers* v. *Catterson*, 43 Ch. Div. 470). So in the case of a lease of part of a building estate, the lessor's right of obstructing lights on the demised premises is confined to building on the adjoining land. He cannot erect a hoarding (*Wilson* v. *Queen's Club*, 1891, 3 Ch. 522).

Where a person owning a house with ancient lights looking over the adjoining land, and also owning the adjoining land, sells the land retaining the house, the purchaser may obstruct the lights, there being no implied reservation in favour of the vendor (*Curriers' Co.* v. *Corbet*, 2 Dr. & Sm. 360; *White* v. *Bass*, 7 H. & N. 722; see *Tenant* v. *Goodwin*, 2 Ld. Raym. 1093; *Rosewell* v. *Prior*, 6 Mod. 116; *Canham* v. *Fisk*, 2 Cr. & J. 128; *Ellis* v. *Manchester, &c. Co.*, 2 C. P. D. 13; *Master* v. *Hansard*, 4 Ch. D. 718; *Wheeldon* v. *Burrows*, 12 Ch. Div. 31). If, however, on a sale of land adjoining a house to be built by the vendor, it is agreed that an outer wall of the house may stand within the verge of the lands sold and shall have in it windows overlooking such lands, and if the house be erected accordingly, the purchaser cannot afterwards obstruct those windows (*Russell* v. *Watts*, 10 App. Cas. 602).

Sale of land by owner of adjoining house.

Where a person owning a house with lights looking over adjoining land and also owning such land, at the same time sells the house to A. and the land to B., both purchasers being aware of the simultaneous conveyances, B. cannot obstruct the lights of A. (*Allen* v. *Taylor*, 16 Ch. D. 355; see *Rigby* v. *Bennett*, 21 Ch. D. 567; *Compton* v. *Richards*, 1 Price, 27; *Swansborough* v. *Coventry*, 9 Bing. 305). The same principle was applied to the devise in a will of the house to A., and the adjoining land to B. (*Phillips* v. *Low*, 1892, 1 Ch. 47; *Barnes* v. *Loach*, 4 Q. B. D. 494); and to successive mortgages of plots of land comprised in one building scheme, the mortgagees having notice of the scheme (*Russell* v. *Watts*, 10 App. Cas. 590).

Simultaneous sale of land and house.

The mere fact of there being windows in an adjoining house which over-

Of the Right to Light and Air.

looks a purchased property is not constructive notice of any agreement giving a right to the access of light to them (*Allen* v. *Seckham*, 11 Ch. Div. 790).

Nature and extent of right to light.

The access of light referred to in the statute "may be described as being the freedom with which light may pass through a certain space over the servient tenement; and whenever for the statutory period a given space over the servient tenement has been used by the dominant tenement for the purpose of light passing through that space, a right arises to have that space left free so long as the light passing through it is used for or by the dominant tenement. The opening in the dominant tenement is the limit which defines the boundaries of the space over the servient tenement" (*Per Fry*, J., *National, &c. Co.* v. *Prudentixl, &c. Co.*, 6 Ch. D. 765; see *Scott* v. *Pape*, 31 Ch. Div. 554). "The right conferred or recognized by the statute 2 & 3 W. 4, c. 71, is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used. Therefore, even if the evidence satisfied me, which it does not, that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have sufficient light remaining, I should not think the defendant had established his defence unless he had shown that for whatever purpose the plaintiffs might wish to employ the light, there would be no material interference with it" (*Per* Lord *Cranworth*, *Yates* v. *Jack*, 1 Ch. 298; approved by *Jessel*, M. R., *Aynsley* v. *Glover*, 18 Eq. 549). There is no distinction between the right to light in town and country (*Martin* v. *Headon*, 2 Eq. 425).

Light for special purpose.

The doctrine as to the acquisition by prescription of an extraordinary amount of light laid down in *Lanfranchi* v. *Mackenzie* (4 Eq. 421), and *Dickinson* v. *Harbottle* (28 L. T. 186), and referred to by *Field*, J., in *Dalton* v. *Angus* (6 App. Cas. 760), seems inconsistent with the above principles. See *Mackey* v. *Scottish Widows Co.*, I. R. 11 Eq. 541 (case of a seed merchant); and compare *Herz* v. *Union Bank*, 2 Giff. 686 (in which a diamond merchant was held entitled by contract to a special light); *Cartwright* v. *Last*, 1876, W. N. 60 (the case of a dentist); *Theed* v. *Debenham*, 2 Ch. D. 165 (a sculptor); *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 282 (a photographer). *Moore* v. *Hall* (3 Q. B. D. 178) decides that light cannot be protected for a special purpose, unless it has been used for that or a like purpose or there is a reasonable probability of its being hereafter applied to such purpose. But it is not necessary that there should have been a user of the light for the special purpose during the prescriptive period (*A. G.* v. *Queen Anne's Co.*, 60 L. T. 761).

Alterations of ancient lights.

The owner of an ancient light may pull down the building with a view to restoration without interfering with his right to light (*Eccles. Commissioners* v. *Kino*, 14 Ch. D. 213); and may change the purpose for which the building is to be used (*Scott* v. *Pape*, 31 Ch. Div. 569). Such an owner may also make alterations in the framework and glazing of his windows without losing his right (*Turner* v. *Spooner*, 1 Dr. & Sm. 467). With regard to an alteration in the plane of the window it has been laid down by the C. A. that no such alteration will destroy the right so long as the owner of the dominant tenement can show that he is using through the new apertures in the new building the same or a substantial part of the same light which passed through the old apertures into the old building (*Scott* v. *Pape*, 31 Ch. Div. 554; see *Newson* v. *Pender*, 27 Ch. Div. 71; see further *National, &c. Co.* v. *Prudential, &c. Co.*, 6 Ch. D. 757; *Blanchard* v. *Bridges*, 4 Ad. & Ell. 176; *Barnes* v. *Loach*, 4 Q. B. D. 494; *Bullers* v. *Dickinson*, 29 Ch. D. 155). In the case of an alteration, accurate evidence as to the position, &c., of the old light should be preserved (*Fowlers* v. *Walker*, 42 L. T. 356; 51 L. J. Ch. 443; *Scott* v. *Pape*, 31 Ch. Div. 554; see *Pendarves* v. *Monro*, 1892, 1 Ch. 611).

For the older doctrine as to the effect of an alteration of ancient lights, see *Chandler* v. *Thompson* (3 Camp. 80); *Garratt* v. *Sharpe* (3 Ad. & Ell. 325); *Martin* v. *Goble* (1 Camp. 322); *Cherrington* v. *Abney* (2 Vern. 646).

Where there is an ancient light and other lights are added, and an obstruction is raised against the added lights, which from their position

cannot be obstructed without also obstructing the ancient light, the House of Lords has decided that such obstruction is illegal (*Tapling* v. *Jones*, 11 H. L. C. 290). This last decision overrules the older cases to the contrary effect (*Renshaw* v. *Bean*, 18 Q. B. 112; *Hutchinson* v. *Copestake*, 9 C. B. N. S. 863; *Binckes* v. *Pash*, 11 C. B. N. S. 324; *Davies* v. *Marshall*, 1 Dr. & Sm. 557; *Cooper* v. *Hubbuck*, 30 Beav. 160; *Weatherley* v. *Ross*, 1 H. & M. 349).

The doctrine of *Tapling* v. *Jones* applied to an injunction as well as to damages (*Staight* v. *Burn*, 5 Ch. 163; see *contra*, *Heath* v. *Bucknall*, 8 Eq. 1).

Unity of ownership.

An union of the ownership of the dominant and of the servient tenements for different estates does not extinguish an easement of this description, but merely suspends it so long as the union of ownership continues, and upon a severance of the ownership the easement revives (*Simper* v. *Foley*, 2 J. & H. 555).

Abandonment of right.

The intention to abandon a right to light must be clearly established (*Greenwood* v. *Hornsey*, 33 Ch. D. 471). Completely shutting up windows with bricks and mortar for above twenty years will destroy the privilege of light (*Lawrence* v. *Obee*, 3 Campb. 514). And the right may be lost by non-user for a less period than twenty years, unless an intention of resuming the right within a reasonable time be shown when it ceased to be used. As where a person, entitled to ancient lights, pulled down his house, and erected a blank wall in the place of a wall in which there had been windows, and suffered such blank wall to remain about seventeen years (*Moore* v. *Rawson*, 3 B. & C. 336; see *Cook* v. *Bath*, 6 Eq. 177). So if a man pulls down a house, and does not make any use of the land for two or three years, or converts it into tillage (3 B. & C. 341). After a building is pulled down, the right exists as before, until it is shown to be abandoned (*Ecclesiastical Commissioners* v. *Kino*, 14 Ch. Div. 223). It was questioned whether the manifestation of an intention to abandon the windows communicated to the owner of the land would destroy the right, until the owner of the land altered his position in reliance thereon (*Stokoe* v. *Singers*, 8 El. & Bl. 31).

Remedies for disturbance of right to light.

Abatement.

As a general rule, a person who is injured by a private nuisance may abate it (Jenk. Cent. 260, Cent. 6, Case 57; *Penruddock's case*, 5 Rep. 100 b); but no more of a house which is erected as a nuisance can be pulled down than is necessary to abate such nuisance (*James* v. *Hayward*, 1 W. Jones, 221, 222). If a person builds a house so near that of another that it stops his lights, or shoots water upon his house, the person injured may enter upon the owner's soil and pull the house down, provided no person be therein (*R.* v. *Rosewell*, 2 Salk. 459; see *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Lane* v. *Capsey*, 1891, 3 Ch. 411; *Thompson* v. *Eastwood*, 8 Exch. 69).

Action.

By whom actions may be brought.

When a party has acquired a right to the use of light, an action lies for obstructing it (9 Rep. 59 a; *Boury* v. *Pope*, 1 Leon. 168). A reversioner may maintain an action (*Shadwell* v. *Hutchinson*, 1 Mood. & Malk. 350; see 3 Taunt. 139). The ground upon which a reversioner is allowed to bring his action for obstruction to lights and other easements is, that if acquiesced in, they would become evidence of a renunciation and abandonment (*Bower* v. *Hill*, 1 Bing. N. C. 555; see 1 Wms. Saund. 346 b, n.; *Raine* v. *Alderson*, 4 Bing. N. C. 702). And in *Young* v. *Spencer*, Lord *Tenterden* said that if anything be done to destroy the evidence of title, an action is maintainable by the reversioner (10 B. & C. 145), who may in all cases bring an action where a stranger does an act injurious to the inheritance, and rendering it of less value (*Jesser* v. *Gifford*, 4 Burr. 2141; see *Metropolitan Association* v. *Petch*, 5 C. B. N. S. 504). And if the obstruction be continued, a new action may be maintained, notwithstanding the former recovery (2 B. & Ad. 97). A reversioner can obtain an injunction (*Mercers' Co.* v. *Auction Mart Co.*, 2 Eq. 238); but he cannot sue for a trifling injury (*Cooper* v. *Crabtree*, 20 Ch. Div. 589; *Perkins* v. *Slater*, 35 L. T. 356).

The court will restrain the interference with ancient lights, although the

Of the Right to Light and Air.

plaintiff is not the occupier of the house interfered with, and may have no intention of occupying it (*Wilson* v. *Townend*, 1 Dr. & Sm. 324). A tenant from year to year may apply for an injunction; but the injunction will be limited to his tenancy (*Simper* v. *Foley*, 2 J. & H. 555). A tenant from year to year under notice to quit may apply (*Jacomb* v. *Knight*, 11 W. R. 812). And a tenant whose lease had expired, but who had agreed for a renewal (*Gale* v. *Abbott*, 10 W. R. 748). But where a tenant under an agreement for a lease filed a bill to restrain his lessor from obstructing ancient lights, but did not ask to have the agreement specifically performed, an injunction was refused (*Fox* v. *Pursell*, 3 Sm. & Giff. 242). An injunction will not be granted where the title to the property sought to be protected has not been accepted by the plaintiff (*Heath* v. *Maydew*, 13 W. R. 199). An executor was held entitled to recover damages for an obstruction to the light of a house of his testatrix (*Jones* v. *Simes*, 43 Ch. D. 607).

Against whom actions may be brought.

The owner of the inheritance of a house may maintain an action against his own lessee for obstructing lights (*Thomlinson* v. *Brown*, Say. R. 215; see also 4 Burr. 2141; 3 Leon. 109). Such an action may be brought not only against the party who first erected the nuisance, but also against his lessee or assignee for continuing it (*Rosewell* v. *Prior*, 12 Mod. 635; *S. C.*, 2 Salk. 460; 1 Ld. Raym. 713; see also Carth. 456; 1 Keb. 994); but after damages have been recovered from the lessor the right of action against the lessee will be barred, as but one satisfaction will be given (12 Mod. 640; Carth. 455) unless there is a continuance of the nuisance. Not only the person who erected the obstruction, and the occupier of the premises where it is erected, but even the workmen and the clerk who superintended the works, are liable to an action (*Wilson* v. *Peto*, 6 B. Moore, 47). As to making occupiers defendants, see *White* v. *Jameson* (18 Eq. 303); *Broder* v. *Suillard* (2 Ch. D. 692).

Corporations.

Compensation can be recovered, under the Lands Clauses Act, 1845, from corporations for diminution of light (*Eagle* v. *Charing Cross R. Co.*, L. R. 2 C. P. 638; *Badham* v. *Marris*, 45 L. T. 579; *R.* v. *Poulter*, 20 Q. B. Div. 132; as to compensation for inchoate rights to light, see *Barlow* v. *Ross*, 24 Q. B. Div. 381; *Re London, Tilbury, &c. R. Co.*, *Ib.* 326); and injunctions against corporations were accordingly refused (*Clark* v. *London School Board*, 9 Ch. 120; *Bedford* v. *Dawson*, 20 Eq. 353; *Wigram* v. *Fryer*, 36 Ch. D. 87). On the construction of a railway act it was held that the company was liable in damages for obstructing light, the plaintiff not being bound to come in under the compensation clause (*Turner* v. *Sheffield, &c. R. Co.*, 10 M. & W. 425).

When an action can be brought.

Rights to air and light are bestowed by Providence for the common benefit of man, and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes without in some degree impairing the natural purity of the air; he cannot erect a building or plant a tree near the house of another, without in some degree diminishing the quantity of light he enjoys; but such small interruptions give no right of action, for they are necessary incidents to the common enjoyment by all (*Per Parke*, B., *Embrey* v. *Owen*, 6 Exch. 372, 373).

"In order to give a right of action and sustain an issue there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done" (Ruling of *Best*, C. J., *Back* v. *Stacey*, 2 C. & P. 465, altered by *Wood*, V. C., *Dent* v. *Auction Mart Co.*, 2 Eq. 245, and adopted as altered by *Jessel*, M. R., *Aynsley* v. *Glover*, 18 Eq. 522, and *Brett*, L. J., *Ecclesiastical Commissioners* v. *Kino*, 14 Ch. D. 224). Compare the ruling of *James*, L. J., *Kelk* v. *Pearson*, 6 Ch. 811; adopted by Lord *Selborne*, *City of London Brewery Co.* v. *Tennant*, 9 Ch. 218; and the older rulings in *Cotterell* v. *Griffiths*, 4 Esp. N. P. C. 69; *Pringle* v. *Wernham*, 7 C. & P. 777; *Wells* v. *Ody*, *Ib.* 410; *Parker* v. *Smith*, 5 C. & P. 438.

In estimating injury to light "the matter to be considered is whether there is any diminution of light for any purpose for which the dominant tenement may be reasonably considered available." . . . . There is to be considered "not only the actual present use of the rooms, but any purpose to which it may reasonably be expected that in the future they may be applicable" (*Per Cockburn*, C. J., *Moore* v. *Hall*, 3 Q. B. D. 182, in which case *Martin* v. *Goble*, 1 Camp. 320, was dissented from. See opinion of *Jessel*, M. R., to the same effect in *Aynsley* v. *Glover*, 18 Eq. 548—551; *Jackson* v. *Newcastle*, 3 D. J. & S. 275, to the contrary effect being disapproved; *Younge* v. *Shaper*, 21 W. R. 135; *Dicker* v. *Popham*, 63 L. T. 379).

Possible future use of dominant tenement.

As to lateral obstructions, see *Clarke* v. *Clark* (1 Ch. 16); *City of London Brewery* v. *Tennant* (9 Ch. 212); *Kino* v. *Rudkin* (6 Ch. D. 160); *Dicker* v. *Popham* (63 L. T. 379).

Lateral obstructions.

There is no conclusion of law that a building will not obstruct the light coming to a window if it permits the light to fall on the window at an angle of not less than forty-five degrees from the vertical. The amount of obstruction is always a question of fact which depends upon the evidence (*Parker* v. *First Avenue Co.*, 24 Ch. D. 282). "But the fact that forty-five degrees are left unobstructed may, under ordinary circumstances, be considered *primâ facie* evidence that there is not likely to be material injury" (*Per* Lord *Selborne*, *City of London Brewery* v. *Tennant*, 9 Ch. 220). The supposed rule was derived from the Metropolitan Building Acts, being there laid down for a different purpose (*Ecclesiastical Commissioners* v. *Kino*, 14 Ch. Div. 228; *Theed* v. *Debenham*, 2 Ch. D. 168).

Rule as to 45 degrees.

An injunction to restrain obstruction to light will not be granted unless substantial damage be proved (*Kino* v. *Rudkin*, 6 Ch. D. 160; see *Aynsley* v. *Glover*, 18 Eq. 553; *A. G.* v. *Nichols*, 16 Ves. 343; *Johnson* v. *Wyatt*, 2 D. J. & S. 25). The damage may be such as is likely to accrue in respect of possible future user (*Dicker* v. *Popham*, 63 L. T. 379).

Injunctions to restrain obstruction to light.

As to the considerations of convenience and otherwise which affect the granting of an interlocutory injunction, see *Newson* v. *Pender*, 27 Ch. Div. 43. On every such injunction the plaintiff should give an undertaking as to damages (*Graham* v. *Campbell*, 7 Ch. D. 494), on which the defendant may obtain an inquiry even where the plaintiff has been guilty of no default in obtaining the injunction (*Griffith* v. *Blake*, 27 Ch. Div. 474; see *Smith* v. *Day*, 21 Ch. Div. 421). As to the effect of the undertaking where the action is subsequently dismissed, see remarks of *Jessel*, M. R. (Memorandum, 1879, W. N. 74).

Interlocutory injunction.

An injunction was refused on the ground that the plaintiff had not proved substantial injury, in *Radcliffe* v. *Portland* (3 Giff. 702); *Johnson* v. *Wyatt* (2 D. J. & S. 18); *Jacomb* v. *Knight* (11 W. R. 812); *Curriers' Co.* v. *Corbett* (13 W. R. 1056); *Clarke* v. *Clark* (1 Ch. 16); *Robson* v. *Whittingham* (*ib.* 442); *Lanfranchi* v. *Mackenzie* (4 Eq. 421); *Sparling* v. *Clarson* (17 W. R. 518). Injunctions have been granted upon evidence being given of substantial injury in *Gale* v. *Abbott* (10 W. R. 748); *Stokes* v. *City Offices Co.* (11 Jur. N. S. 560); *Yates* v. *Jack* (1 Ch. 295); *Dent* v. *Auction Mart Co.* (2 Eq. 238); *Maguire* v. *Grattan* (16 W. R. 1189). And a plaintiff who obscured the light and air to his own dwelling was held not to be thereby disentitled to an injunction (*Arcedeckne* v. *Kelk*, 2 Giff. 683; *Staight* v. *Burn*, 5 Ch. 163; *Bourke* v. *Alexandra Co.*, 1877, W. N. 30; see also *Dyers' Co.* v. *King*, 9 Eq. 438).

Injunction refused where no evidence of substantial injury.

Injunction granted where evidence of substantial injury.

In *Leech* v. *Schweder* (22 W. R. 292), *Jessel*, M. R., gave reasons for refusing to inspect, as a judge, an alleged obstruction to light (See also *Jackson* v. *Newcastle*, 3 D. J. & S. 275). In the former case the C. A. directed a screen to be erected, and appointed a surveyor to report (9 Ch. 463). A surveyor was also appointed in *Kelk* v. *Pearson* (6 Ch. 810); *Cartwright* v. *Last* (1876, W. N. 60). The appointment of a surveyor before trial was refused in *Stokes* v. *City Offices* (13 W. R. 537); *Baltic Co.* v. *Simpson* (24 W. R. 390). See now R. S. C. Ord. 55, r. 19.

The form of injunction usually adopted by *Jessel*, M. R., is given in

Form of injunction.

Of the Right to Light and Air.

Jacobs v. *M'Sheehan*, 1877, W. N. 86. See also the forms given in Seton, 5th ed. 487 *et seq.* The order should not refer to the angle of incidence of light (as in *Hackett* v. *Baiss*, 20 Eq. 494), unless there is special evidence (*Parker* v. *First Avenue Co.*, 24 Ch. Div. 282).

Mandatory injunction.

A mandatory injunction may be granted ordering the pulling down of anything erected after the commencement of an action, or after notice given to the defendant that his erecting it will be objected to (*Smith* v. *Day*, 13 Ch. Div. 651; *Kelk* v. *Pearson*, 6 Ch. 809; *Daniel* v. *Ferguson*, 1891, 2 Ch. 27); even where the erection was completed before writ issued (*Lawrence* v. *Horton*, 62 L. T. 749). Mandatory injunctions were granted in *Myers* v. *Catterson* (43 Ch. Div. 470); *Dicker* v. *Popham* (63 L. T. 379). An undertaking is not essential (*Smith* v. *Day*, *sup.*; *Mackey* v. *Scottish Widows*, I. R. 10 Eq. 113). On the question of granting such an injunction it is important to see if the defendant knew he was doing wrong (See remarks of *Jessel*, M. R., *Smith* v. *Smith*, 20 Eq. 503—505). But there must be no acquiescence on the part of the plaintiff (*Gaskin* v. *Balls*, 13 Ch. Div. 324; *Baxter* v. *Bower*, 23 W. R. 805). A mandatory injunction was refused where unsubstantial damages had been awarded (*Webster* v. *Whewall*, 42 L. T. 868). In the earlier cases it was laid down that a mandatory injunction would only be granted to prevent extreme or very serious damage (*Durell* v. *Pritchard*, 1 Ch. 244; *Isenberg* v. *East India Co.*, 3 D. J. & S. 263; *Sparling* v. *Clarson*, 17 W. R. 518; *Curriers' Co.* v. *Corbett*, 13 W. R. 1056; see *Lawrence* v. *Austin*, 13 W. R. 981; *Gort* v. *Clark*, 16 W. R. 569; *Dunball* v. *Walters*, 35 Beav. 565). A mandatory injunction was refused in *Calcraft* v. *Thompson* (15 W. R. 387); and *Stanley* v. *Shrewsbury* (19 Eq. 616). As to an interlocutory application, see *Johnstone* v. *Royal Courts*, 1883, W. N. 5.

Damages awarded under 21 & 22 Vict. c. 27.

Under 21 & 22 Vict. c. 27, s. 2 (*ante*, p. 78), wherever the Chancery Division can grant an injunction, it may award damages either in addition to, or in substitution for, the injunction. This act has been repealed by 46 & 47 Vict. c. 49, but the repeal has not affected the jurisdiction of the court (*Sayers* v. *Collier*, 28 Ch. Div. 103; see *Elmore* v. *Pirrie*, 57 L. T. 333). For obstructions to light, damages are often an appropriate remedy (*Pennington* v. *Prinsop Co.*, 5 Ch. D. 773); but it was not intended by the act to compel a man who is wronged to sell his property to the person who has wronged him (*Krehl* v. *Burrell*, 7 Ch. D. 555; 11 Ch. Div. 148). Where the result of the defendant's act would be to render the plaintiff's property useless to him, the court will not, under the powers of the act, compel the plaintiff to sell his property to the defendant; but if the injury is less serious, the court will exercise its discretion (*Holland* v. *Worley*, 26 Ch. D. 578). Where the defendant's building is completed before the commencement of the action, damages may be awarded by the Chancery Division, even where a mandatory injunction will not be granted (*Stanley* v. *Shrewsbury*, 19 Eq. 616; *City of London Brewery* v. *Tennant*, 9 Ch. 212; differing from the practice adopted in *Durell* v. *Pritchard*, 1 Ch. 244; *Curriers' Co.* v. *Corbett*, 4 D. J. & S. 764). The comparative injury that would be caused in point of value and damage to each party by removing the obstruction must be considered (*National Co.* v. *Prudential Co.*, 6 Ch. D. 761); and where the injury to the plaintiff was not serious, damages were awarded (*Ib.* 769; *Holland* v. *Worley*, 26 Ch. D. 587). Where there had been delay on the part of the plaintiff, and there had been also an offer made by the plaintiff to sell his property to the defendant. damages in lieu of an injunction were awarded (*Senior* v. *Pawson*, 3 Eq. 330).

Covenant.

As to the interference of a court of equity to restrain the erection of additional buildings when a covenant to that effect had ceased to be applicable according to the spirit and intent of the contract, see *Bedford* v. *British Museum*, 2 M. & K. 552.

Acquiescence and delay.

In *Dann* v. *Spurrier* (7 Ves. 235), the court proceeded upon the doctrine that it will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using

terms of encouragement. This doctrine was applied in the case of an obstruction to light in *Cotching* v. *Bassett* (32 Beav. 101), a case depending on the old law as to alteration. A plea of acquiescence was held a good defence on equitable grounds to an action for damages for obstruction of light, and a replication that the acquiescence took place on the faith of the defendant's false representations was a good equitable answer to the plea (*Davies* v. *Marshall*, 10 C. B. N. S. 697). An injunction to restrain the obstruction of ancient lights was refused on the ground of delay (*Cooper* v. *Hubbuck*, 30 Beav. 160; *Cocks* v. *Romaine*, 14 L. T. 390). As to the difference between the acquiescence which will justify the refusal of an interlocutory and of a perpetual injunction, see *Johnson* v. *Wyatt*, 2 D. J. & S. 18; *Turner* v. *Mirfield*, 34 Beav. 390). Where the plaintiff had submitted for six years to interference with an ancient light, an injunction was refused (*Gaunt* v. *Fynney*, 8 Ch. 8).

Privacy.

The opening of a window, whereby the plaintiff's privacy is disturbed, is not actionable; the only remedy is to build upon the adjoining land, opposite the offensive window (*Chandler* v. *Thompson*, 3 Campb. 80; see 9 Rep. 58 b; *Cottrell* v. *Griffiths*, 4 Esp. N. P. C. 69). The intrusion upon a neighbour's privacy, even by opening a new window overlooking the adjoining property, is not a ground for interference either at law or in equity (*Turner* v. *Spooner*, 1 Dr. & Sm. 467; see also *Re Penny and South Eastern R. Co.*, 7 Ell. & Bl. 660; and the remarks of Lord *Westbury* in *Tapling* v. *Jones*, 11 H. L. C. 290; and compare *Roberts* v. *Macord*, 1 M. & Rob. 230; *Potts* v. *Smith*, 6 Eq. 311; *ante*, p. 11).

Prospect.

An injunction was refused where the application proceeded on a particular right to a long enjoyment of a prospect (*A. G.* v. *Doughty*, 2 Ves. sen. 453; see *Squire* v. *Campbell*, 1 M. & C. 459). So the building of a wall which merely intercepts the prospect of another, without obstructing his lights, is not actionable (*Knowles* v. *Richardson*, 1 Mod. 55; 2 Keb. 611, 642). A covenant, however, not to obstruct a prospect will be enforced in equity (*Piggott* v. *Stratton*, 1 D. F. & J. 33; *Western* v. *Macdermott*, 2 Ch. 72).

View of shop window.

The erection of a building will not be restrained because it injures the plaintiff by obstructing the view of his place of business (*Smith* v. *Owen*, 35 L. J. Ch. 317; *Butt* v. *Imperial Gas Co.*, 2 Ch. 158).

Rights with regard to air.

A right to the unobstructed passage of air through a window may be acquired by prescription at common law (*Aldred's Case*, 9 Coke, 58; see *Gale* v. *Abbott*, 10 W. R. 748; *Dent* v. *Auction Mart Co.*, 2 Eq. 252). The right to the passage of air through a defined channel was acquired by lost grant (*Bass* v. *Gregory*, 25 Q. B. D. 481). And a covenant not to intercept the access of air sufficient for the purposes of a slaughter-house was implied from thirty years' user (*Hall* v. *Lichfield Co.*, 43 L. T. 380). But the court will only interfere in special cases (*City of London Brewery* v. *Tennant*, 9 Ch. 221; *Baxter* v. *Bower*, 33 L. T. 41). The access of air to the chimney of a building over the general unlimited surface of a neighbour cannot be claimed as a natural right, or as an easement by prescription at common law, or by lost grant, or under the Prescription Act (*Bryant* v. *Lefever*, 4 C. P. D. 172; see *Harris* v. *De Pinna*, 33 Ch. Div. 238; *Webb* v. *Bird*, 13 C. B. N. S. 841).

Remedies for pollution of air, at law and in equity.

The owner of a house has a right at common law to wholesome and untainted air, unless the business which creates a nuisance has been carried on for such a length of time as will raise a presumption of a grant from the neighbouring owners (*Elliottson* v. *Feetham*, 2 Bing. N. C. 134). Nothing less than a user of twenty years will afford such presumption (*Bliss* v. *Hall*, 5 Scott, 500; *Crump* v. *Lambert*, 3 Eq. 413). There can be no prescription, however, to justify a public nuisance (*A. G.* v. *Barnsley*, 1874, W. N. 37). An action will lie for pollution of air (*St. Helen's Co.* v. *Tipping*, 11 H. L. C. 642). And the pollution will be restrained (*Tipping* v. *St. Helen's Co.*, 1 Ch. 66; *Crump* v. *Lambert*, 3 Eq. 409; see *Swaine* v. *G. N. R. Co.*, 12 W. R. 391).

Nuisance.

What constitutes a nuisance was thus defined by *Knight-Bruce*, V.-C.: "Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience

Of the Right to Light and Air.

materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?" (*Walter* v. *Selfe*, 4 De G. & Sm. 322, adopted in *Soltau* v. *De Held*, 2 Sim. N. S. 133, and *Crump* v. *Lambert*, 3 Eq. 413; *Bellamy* v. *Wells*, 63 L. T. 635; see *Jenkins* v. *Jackson*, 60 L. T. 105). What would be a nuisance in one locality might not be so in another (*Sturges* v. *Bridgman*, 11 Ch. Div. 852).

Where a man, by an act on his own land, such as burning bricks, causes so much annoyance to another in the enjoyment of a neighbouring tenement, as to amount *primâ facie* to a cause of action, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land (*Bamford* v. *Turnley*, 3 B. & S. 66, overruling *Hole* v. *Barlow*, 4 C. B. N. S. 334). See *Shotts Iron Co.* v. *Inglis*, 7 App. Cas. 528; *Reinhardt* v. *Mentasti*, 42 Ch. D. 685; *Cavey* v. *Ledbitter*, 13 C. B. N. S. 470; *Luscombe* v. *Steer*, 15 W. R. 1191; and *St. Helen's Co.* v. *Tipping*, 11 H. L. C. 642, where Lord *Westbury* distinguishes the cases where material injury is done to property, and those where personal discomfort is produced. An injunction was granted to restrain brick burning (*Beardmore* v. *Tredwell*, 3 Giff. 683; *Walter* v. *Selfe*, 4 De G. & Sm. 315; *Boreham* v. *Hall*, 1870, W. N. 57; *Roberts* v. *Clarke*, 18 L. T. 49); and the emission of noxious vapours (*Imperial Gas Co.* v. *Broadbent*, 7 H. L. C. 600). The plaintiff must prove damage, visible, substantial, and actual (*Salvin* v. *North Brancepeth Co.*, 9 Ch. 709). The fact of the plaintiff having come to the nuisance, does not disentitle him to relief (*Tipping* v. *St. Helen's Co.*, 1 Ch. 66). As to how far the delicate nature of the plaintiff's trade can be taken into consideration, see *Cooke* v. *Forbes*, 5 Eq. 166; *Robinson* v. *Kilvert*, 41 Ch. D. 88.

A weekly tenant can obtain an injunction (*Jones* v. *Chappell*, 20 Eq. 539), and tenants were added as co-plaintiffs by amendment at the time (*House Property Co.* v. *H. P. Horsenail Co.*, 29 Ch. D. 190). As to liability of occupiers, see *White* v. *Jameson*, 18 Eq. 303; *Broder* v. *Saillard*, 2 Ch. D. 692; *Jenkins* v. *Jackson*, 60 L. T. 105. As to joining as co-plaintiffs the occupiers of several houses affected by the nuisance, see *Truman* v. *L. B. & S. C. R. Co.*, 29 Ch. Div. 89; *Umfreville* v. *Johnson*, 10 Ch. 580; *Hudson* v. *Maddison*, 12 Sim. 416.

Acquiescence. Acquiescence in the erection of noxious works while they produce little injury does not warrant the subsequent extension of them to an extent productive of great damage (*Bankart* v. *Houghton*, 27 Beav. 425). See also, as to the effect of acquiescence in such a case, *Williams* v. *Jersey*, Cr. & Phil. 91; *Savile* v. *Kilner*, 26 L. T. 276; *Sanders* v. *Manley*, 1878, W. N. 181.

LIMITATION OF ACTIONS AND SUITS.

I. *Limitation of time for the recovery of land or rent*, 3 & 4 *Will.* 4, c. 27.
1. 3 & 4 *Will.* 4, c. 27, *s.* 1, *Interpretation clause.*
2. *Period of limitation fixed, and when right first accrues, ss.* 2—15.
3. *Savings in case of disabilities, ss.* 16—19.
4. *Concurrent rights, s.* 20.
5. *Operation of the statute in case of estates tail, ss.* 21—23.
6. *Limitation of time as to suits in equity, ss.* 24—27.
7. *Limitation of time between mortgagor and mortgagee, s.* 28.
8. *Limitation of time as to church property and advowsons, ss.* 29—33.
9. *Final extinction of right, s.* 34.
10. *Abolition of real and mixed actions, &c., ss.* 36—39.
11. *Limits of act, ss.* 43, 44.

II. *Limitation of time for the recovery of money charged on land, legacies, arrears of dower, rent and interest*, 3 & 4 *Will.* 4, c. 27, *ss.* 40—42.

I. & II. *Further limitation*, 37 & 38 *Vict.* c. 57.

III. *Of the limitation of actions by or against executors in respect of injuries to property, and of the limitation of actions on specialties*, 3 & 4 *Will.* 4, c. 42, *ss.* 2—7.

IV. *Of the limitation of actions on simple contract*, 21 *Jac.* 1, c. 16; 9 *Geo.* 4, c. 14; 19 & 20 *Vict.* c. 97, *ss.* 9—17.

V. *Limitation of time in actions against trustees*, 51 & 52 *Vict.* c. 59, *ss.* 1, 8, 12.

VI. *Courts of equity and the Statutes of Limitation.*

I. LIMITATION OF TIME FOR THE RECOVERY OF LAND OR RENT.

3 & 4 WILLIAM IV. CAP. 27.—"*An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto.*"

[24th July, 1833.]

1. *Interpretation Clause.*

3 & 4 Will. 4, c. 27, s. 1.

Meaning of the words in the act.

"Land."

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" (*a*) shall extend to manors, messuages, and all other corporeal hereditaments whatsoever (*b*), and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole) (*c*), and also to any share, estate or interest in them or any of them, whether the same shall be a freehold or chattel interest (*d*), and whether freehold or copyhold, or held according to any other tenure; and the word

3 & 4 Will. 4, c. 27, s. 1.

"rent" shall extend to all heriots (*e*), and to all services and suits for which a distress may be made (*f*), and to all annuities and periodical sums of money charged upon or payable out of any land (*g*) (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through or under or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat (*h*); and the word "person" shall extend to a body politic, corporate or collegiate, and to a class of creditors or other persons, as well as an individual (*i*); and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

"Rent."

Person through whom another claims.

"Person."

Number and gender.

Construction of statutes of limitation generally.

The object of all statutes of limitation is to prevent claims at great distances of time when evidences are lost, and in all well-regulated countries the question of possession is held to be an important point of policy (*Dundee Harbour* v. *Dougall*, 1 Macq. H. L. C. 321, *per* Lord *St. Leonards*). The several statutes of limitations being all *in pari materiâ* ought to receive an uniform construction notwithstanding a slight variation in phrase, the object and intention being the same (*Murray* v. *East India Co.*, 5 B. & Ald. 206, 215, *per Abbott*, C. J.) All these acts being, as they were emphatically termed by Lord *Kenyon*, statutes of repose, are to be liberally and beneficially expounded (*Per Dallas*, C. J., in *Tolson* v. *Kaye*, 6 Moore, 558; 3 Bro. & B. 217). See the maxims "*Interest reipublicæ ut sit finis litium*" (Broom's Legal Maxims, 328, 6th ed.) and "*Vigilantibus non dormientibus jura subveniunt*" (Broom, 844, 6th ed.)

Subjects not included in this act.

(*a*) Turnpike tolls are not within this act; and consequently more than six years' arrears of interest may be recovered on a mortgage of turnpike tolls notwithstanding the 42nd section of the act, a share of the tolls of a turnpike road not coming within the meaning of the word *land* as defined by the first section of this act (*Mellish* v. *Brooks*, 3 Beav. 22). But quarries and limestone land do come within that word (3 Ir. L. R. 521). The limitation prescribed by the 3 & 4 Will. 4, c. 27, did not apply to an action on a collateral covenant for payment of a rent charged on land, and the covenantee might recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge was barred by this statute (*Manning* v. *Phelps*, 10 Exch. 59). See now as to this, 37 & 38 Vict. c. 57, s. 8, *post*, p. 198.

The word "rent" has an ambiguous meaning, being either the estate in the rent or the rent reserved under a lease. It has been confined in sect. 2 to the former meaning alone, so that a mere non-receipt of rent under a lease for more than the statutory period did not deprive the lessor of his right to rent under the lease (*Grant* v. *Ellis*, 9 M. & W. 113; *Irish Land Commission* v. *Grant*, 10 App. Cas. 26). Lord *St. Leonards* said, *rent*, in the sense in which it is spoken of in the second section, means rent of inheritance, and it does not mean rent reserved by lease for example, or rent in the common and customary form of a render for property (*Ely* v. *Bliss*, 2 D. M. & G. 472).

Tithes.

The word "tithes," like rent, has an ambiguous meaning, signifying

either the estate in the tithes or the chattel itself, the fruits of the estate. Tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), are included in the word "land," which in its proper sense applies only to cases in which there are two parties, each claiming an estate in the land adverse to each other. It has been held, that the statute does not prevent the tithe-owner from recovering tithes as *chattels* from the occupier, although none had been set out for twenty years, but that the operation of the statute is confined to cases where there are two parties, each claiming an adverse *estate* in the tithes. Therefore a person who has received no tithes for the statutory period cannot recover the possession of them from another, who has for the same period received those tithes from the terre-tenant (*Ely* v. *Cash*, 15 M. & W. 617; *Ely* v. *Bliss*, 5 Beav. 574; 2 D. M. & G. 459; see *Shannon* v. *Hodder*, 2 Brady, Adair & Moore, 223, n.) The effect of time as between tithe-owner and occupier is determined by 2 & 3 Will. 4, c. 100 (See *Salkeld* v. *Johnston*, 1 Mac. & G. 242, where Lord *Cottenham* expressed his opinion that under that act the proof of the enjoyment of the discharge claimed for the prescribed time is a sufficient answer to a demand for tithes: see 2 Ex. 256; 2 C. B. 749). The cases on the construction of that act are collected, Shelford on Tithes, 391—398, 3rd ed., and Supplement, 47—86; and see Leach's Tithe Acts, 5th ed. Payments imposed in London by 37 Hen. 8, c. 12, are not within that act (*Payne* v. *Esdaile*, 13 App. Cas. 613).

3 & 4 Will. 4, c. 27, s. 1.

Tithes, moduses or compositions, belonging to a spiritual or eleemosynary corporation sole, are excepted from the operation of 3 & 4 Will. 4, c. 27. The time for recovering lands belonging to such a corporation is prescribed by 3 & 4 Will. 4, c. 27, s. 29, *post*.

Tithe rent-charge not belonging to a spiritual or eleemosynary corporation sole is within the meaning of the word "rent" in sect. 2, and the right thereto will be extinguished by non-payment for the statutory period (*Irish Land Commission* v. *Grant*, 10 App. Cas. 14). In the case of a tithe rent-charge belonging to a spiritual corporation sole, and which arose under the Irish Tithe Commutation Act (1 & 2 Vict. c. 109), the House of Lords held on the construction of the last-mentioned act that it was not a "composition" within the meaning of sect. 1 of 3 & 4 Will. 4, c. 27, s. 1, and accordingly fell within the general operation of the act (*Irish Land Commission* v. *Grant*, 10 App. Cas. 14).

Tithe rent-charge.

As to the recovery of arrears of tithes and tithe rent-charge, see note to sect. 42, *post*.

Arrears of tithes and tithe rent-charge.

(*b*) Hereditament is a very comprehensive term, including whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed (Co. Litt. 6 a; 3 Rep. 2; Shep. Touch. 91). *Hereditaments* are of two sorts; *corporeal*, consisting wholly of substantial and permanent objects; all of which may be comprehended under the general denomination of land (Co. Litt. 4; 2 Bl. Com. 17); and *incorporeal*, which are rights issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within the same (*Ib.* 20). Many of the latter are not within this act, but the periods of limitation for several incorporeal rights are prescribed by the stat. 2 & 3 Will. 4, c. 71 (*ante*, pp. 1—21).

Hereditaments.

(*c*) Spiritual corporations are those of which not only the members composing it are spiritual persons, but of which the object of the institution is also spiritual, such as bishops, some deans, and prebendaries, all archdeacons, parsons, and vicars, which are *sole* corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate (Co. Litt. 150 a; 1 Bl. Com. 471; 1 Kyd on Corporations, 22).

Different kinds of corporations.

Eleemosynary corporations are such as are constituted for the perpetual distribution of the free-alms or bounty of the founder of them to such persons as he has directed (1 Bl. Com. 471). These are of two general descriptions; hospitals for the maintenance and relief of poor and impotent persons, and colleges for the promotion of learning, and the support of persons engaged in literary pursuits, of which the greater

3 & 4 Will. 4, c. 27, s. 1.

number are within the universities, and form component parts of these larger corporations; and others are out of the universities, and not necessarily connected with them. Between hospitals having a common seal, and colleges in the universities or out of them, there is no difference in legal consideration, the difference is only in degree; for where in an hospital the master and poor are incorporated, it is a college having a common seal by which it acts, although it have not the *name* of a college (*Per Holt*, Skinn. 484). There are many hospitals not incorporated in which the succession is kept up by trustees (10 Rep. 31, 35). There are other corporations which may be classed under the head of *eleemosynary*, as their object is, by means of trustees or governors incorporated, to carry into execution some public charity; such is the corporation created in the reign of Queen Anne, under the name of "The Governors of the Bounty of Queen Anne, for the Augmentation of the Maintenance of the Poor Clergy" (2 Anne, c. 11; 5 Anne, c. 24; 6 Anne, c. 27; 1 Geo. 1, stat. 2, c. 10; 3 Geo. 1, c. 20). And such are many corporations of trustees or governors of free schools (See 1 Kyd on Corporations, 25—27). All these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons (1 Ld. Raym. 6), and although they, in some things, partake of the nature, privileges and restrictions of ecclesiastical bodies (1 Bl. Com. 471). Each university of Oxford and Cambridge is a *lay* corporation and not eleemosynary, as particular colleges are, although some salaries are attached to some of their officers (*R.* v. *Cambridge*, 3 Burr. 1652; see Shelford on the Law of Mortmain and Charities, 8—34; Tudor's Charitable Trusts, 3rd ed.)

Corporations *aggregate* consist of many persons, of which kind are the mayor and commonalty of a city, the head and fellows of a college, the master and brethren of an hospital, the dean and chapter of a cathedral church (10 Rep. 29 b; 11 Rep. 69 b).

Corporations *sole* consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a corporation sole (Co. Litt. 43). So are archbishops, bishops, deans and prebendaries, distinct from their several chapters; and so is every parson and vicar (10 Rep. 29 b; Wood's Inst. 109; 1 Bl. Com. 470; 1 Kyd on Corporations, 20). Corporations are as liable to the operation of prescription as private persons (*Dundee* v. *Dougall*, 1 Macq. H. L. C. 317).

Meaning of the term "freehold."

(*d*) The term *freehold*, as denoting an estate of a given *quantity*, or rather of a peculiar *quality*, is opposed to the term chattel (Co. Litt. 43 b; 1 Burr. 108). An estate of freehold may be defined to be "an estate in possession, remainder, or reversion, in corporeal or incorporeal hereditaments, held for life, or some uncertain interest, created by will, or some other mode of conveyance, capable of transferring an estate of freehold, which may last the life of the devisee or grantee, or of some other person" (Watk. on Conv. by Morley and Coote, 63; Prest. on Estates, 200—203; see observations on an Estate of Freehold, by Manning, 2 Jur. 459). All interests in land for a shorter period than a life, or, more properly speaking, all interests for a *definite* space of time, measured by years, months, or days, are deemed *chattel* interests (1 Prest. on Estates, 203), which may subsist in both corporeal and incorporeal hereditaments (Noy's Maxims, by Bythewood, 142, 357; Bac. Abr. Executors (H. 3)). Chattels real are such as concern the realty, as terms for years in land, the next presentation to a church (Dyer, 135 a), estates by statute-merchant, statute-staple, elegit, or the like (Co. Litt. 118 b). By the common law no estate of inheritance or freehold is comprehended under the word chattels.

Heriots.

(*e*) Heriot is defined to be the best beast, or other thing, due to the lord on the death or alienation of his tenant. Heriots are usually divided into two sorts, heriot *service*, and heriot *custom*. The former are such as are due upon a special reservation in a grant or lease of lands (*Lanyon* v. *Carne*,

Heriot service.

2 Saund. 166); the latter depend merely upon immemorial usage and custom (Co. Cop. s. 24). Heriot *service* may be recovered either by seizure (Plowd. 96; Cro. Eliz. 589; 1 And. 298; Gouldsb. 191; 1 Salk. 356; 1 Show. 81; Willes, 192), or by distress within the manor (Plowd. 96 a; Cro. Car. 260; Bro. Har. 2; Kich. 133 b; 3 Bl. Comm. 15; Gilbert's Distresses, 10, 11). Any goods belonging to another, found upon the lands charged with heriot service, may be distrained (Bro. Har. 6; Cro. Car. 260; *Austin* v. *Bennet*, 1 Salk. 356). A heriot due by the *custom* of a manor may be payable on the death of every tenant of an estate of inheritance, or for life or years (21 Hen. 7, 13, & 15; Keilw. 80; Bro. Har. 5), or at will (*Hix* v. *Gardiner*, 2 Bulstr. 196). As the property of it vests immediately in the lord on the death or alienation of the tenant, the lord may seize the identical thing, though he cannot distrain any other chattel for it (Cro. Eliz. 590; Keilw. 82 a, 84 b, 167 a; Br. Har. 2, 6, 7; *Parker* v. *Gage*, 1 Show. 81). The property in any particular beast will not vest in the lord before selection of it (*Abington* v. *Lipscomb*, 1 Q. B. 776; see stat. 4 & 5 Vict. c. 35; 6 & 7 Vict. c. 23; 15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94, providing for the commutation of manorial rights in respect of copyholds. See further as to heriots, Shelford on Copyholds and the Supplement thereto, pp. 119—133; 2 Watk. on Cop. c. 6; 2 Saund. Rep. 168, n.; Cruise, Dig. tit. X., c. 4, ss. 49—63; Com. Dig. Copyhold (K. 18), (K. 27); Scriven on Cop. 210—224, 6th ed.; *Croome* v. *Guise*, 4 Bing. N. C. 148). A heriot may be due by custom on the death of a tenant in respect of a tenement of free lands held in fee simple of a manor (*Damarell* v. *Protheroe*, 10 Q. B. 20).

3 & 4 Will. 4, c. 27, s. 1.

Heriot custom.

In a case of heriot service, where a manor had been settled, it was held that the right of the remainderman to seize a heriot in 1847 (he being then entitled in possession) was not barred by sects. 2 and 3, owing to the non-payment of a heriot to the tenant for life in 1824 (*Chichester* v. *Hall*, 17 L. T. (O. S.) 121). In *Lord Zouch* v. *Dalbiac* (L. R. 10 Ex. 172), a case of heriot custom, where it was admitted that more than twenty years before the heriot the subject matter of the action became due, a previous heriot had become due which the lord had not seized, the lord's right of seizure was not barred under this statute. Opinions were expressed that neither heriot custom nor heriot service were within sects. 2 and 3 (*Ib.* 182); and that if rent did anywhere in the statute include heriots, it might be in sect. 42 (p. 179). *Bramwell*, B., doubted whether it was the general intention of the statute to bar not merely the right to a particular heriot, but the title generally (See the relation of the statute to heriots discussed in *Owen* v. *De Beauvoir*, 16 M. & W. 566; *De Beauvoir* v. *Owen*, 5 Exch. 166; Darb. & Bos. Stat. Lim. 208, 224).

Negligence in exacting acknowledgments for fines.

In the absence of evidence adverse to the rights of the lord of a manor, the court will not presume the enfranchisement of land shown to have been copyhold more than a century ago, from mere negligence by the lords in exacting the small acknowledgments for fines, &c., which were then commuted. *Wood*, V.-C., said it was not a case to which any statute of limitations applied (*Turner* v. *West Bromwich Union*, 9 W. R. 155; see also as to these presumptions, *Chichester* v. *Hall*, 17 L. T. (O. S.) 121).

Different kinds of rents.

(*f*) A rent (*reditus*) is properly a sum of money, or other thing to be rendered periodically, in consequence of an express reservation in a grant or demise of lands or tenements, the reversion of which is in the grantor or person demising (2 Bl. Comm. 31; Gilb. on Rents, 9, &c.) There are at common law three sorts of rents: rent-service, rent-charge, and rent-seck (Litt. s. 213).

Rent-service.

Rent-service is so called because it hath some corporeal service incident to it, as at least fealty or the tenant's feodal oath of fidelity (Co. Litt. 142). And for these, in case they be in arrear, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion or future estate of the lands, after the lease or particular estate of the lessee or grantee is expired (Litt. s. 215).

Rent-charge.

A *rent-charge* is where the owner of the rent hath no future interest or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain

3 & 4 Will. 4, c. 27, s. 1.

rent payable thereout, and adds to the deed a covenant or clause of distress if the rent be in arrear. In this case the land is liable to distress, not of common right, but by virtue of the clause in the deed, and therefore it is called a rent-*charge*, because in this manner the land is charged with a distress for the payment of it (Co. Litt. 143). A rent for equality of partition is not a rent-service but a rent-charge of common right, and may be distrained for (Litt. s. 253).

Rent-seck.

Rent-*seck* (*reditus siccus*), or barren rent, is, in effect, nothing more than a rent reserved by deed, but without any clause of distress (2 Bl. Comm. 42; see *Dodds* v. *Thompson*, L. R. 1 C. P. 133). Either a rent-service disconnected from the reversion (*Ards* v. *Watkin*, Cro. Eliz. 637, 651), or a rent-charge may be divided by will or by deed, operating under the Statute of Uses, so as to make the tenant liable without attornment to several distresses by the devisees or *cestuis que use*. It seems that since the stat. 4 Anne, c. 16, s. 9, a rent-charge may be so divided by a conveyance of any kind (*Rivis* v. *Watson*, 5 M. & W. 255; see *Colborne* v. *Wright*, 2 Lev. 239).

There are also other species of rents, which are reducible to these three. Rents of *assize* are the certain established rents of the freeholders and ancient copyholders of a manor (2 Inst. 19), which cannot be departed from or varied. Those of the freeholders are frequently called *chief* rents (*reditus capitales*); and both sorts are indifferently denominated *quit-rents* (*quieti reditus*), because thereby the tenant goes quit and free of all other services. A *fee-farm* rent is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands at the time of its reservation (Co. Litt. 143; see *Bradbury* v. *Wright*, Dougl. 627, n. 1). These are the general divisions of rent; but the difference between them (in respect of the remedy for recovering) is now abolished.

Remedy by distress for recovering rents-seck given by 4 Geo. 2, c. 28, s. 5.

By stat. 4 Geo. 2, c. 28, s. 5, the same remedy was given by distress, and by impounding and selling the same, in cases of rents-seck, rents of assize, and chief-rents, which had been duly answered or paid for the space of three years within the space of twenty years before the first day of that session of parliament (January 21, 1731), or which should be thereafter created, as in case of rent reserved upon lease. As to this section, it was held that, unless the case was brought within it, a rent-seck could not be recovered by distress (*Bradbury* v. *Wright*, Dougl. 627). It was not, however, necessary that the three years mentioned in the statute should be *continuous;* it was sufficient if, for the space of three *whole* years within twenty years before the passing of the act, the rent was paid, though those years might not be consecutive (*Musgrave* v. *Emerson*, 10 Q. B. 326). A rent-charge granted by deed containing no power of distress is within the section (*Dodds* v. *Thompson*, L. R. 1 C. P. 133).

Distress for rents.

Now by Conv. Act, 1881, s. 44, *post*, where an annual sum is, by an instrument coming into operation after December 31, 1881, charged on land or the income thereof, whether by way of rent-charge or otherwise, and which annual sum is not a rent incident to a reversion, such annual sum can be recovered by means of (1) a distress, (2) an entry, (3) a demise of the land charged.

As a general rule, a person who has parted with the reversion cannot distrain (*Parmenter* v. *Webber*, 8 Taunt. 593; *Langford* v. *Selmes*, 3 K. & J. 226; see as to a mortgage, *Trent* v. *Hunt*, 9 Exch. 14). If a lessee make an underlease of his whole term, that amounts to an assignment (*Beardman* v. *Wilson*, L. R. 4 C. P. 57; *Hyde* v. *Warden*, 3 Ex. D. 83); and if rent be reserved, the assignor cannot distrain (——— v. *Cooper*, 2 Wils. 375). Under certain circumstances, however, the rent reserved may amount to a rent-charge (See *Williams* v. *Hayward*, 1 E. & E. 1040), to which apparently 4 Geo. 2, c. 28, s. 5, would apply.

Rents for which a distress may be made within 3 & 4 Will. 4, c. 27.

It was said by *Patteson*, J., that the language of the first section of this act cannot limit the sense of the term rent. An interpretation clause does not restrain the meaning (7 Q. B. 979). Where a tenant holds premises by the service of cleaning the parish church, without any pecuniary render, such service is a "rent" for which a distress may be made, within the meaning of the Limitation Act, 3 & 4 Will. 4, c. 27, ss. 1, 8 (*Doe* v.

Benham, 7 Q. B. 976, 981). So the service (under the like circumstances) of ringing the church bell at stated hours from Michaelmas to Christmas (*Doe* v. *Benham*, 7 Q. B. 976, 983). It is laid down in Co. Litt. 142 a, that "rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, pepper, comine, wheat, or other profit that lieth in render, office, attendance, and such like, as in payment of money;" and that for these things there may be a distress. So in Co. Litt. 96 a, it is said, "A man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number and sometime a lesser number there; and yet this uncertainty being referred to the manor, which is certain, the lord may distrain for this uncertainty." So in Litt. s. 137, it is laid down, that if land be holden by the service of singing a mass every Friday, the lord may distrain for not doing it (*Doe* v. *Benham*, 7 Q. B. 982). The keeping up of a grindstone upon land for the convenience of the parish, was held not rent, or "profits of land" within the third section of the act (*Doe* v. *Hinde*, 2 M. & Rob. 441; *Doe* v. *Benham*, 7 Q. B. 978).

3 & 4 Will. 4, c. 27, s. 1.

By stat. 3 & 4 Will. 4, c. 42, ss. 37, 38, the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for the arrearages due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime (sect. 37). And such arrearages may be distrained for after the determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined: provided such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; and all powers and provisions in the several statutes, made relating to distresses for rent, are made applicable to the distresses so made as aforesaid (sect. 38). See before that act, *Prescott* v. *Boucher*, 3 B. & Ad. 849.

Right of executors to distrain.

Distress after end of term.

Since stat. 8 Ann. c. 18, s. 6, rent accruing before the expiration of a tenancy can be distrained for within six months after the tenancy expires, and while the tenant continues in occupation. See before that act, *Williams* v. *Stiven* (9 Q. B. 14).

It has been decided, that a distress may be taken for arrears of a rentcharge created by *will*, although the testator does not in terms give a power to distrain, such power being a consequence drawn by law from the rentcharge (*Rodham* v. *Berry*, Watk. Conv. by Cov. 243, n. (*a*)). So in the case of annuities charged on land by wills containing no power of distress, the annuitant can distrain under 4 Geo. 2, c. 28, s. 5 (*Buttery* v. *Robinson*, 3 Bing. 392; *Roper* v. *Roper*, 3 Ch. D. 720); and a receiver will not be appointed (*Sollory* v. *Leaver*, 9 Eq. 22); except, perhaps, where the rents are not sufficient, or the annuity has been long in arrear (*Kelsey* v. *Kelsey*, 17 Eq. 500). In the case of an annuity created since 1881, see Conv. Act, 1881, s. 44, *post*.

Right to distrain for annuity given by will.

Since the abolition of real actions, a rentcharge in fee may be recovered in an action of debt, either under a covenant binding the terre-tenant (*Varley* v. *Leigh*, 2 Exch. 446), or independently of one (*Thomas* v. *Sylvester*, L. R. 8 Q. B. 368). But the rule does not apply when the land is situate out of England (*Whitaker* v. *Forbes*, 1 C. P. Div. 51). See as to the old law, *Webb* v. *Jiggs* (4 M. & S. 112).

Action of debt for rentcharge.

Rent cannot as a general rule issue out of an incorporeal hereditament, so as to warrant a distress, which can only be made in respect of a fixed ascertained rent reserved out of land (2 B. & Ad. 339). A rent could not formerly be reserved out of an advowson in gross, tithes, or any other *incorporeal* hereditament (Co. Litt. 47 a, 142 a; Gilb. on Rents, 20, 22). A rent cannot be reserved out of a rent (2 Roll. Abr. 446; Keilw. 161); nor out of a mere privilege or easement in land (*Buzzard* v. *Capel*, 8 B. & C. 141). Part of a rent may be granted, although it cannot be reserved out of an *old* rent (2 Ves. sen. 178).

Rents not in general issuable out of incorporeal hereditaments.

The king, however, may reserve a rent out of an incorporeal hereditament, as well as out of lands, because by his prerogative he may distrain for such rent on all the lands of his tenant (Co. Litt. 47 a; 2 Inst. 132;

Exceptions to the rule.

3 & 4 Will. 4, c. 27, s. 1.

5 Rep. 4; Gilb. on Rents, 22). And the grantee of fee-farm rents from the Crown might exercise the same power (1 P. Wms. 306). A rent may be reserved upon a grant of an estate in remainder or reversion, for the remedy by distress will arise when the lessee comes into possession (Co. Litt. 47 a) for all the arrears (2 Roll. Abr. 446).

Lease of tithes.

A lease by a bishop of *tithes only*, rendering the ancient rent, was held void against the successor, because there was no remedy for the rent by distress or assize (*Tanlintine* v. *Denton*, Cro. Jac. 111; *Windsor* v. *Gover*, 2 Wms. Saund. 230). But by stat. 5 Geo. 3, c. 17, all leases for one, two, or three lives, or for any term not exceeding twenty-one years, of any tithes, tolls, or other incorporeal hereditaments, without any lands by any bishop, college or hall, dean and chapter, precentor, prebendary, hospital, or any other person who is enabled by statute to make such leases of any *corporeal* hereditaments, are as effectual against the lessors and their successors as any leases of corporeal hereditaments are by virtue of 32 Hen. 8, c. 28, and an action of debt against the lessee is given for the recovery of such rent. It is perfectly clear that, in point of law, tithes, being an incorporeal hereditament, cannot pass by parol, but by deed only (*Gardiner* v. *Williamson*, 2 B. & Ad. 336).

Old limitation act as to rents.

By stat. 32 Hen. 8, c. 2, s. 4 (10 Car. 1, sess. 2, c. 6, Irish), no person should make any avowry or cognizance for any rent, suit, or service, and allege any seisin of any rent, suit, or service in the same avowry or cognizance, in the possession of his or their ancestors or predecessors, or in his own possession, or in the possession of any other whose estates he shall pretend or claim to have above fifty years next before the making of the said avowry or cognizance. This provision was held to apply only where it was necessary to allege seisin, and not where rent was expressly created by deed, the commencement whereof could be shown (Co. Litt. 115 a; 8 Rep. 64), or by act of parliament (*Faulkner* v. *Bellingham*, Cro. Car. 80), or by will (*Collins* v. *Goodall*, 2 Vern. 235), as to which there was no prescribed period of limitation, either at law or in equity (*Cupit* v. *Jackson*, M'Clel. 495; 13 Price, 721; see *White* v. *James*, 4 Jur. N. S. 1214; and *Stackhouse* v. *Barnston*, 10 Ves. 467; *Foster's case*, 8 Rep. 128; *De Beauvoir* v. *Owen*, 19 L. J. Exch. 182). So that arrears for any number of years might have been recovered unless there was evidence to raise a presumption of payment (10 Ves. 467). But mere length of time, short of fifty years, the period fixed by the stat. 32 Hen. 8, c. 2, and unaccompanied with other circumstances, was not of itself sufficient ground to presume a release or extinguishment of a quit rent (*Eldridge* v. *Knott*, Cowp. 214, cited 10 Ves. 467, 468).

As to the use of the word "rent" in this statute, see *Doe* v. *Angell*, 9 Q. B. 328, quoted in note to sect. 9, *post*.

Annuities.

(*g*) An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded; a rent-charge being a burthen imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor (2 Bl. Comm. 40). The material distinction between an annuity and a rent is, that the former is a charge on the *personal* estate only, and the latter on the real (Co. Litt. 2 a; 114 b, 20 a).

Annuities charged on land.

An annuity charged upon land is by this clause included in the word "rent" as used in the act. An annuity charged by will on lands, with a power of distress in default of payment after twenty days, was held to be extinguished by sect. 2, twenty years after the first right to distrain accrued after the testator's death (*James* v. *Salter*, 3 Bing. N. C. 544). Six years' arrears only of such an annuity can be recovered under sect. 42, in proceedings other than an action on a specialty (*Francis* v. *Grover*, 5 Hare, 39). Where such an annuity was secured by specialty, twenty years' arrears could formerly be recovered under 3 & 4 Will. 4, c. 42, s. 3, in an action on the specialty (*Strachan* v. *Thomas*, 12 Ad. & El. 536). See now 37 & 38 Vict. c. 57, s. 8, p. 198, *post*. As to the right of distress for an annuity charged on land, see *ante*, p. 107.

Annuities not charged on land.

An annuity given by will and not charged upon land, is within the provision as to legacies in sect. 40 (*Ashwell's Will*, Johns. 112). Lord

St. Leonards seems to have been of opinion that such an annuity would be extinguished if no payment were made for twenty years (R. P. Stat. 138, 2nd ed.) But it has been suggested that time must be reckoned separately with regard to each payment, and that the annuity would not be extinguished by non-payment for the statutory period (Darb. & Bos. Stat. Lim. 126). Such an annuity has been decided not to be within sect. 42 (*Roch* v. *Callen*, 6 Hare, 531). If such an annuity be secured by bond or covenant, the non-payment of each instalment is a distinct breach, and time runs, under 3 & 4 Will. 4, c. 42, s. 3, against each as it becomes due (*Amott* v. *Holden*, 18 Q. B. 593). A terminable annuity for ten or twenty years is within 3 & 4 Will. 4, c. 27 (*Uppington* v. *Tarrant*, 12 Ir. Ch. R. 269). A gross sum of money charged upon lands, to be paid by yearly instalments, and secured by power of distress, is within sections 40 and 42 (*Ib.* 262). Payments for tithe imposed in London by 37 Hen. 8, c. 12, are within the words "annuities or periodical sums of money charged upon land" (*Payne* v. *Esdaile*, 13 App. Cas. 613). 3 & 4 Will. 4, c. 27, s. 1.

The "compositions" excepted from the definition of rent were compositions real (*Per* Lord Selborne, *Irish Land Commission* v. *Grant*, 10 App. Cas. 31). Compositions.

As to the meaning and operation of the words "issue in tail" in this clause, see *Abergavenny* v. *Brace*, L. R. 7 Ex. 152, *post*, p. 114. Person through whom another claims.

(*h*) An *escheat* was in its nature feodal. A feud was the right which the tenant had to enjoy lands, rendering to the lord the duties and services reserved to him by contract. After a grant made, a right remained in the lords, called a seignory, consisting of services to be performed by the tenant, and a right to have the land returned on the expiration of the grant as a reversion, called an escheat (*Burgess* v. *Wheate*, 1 Eden, 191). Escheat.

Escheat is founded on the principle that the blood of the person last seised *in fee* is by some means utterly extinct and gone; and since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence that the inheritance must fail (2 Inst. 64; Wright's Ten. 115). Escheat may happen from default of heirs, as where the tenant dies without any relations on the part of any of his ancestors, or where he dies without any relations on the part of those ancestors from whom the estate descended, or where, until the stat. 3 & 4 Will. 4, c. 106, s. 9 (see *post*), he died without any relations of the whole blood. An escheat also arose from the corruption of the tenant's blood, consequent upon an attainder for treason or felony, by which he became incapable of inheriting, and of transmitting anything by heirship (See 3 & 4 Will. 4, c. 106, s. 10, and note, *post*). On the subject of escheat, see 2 Bl. Comm. 241—257; Cruise's Dig. tit. XXX.; Harg. Co. Litt. 18 b, n. (2); *Henchman* v. *A. G.* (2 Sim. & Stu. 498; 3 M. & K. 492); and the note to *A. G.* v. *Sands* (Tudor, L. C. Conv. 760, 3rd ed.); 47 & 48 Vict. c. 71, s. 4.

(*i*) The poor of a parish are a class of persons within the meaning of the word "persons" in this section, in a case where the rents of property are applicable for the benefit of such poor (*Magdalen College* v. *A. G.*, 6 H. L. C. 189). The Att. Gen., whether suing *ex officio*, or at the relation of others, is not a "person" having a right to bring an action or suit in equity to recover land, within the meaning of this act; he is only part of the machinery by which the rights of others are sought to be enforced (*Ib.*; see *A. G.* v. *Magdalen College*, 18 Beav. 223; sect. 24, *post*). Persons.

The king having the prerogative of not being included within the words "person or persons, bodies politic or corporate," used in an act of parliament, whether affirmatively or negatively (11 Rep. 68), is not bound in his public capacity by the general words of an act of parliament, unless named (7 Rep. 32; 11 Rep. 68; Plowd. 240; 1 Str. 516; 1 Show. 464; Show. P. C. 185; *Hall* v. *Maule*, 4 Ad. & Ell. 284; *R.* v. *Wright*, 1 Ad. & Ell. 434; *Re Cuckfield Board*, 19 Beav. 153, and the cases cited in the note thereto; *Re Bevan*, 14 W. R. 147; *Re Henley*, 9 Ch. Div. 481; see *Perry* v. *Eames*, 1891, 1 Ch. 668); except where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, when the king is bound, though not Crown, when bound by acts of parliament.

3 & 4 Will. 4, c. 27, s. 1.

particularly named (Plowd. 136, 137; 11 Rep. 68 b; 5 Rep. 14; 7 Rep. 32; see Bac. Abr. Prerogative (E.)). But where a statute is general, and its effect would be to deprive the king of any prerogative, right, title, or interest, he is not bound unless specially named (11 Rep. 68), and was held not to be within the Statute of Limitations (Br. St. Lim. 67), nor the statute of 13 Edward 1, st. 1, c. 5, which makes plenarty for six months a good plea in *quare impedit* (11 Rep. 68; Plowd. 244). It was said by Lord *Romilly* that 3 & 4 Will. 4, c. 27, does not affect suits by the Att. Gen. to recover property belonging to the Crown (18 Beav. 246); and in *Rustomjee* v. *The Queen* (1 Q. B. D. 491, 492), it was said that the Crown cannot be bound by the Statute of Limitations which has relation only to actions between subject and subject. In the same case the statute was held not to apply to a petition of right. The Crown comes expressly within 2 & 3 Will. 4, c. 100, for shortening the time required in claims of modus or discharge from tithes. The Crown is also expressly within sects. 1 and 2 of 2 & 3 Will. 4, c. 71, *ante*, pp. 1, 4; but is not within sect. 3 (*Perry* v. *Eames*, 1891, 1 Ch. 658).

Statutes of limitation as to rights of Crown to realty.

21 Jac. 1, c. 2.

9 Geo. 3, c. 16.

By stat. 21 Jac. 1, c. 2, the king was disabled from claiming any manors, lands, or hereditaments, except liberties and franchises, under a title accrued sixty years before the then session of parliament, unless within that time there had been a possession under such title; but this provision becoming daily more ineffectual by lapse of time, a permanent limitation was introduced (See Co. Litt. 119 a, n. (1); 3 Inst. 188). And by statute 9 Geo. 3, c. 16, it is provided, that the king shall not sue, &c., any persons, &c., for any lands, &c. (except liberties and franchises) on any title which has not first accrued within sixty years before the commencement of such suit, unless he has been answered the rents within that time, or they have been in charge, or stood *insuper* of record; and the subject shall quietly enjoy against the king, and all claiming under him, by patent, &c. This statute was extended to Ireland by 48 Geo. 3, c. 47, as to which, see *Tuthill* v. *Rogers*, 6 Ir. Eq. R. 429; 1 J. & Lat. 36.

In the case of tithes where none had been received, it was held, that the accounts of the auditors of the revenue, in which the tithes had been entered and returned *nil*, were sufficient proof that they had been "duly in charge" (*A. G.* v. *Eardley*, 8 Price, 73; see 3 Inst. 189, as to the meaning of "being in charge").

24 & 25 Vict. c. 62.

The stat. 9 Geo. 3, c. 16, is amended by 24 & 25 Vict. c. 62; and by the 1st section of the latter act, the Crown shall not hereafter sue any persons for real property (other than liberties or franchises) which such persons or their ancestors have held or taken the profits by the space of sixty years before the commencement of suit, by reason only that the same real property, or the rents thereof, have been in charge to the Crown, or stood *insuper* upon record within the said space of sixty years. The Crown shall not, for the purposes of the act 9 Geo. 3, c. 16, be deemed to have been answered the rents of real property which shall have been held, or of which the rents shall have been taken by any person by the space of sixty years before the commencement of any action, as mentioned in that act, by reason only of the same real property having been parcel of any manor of which the rents shall have been answered to the Crown, or some other person under whom the Crown claims or shall thereafter claim as aforesaid or of any manor which shall have been duly in charge to the Crown or stood *insuper* of record (24 & 25 Vict. c. 62, s. 3). As to Ireland see

Adverse possession against the Crown.

Where an entire manor or other district has been in charge to the Crown within sixty years, acts done in different parts of it by different persons, such as the erection and occupation of lime-kilns for burning limestone found within the district, and of cottages for the purpose of such occupation and the sale of lime so produced, do not amount to such an adverse possession as to displace the title of the Crown to the district, although they may have been continued for above sixty years (*Doe* v. *Roberts*, 13 M. & W. 520).

The statute 9 Geo. 3, c. 16, does not give a title, it only takes away the right of suit of the Crown, or those claiming from the Crown, against such as have held an adverse possession against it for sixty years (11 East,

495). Adverse possession of Crown lands for less than sixty years was not sufficient to support the plaintiff's title in an action of ejectment against a stranger (*Goodtitle* v. *Baldwin*, 11 East, 488). 3 & 4 Will. 4, c. 27, s. 1.

By stat. 21 Jac. 1, c. 14, s. 1, it is enacted, "that wheresoever the king, his heirs or successors, and such from or under whom the king claimeth, and all others claiming under the same title under which the king claimeth, hath been or shall be out of possession by the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements, or hereditaments, within the space of twenty years before any information of intrusion brought or to be brought to recover the same: that in every such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially; and that in such cases the defendant or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found, or adjudged for the king." Although the king can never be put out of possession in point of law by the wrongful entry of a subject, yet there may be an adverse possession *in fact* against the Crown. Therefore, after such an adverse possession by a subject for twenty years, the Crown could only recover land by information of intrusion; consequently ejectment would not lie at the suit of the grantee of the Crown, notwithstanding the rights of the Crown are not barred by the Statute of Limitations (*Doe* v. *Morris*, 2 Bing. N. R. 189). Rules have been made for assimilating the mode of procedure to that in ejectment and trespass on the common law side of the Court of Exchequer as nearly as may be, consistently with the rights and prerogatives of the Crown, and the provisions of the stat. 21 Jac. 1, c. 14, the mode of procedure to remove persons intruding upon the Queen's possession of lands, shall be distinct from that to recover profits or damages for intrusion (See Rules on Revenue side of the Court of Exchequer, made in pursuance of 22 & 23 Vict. c. 21, 22nd June, 1860, Nos. 21—38; 2 Chitty's Statutes, 613 *et seq.*; and also 28 & 29 Vict. c. 104, s. 31 *et seq.*) 21 Jac. 1, c. 14.

Practice in Crown suits

The title of the Crown to lands, of which it has been out of possession for twenty years, may be tried in the information of intrusion itself, and need not be first found by inquest of office, the only effect of the statute 21 Jac. 1, c. 14, being to throw the *onus* of proving title in the first instance, in such a case, on the Crown (*A. G.* v. *Parsons*, 2 M. & W. 23). As to inquests of office, see now 28 & 29 Vict. c. 104, s. 52. See, as to evidence in Crown suits, *Doe* v. *Roberts*, 13 M. & W. 520.

Although the Statute of Limitations does not bind the Crown, yet where the claim of the Crown is only a derivative right, it must stand in the same situation as its principal. Therefore, the statute may be pleaded to a *scire facias* issued by the Crown against the drawer of a bill of exchange, which was barred in the hands of the Crown debtor, upon the ground that the Crown is only entitled to its debtor's right, and cannot create or reserve a right, if none existed, or it has become barred (*R.* v. *Morrall*, 6 Price, 24). But where a right has vested in the Crown before the statute has run against the former owner, the rights of the Crown are not barred or affected by the statute, as the Crown is not within its operation (*Lambert* v. *Tayler*, 4 B. & C. 138; see *Tayler* v. *A. G.*, 10 Sim. 413, as to course of proceeding by a subject to enforce a claim of property against the Crown; *Re Robson*, 2 Phil. 64; *Re De Bode*, *Ib.* 85; see 23 & 24 Vict. c. 34, as to petitions of right and the orders thereon, 8 Jur. N. S. 283, Part II.) Chose in action vested in the Crown.

With respect to the personal estate of a deceased, proceedings on the part of the Crown cannot now be instituted, nor can a petition of right be presented, except within the same time, and subject to the same rules of law and equity, as in the case of an action by or against a subject (47 & 48 Vict. c. 71, s. 3). *under 62 Vict. c. 7 ss. 12, 14, the claim of the Crown*

The Statutes of Limitation which affect the rights of the Duke of Cornwall are 7 & 8 Vict. c. 105, ss. 71—88; 23 & 24 Vict. c. 53; and 24 & 25 Vict. c. 62; as to which, see Darb. & Bos. Stat. Lim. 413; Brown's Law of Limitation, 251, 415. Statutes of Limitation as to rights of Duke of Cornwall.

But though the Crown was not bound by the Statute of Limitations, yet Presumption

3 & 4 Will. 4, c. 27, s. 1.

of grants from the Crown.

a grant from it may be presumed from great length of possession, not because the court really thinks a grant has been made, but it presumes the fact for the purpose and from a principle of quieting the possession (*Hull* v. *Horner*, Cowp. 102, 215). Thus grants from the Crown of markets and the like, after an uninterrupted enjoyment of twenty years (11 East, 419) have been presumed. So an enfranchisement of a copyhold may, upon sufficient evidence, be presumed against the Crown (*Roe* v. *Ireland*, 11 East, 280). So where the title of a family to an advowson was evidenced by deeds and conveyances for a period of nearly 140 years, and there had been three presentations by them and none by the Crown, it was held, that a grant from the Crown might be presumed (*Gibson* v. *Clark*, 1 Jac. & W. 159; see 3 T. R. 158). Letters patent from the Crown have been presumed (*Picking* v. *Stamford*, 2 Ves. jun. 282); but a grant which would have been against a statute was not presumed (*Goodtitle* v. *Baldwin*, 11 East, 495). In a case where Charles I. had granted the soil between high and low water marks along the coast of the county of Southampton, but the Crown remained in possession for upwards of 150 years after the grant, this was held to create a presumption against the grant (*Parmeter* v. *A. G.*, 1 Dow, 316). An objection to a title that two fee-farm rents, created by letters patent by James I., were not shown to have been extinguished, was overruled, it being proved that no claim had been made by the Crown of the rent from the year 1706, and no proof of any previous claim (*Simpson* v. *Gutteridge*, 1 Madd. 609; see *Flower* v. *Hartopp*, 12 L. J. Ch. 507). A grant from the Crown of undefined shares in land will not be held void for uncertainty after long modern possession, for a supplementary grant may be presumed (*Des Barres* v. *Shey*, 29 L. T. 592). Enjoyment of property for 110 years by a parish, although no conveyance appeared in evidence, was held conclusive proof of ownership against the Crown (*A. G.* v. *Hotham*, 1 T. & R. 210).

Presumption of inrolments and registration.

But although grants on record have been presumed, there seems to be no instance of the presumption of an inrolment of a deed which was made essential by statute (*Doe* v. *Waterton*, 3 B. & Ald. 149, 151; *Wright* v. *Smythies*, 10 East, 409). It might be otherwise if some foundation were laid for raising a presumption by showing that there was a chasm in the records corresponding with the date of the supposed conveyance (*Allen* v. *Walker*, 1 Jac. & W. 619). The registry of a deed of lands in a register county will not be presumed (*Doe* v. *Hirst*, 11 Price, 475). An inrolment of a tithe award was presumed where the usage of paying tithe was shown (*Macdougall* v. *Purrier*, 2 Dow & Cl. 135, cited 8 Q. B. 580).

Port duties.

It seems that where port duties are claimed under a grant from the Crown, which appears from the evidence to be inrolled, but which is not produced by the plaintiff, the jury ought not to be directed to presume such grant upon mere evidence of usage (*Brune* v. *Thompson*, 4 Q. B. 543). As to the presumption that a claim for port duties had a legal origin, see *Foreman* v. *Whitstable* (L. R. 4 H. L. 266), and cases there cited.

Presumption of an act of parliament.

After long possession the court will even presume an act of parliament in order to protect a right (*A. G.* v. *Ewelme Hospital*, 17 Beav. 366), but not the passing of an act of parliament within the last 250 years, on an important subject of the most general interest, of which no vestige can be found (*R.* v. *Exeter*, 12 Ad. & Ell. 532, 533). *Jessel*, M. R., refused to presume an act of parliament as an origin for an alleged right (*Chilton* v. *London*, 7 Ch. D. 733). See further, 1 Taylor, Ev. 144, 7th ed.

2. *Period of Limitation fixed, and when Right first accrues.*—*Twenty Years.*

No land or rent to be recovered, but

2. After the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall make an entry or

distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same (*k*).

3 & 4 Will. 4, c. 27, s. 2.

within twenty years after the right of action accrued to the claimant, or some person whose estate he claims.

(*k*) From the 1st January, 1879, sect. 1 of 37 & 38 Vict. c. 57 (*post*, p. 194), has, by sect. 9 of the same act, been substituted for sect. 2 of 3 & 4 Will. 4, c. 27. Sect. 1 of 37 & 38 Vict. c. 57, fixes the period of limitation for the recovery of land or rent at twelve years, and also expressly includes "suits," but is in other respects similar to sect. 2 of 3 & 4 Will 4, c. 27. The following note has reference to the last-mentioned section.

37 & 38 Vict. c. 57.

Where the claim is to the possession of land, the real right is the right of entry, and the right of action is only given to enforce the right of entry (*Magdalen Hospital* v. *Knotts*, 8 Ch. Div. 727). By this section the right of entry is taken away unless an entry be made within the statutory period computed from the right first accruing (*Holmes* v. *Newlands*, 11 Ad. & El. 44; 8 Q. B. 679).

This section governs cases which fall within its general words, even though not included among the instances given in sect. 3. A testator charged an annuity on land, payable quarterly, with a power of distress if the annuity should be in arrear for twenty days after any quarterly day. The testator died in 1804, and on the 17th March, 1835, the defendants distrained for twenty-nine years' arrears of the annuity, ending at Christmas, 1834. The right to make a distress for the annuity first accrued to the annuitant in April, 1805. It was held that the claim to the annuity was barred. *Tindal*, C. J., in giving judgment, said "that the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and upon a more close examination of the third section, the object and intent of it seems to us to be no more than this: to explain and give a construction to the enactment contained in the second clause, as to 'the time at which the right to make a distress for any rent shall be deemed to have first accrued,' in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but is not included amongst the instances given by the third, to be governed by the operation of the second" (*James* v. *Salter*, 3 Bing. N. C. 553; approved in House of Lords, *Irish Land Commission* v. *Grant*, 10 App. Cas. 27; see *Magdalen Hospital* v. *Knotts*, 8 Ch. Div. 727). And in a case where it was held that the right of a mortgagee to recover possession first accrued (within the above section), at the date of a foreclosure order, it was said by Earl *Cairns*, that sect. 3, in defining when the right shall be deemed to have accrued, is not necessarily exhaustive (*Pugh* v. *Heath*, 7 App. Cas. 235).

This section governs cases not included among instances in sect. 3.

James v. *Salter*.

Where a lessee entered under a lease granted by a charitable corporation in 1783, which the court held to have been absolutely void, and an action was brought in 1876 claiming possession of the demised land, it was held by the House of Lords that the lessees must be taken to have been in possession from 1783 without any title whatever, and that the rights of the corporation were barred by this section (*Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324; see *Webster* v. *Southey*, 36 Ch. D. 9). In the courts below, the same lease was treated as voidable only; and it was held by the Court of Appeal (overruling *Jessel*, M. R., 5 Ch. D. 175) that the period of limitation ran from the granting of the lease (8 Ch. Div. 709).

Void lease.

Where a lessor permitted his lessee during the continuance of the lease

Landlord and tenant.

3 & 4 Will. 4, c. 27, s. 2.

to pay no rent for the statutory period, time ran against the lessor's right to bring ejectment from the determination of the lease, his right of action accruing under the fourth branch of the third section (*Doe* v. *Oxenham*, 7 M. & W. 131). Nor did he lose his right to rent, the word "rent" in the second section not including rents reserved on leases for years (*Grant* v. *Ellis*, 9 M. & W. 113; *Re Turner*, 11 Ir. Ch. R. N. S. 304; *Irish Land Commission* v. *Grant*, 10 App. Cas. 26). So long as the relation of landlord and tenant under a lease in writing subsists as a legal relation, the landlord's right to rent is not barred by non-payment for however long a time (*Archbold* v. *Scully*, 9 H. L. C. 360). Where a lease was renewed, the landlord's estate became an estate in possession, and his right of action accrued (*Eccl. Commissioners* v. *Rowe*, 5 App. Cas. 741).

Rent within this section.

Grant v. *Ellis.*

The word "rent" in the second section of the act does not include rents reserved on leases for years, but is confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rents service, fee-farm rents, or the like (*Grant* v. *Ellis*, 9 M. & W. 113; *Irish Land Commission* v. *Grant*, 10 App. Cas. 26). The word is used to express rents which are a charge on land (*Paget* v. *Foley*, 2 Bing. N. C. 688; see 1 Real Prop. Report, 50). An additional rent in the nature of a penal rent reserved by indenture of demise between landlord and tenant was held not to be within the section (*Daly* v. *Bloomfield*, 5 Ir. L. R. 65). As to the use of the word "rent" in the statute, see further, *Doe* v. *Angell*, 9 Q. B. 328, quoted under sect. 9, *post*.

Issue in tail.

The first section interpreting the person through whom another person is said to claim as meaning any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed "as issue in tail," it has been laid down that by virtue of the first and second sections an ordinary tenant in tail would lose his right after want of possession for the statutory period in the time of his ancestor (*Abergavenny* v. *Brace*, L. R. 7 Ex. 152, 172). But a statutory entail (as that of the Abergavenny estates) is not within these words (*Ib.* 155, 172).

Actions and suits to recover land within this section.

The right of a lord to enter and seize copyholds *quousque* was barred after seventy years (*Re Lidiard*, 42 Ch. D. 254). A suit by a copyhold tenant to compel admittance by the lord was a suit to recover land within this section (*Walters* v. *Webb*, 5 Ch. 531). So was an action for an assignment of dower (*Marshall* v. *Smith*, 5 Giff. 37). A foreclosure action is an action to recover land within this section (*Harlock* v. *Ashberry*, 19 Ch. Div. 539; *Hugill* v. *Wilkinson*, 38 Ch. D. 480). A mortgagee's petition to recover arrears of interest out of a fund in court, representing the mortgaged property was held analogous to a suit to recover land (*Re Stead*, 2 Ch. D. 713, 718).

Limitation of real actions before 3 & 4 Will. 4, c. 27.

By the common law there was no stated or fixed period within which it was necessary to commence actions, but afterwards certain remarkable events were from time to time selected for that purpose, as the return of King John from Ireland, and the coronation of Henry the Third. A certain period was limited by stat. 32 Hen. 8, c. 2, which enacted that no person should maintain any writ of right, or make any prescription, title or claim of, to or for any *manors*, *lands*, *tenements*, *rents*, *annuities*, *commons*, *pensions*, *portions*, *corodies*, or *other hereditaments* of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but within sixty years next before the teste of the said writ, or next before the said prescription, title or claim so made. Actions upon the *possession* of the ancestor of the party claiming were limited to fifty years; and those upon the seisin or possession of the party himself to thirty years; and formedons in remainder or reverter were required to be sued within fifty years. The writ of intrusion came within the stat. 32 Hen. 8, c. 2, and not within the stat. 21 Jac. 1, c. 16, and the limitation of time for suing out such writ was fifty years (See *Peircey* v. *Gardner*, 3 Bing. N. C. 748). Dignities were held not to be within the Statute of Limitations (In the barony of

32 Hen. 8, c. 2.

Willoughby of Paiham, Lords' Journ. vol. 31, p. 350; see 3 Cru. Dig. 202). But offices with fees and profits are within them (Lords' Journ. vol. 36, p. 295). An annuity was not within the stat. 32 Hen. 8, c. 2, for the plaintiff did not declare upon a seisin, but upon his grant (Bro. St. Lim. 26; see *ante*, p. 108). So that statute did not extend to a corporation aggregate, as mayor and commonalty, nor to a dean and chapter. But it was otherwise as to a corporation sole; for if a bishop or other sole corporation sued upon a seisin of his predecessor, he was barred if the seisin was not within sixty years (Bro. St. Lim. 33; Bac. Abr. Limitation of Actions, (E)).

3 & 4 Will. 4, c. 27, s. 2.

The stat. 21 Jac. 1, c. 16, sects. 1 and 2 (repealed by 26 & 27 Vict. c. 125), limited the period for all writs of formedon to twenty years, and enacted that no persons should at any time thereafter make any entry into any lands, tenements or hereditaments, but within twenty years next after his title should *first descend* or accrue to the same, and, in default thereof, such persons so not entering, and their heirs, should be disabled from such entry after to be made. [The provisions of the statutes 32 Hen. 8, c. 2, and the 21 Jac. 1, c. 16, were extended to Ireland by the Irish stat. 10 Car. 1, sess. 2, c. 6.]

Limitation of right of entry.

21 Jac. 1, c. 16.

By the stat. 21 Jac. 1, c. 16, s. 1, no entry could be made, and therefore no ejectment maintained, but within twenty years after the title of entry first accrued, with the exception of persons under disabilities. There were two periods from which the term of twenty years limited by that statute was to be computed, one with respect to the rights of persons entitled in possession, and the other with respect to the rights of persons entitled to future interests. Less difficulty arose with respect to the latter, because it can easily be proved when such rights would have come into possession by the determination of the preceding estates; but the former period was to be computed from the time when the *wrongdoer* acquired the possession of the freehold *adversely* to the title of the owner, whose estate thereby became a mere right; and in many cases it was very difficult to ascertain what would constitute such possession.

As to the rights of issues in tail under the stat. 21 Jac. 1, c. 16, see *Tolson* v. *Kaye*, 3 Brod. & B. 217; 3 B. & A. 738; 6 M. & G. 536; *Doe* v. *Woodroffe*, 16 M. & W. 769.

Non-claim on fines.

4 Hen. 7, c. 24.

By stat. 4 Hen. 7, c. 24, a fine with proclamations was made a bar to all persons if they did not claim within five years after the proclamations made, or after their rights of entry accrued, or after the removal of their disabilities (See *Davies* v. *Lowndes*, 5 Bing. N. C. 177, 178; *Runcorn* v. *Doe*, 5 B. & C. 701; *Doe* v. *Perkins*, 3 M. & S. 271; *Doe* v. *Gregory*, 2 Ad. & Ell. 14). For the case of married women, see *Doe* v. *Pett*, 11 Ad. & Ell. 853; *Doe* v. *Plumtre*, 3 B. & Ald. 474. It seems that the adverse possession necessary to make a fine with proclamations operate by way of bar, was the same as the adverse possession necessary for the purpose of barring a right of entry (Note to *Nepean* v. *Doe*, 2 Smith's L. C. 610, 9th ed.)

Adverse possession necessary under above statutes.

To constitute adverse possession, it was formerly considered necessary that there should be an ouster of the seisin in one of five modes, called disseisin, abatement, intrusion, discontinuance, and deforcement. Disseisin is where the person in possession of the freehold is evicted. Abatement is where a wrongdoer enters on the vacant possession, after the death of the owner, instead of the heir or devisee. Intrusion is where a wrongdoer enters on the vacant possession, after the death of the tenant for life, instead of the remainderman or reversioner. Discontinuance was where a tenant in tail in *possession* aliened by a tortious conveyance, as feoffment or fine, which did not bar the entail. Deforcement was considered to include the other four terms, and any holding over after the determination of an estate, or other wrongful withholding of the freehold from the right owner (See 1 Real Prop. Rep. 494; 3 Bl. Comm. 167—173).

Disseisin.

When a party entered by colour of a *void* grant, he was a *disseisor* (*Buckler's case*, 2 Rep. 55 b; Cro. Eliz. 451; Cro. Car. 306, 388; Litt. Rep. 298, 373; Cro. Jac. 660; 1 Jones, 316). But where a grant was according to

3 & 4 Will. 4, c. 27, s. 2.

the rules of law, but required to be perfected by a subsequent ceremony, as if a feoffee entered before livery of seisin, he was not a disseisor (2 Rep. 55). Wherever there was a disseisin, the possession of the disseisor was considered *adverse*, and the party was bound to pursue his remedy within twenty years from the act constituting the disseisin (Butl. Co. Litt. 330 b, n.) There might be an unlawful possession which did not amount to a disseisin (*Doe* v. *Gregory*, 2 Ad. & Ell. 14; 4 Nev. & M. 308; see 2 M. & W. 904). As to disseisin, see *Taylor* v. *Horde*, 1 Burr. 108; *Doe* v. *Lynes*, 3 B. & C. 388; *Williams* d. *Hughes* v. *Thomas*, 12 East, 141; Roscoe on Real Actions, 61—63; 2 Prest. on Abst. 284 *et seq.*

Question of adverse possession before 3 & 4 Will. 4, c. 27.

At the time of the enactment of 3 & 4 Will. 4, c. 27, it seems that the question whether possession was or was not adverse, was to be decided by inquiry whether the circumstances of that possession were sufficient to evince its incompatibility with a freehold in the claimant (Note to *Nepean* v. *Doe*, 2 Smith's L. C. 610, 9th ed.; and see the judgment of the Privy Council in *Des Barres* v. *Shey*, 22 W. R. 273, an appeal from Nova Scotia).

The possession of a lessee could not be adverse (1 Wils. 176; 3 Wils. 521; 2 Bos. & P. 542; 2 D. & R. 38), until the end of the tenancy (Cowp. 218). So in the case of a husband of a tenant for life holding on after her death (*Doe* v. *Gregory*, 4 Nev. & M. 308; see *Doe* v. *Blakeway*, 5 C. & P. 563). Joint possession with the real owner was held not adverse (*Reading* v. *Rawsterne*, 2 Ld. Raym. 829; 1 Salk. 423).

Possession was not adverse in some cases if there was a possible explanation consistent with the plaintiff's title; as when possession might have been, under a custom, for a husband to hold for life his deceased wife's copyhold (*Doe* v. *Brightwen*, 10 East, 583), or might have been in respect of dower (*Doe* v. *Haslewood*, 6 Ad. & Ell. 167; see *Doe* v. *Pettet*, 5 B. & Ald. 223; *Doe* v. *Harbrow*, 1 Ad. & Ell. 67, n.; *Doe* v. *Langfield*, 16 M. & W. 497); or might have been under an agreement for partition by deed, which was never executed (*Doe* v. *Millett*, 11 Q. B. 1036). Where a person held land which was intended to be, but was not in fact, conveyed to him on certain trusts, his possession was not adverse while it was in accordance with the trusts (*Doe* v. *Hulse*, 3 B. & C. 757). But where copyhold lands had been granted to A. for the lives of herself and B., and in reversion to C. for other lives, and A. died, having devised to B., who entered and kept possession for more than twenty years, it was held that C. was barred by the statute after B.'s death from maintaining ejectment, as C.'s right of possession accrued on the death of A., when his interest terminated, inasmuch as there could be no general occupant of copyhold land (*Doe* v. *Scott*, 4 B. & C. 706). Possession by a woman was held adverse to her brother, who was entitled as heir (*Doe* v. *Lawley*, 13 Q. B. 954). So possession by the mother of the heir was adverse unless it was by his permission (*Doe* v. *Jauncey*, 8 C. & P. 99). Where a party was let into possession with the consent of the owner, and did acts importing that he continued in possession only with the owner's permission, such acts prevented the possession being adverse (See Litt. s. 70). So where a person was let into possession under a contract for purchase, and paid interest on a portion of the purchase-money for some years, but never completed the purchase, it was held that his possession was not adverse (*Doe* v. *Edgar*, 2 Bing. N. C. 498). A woman, living apart from her husband, obtained a demise of property for a term: it was held that possession, if adverse to the wife, was adverse to the husband, and not otherwise (*Roe* v. *Wilkins*, 4 Ad. & Ell. 86). The solitary act of entry and attornment, followed by no assertion of right for upwards of thirty years, was no evidence of a possession not being adverse (*Doe* v. *Edwards*, 5 Ad. & Ell. 95).

Adverse possession before 3 & 4 Will. 4, c. 27, in the case of encroach-

The stat. 21 Jac. 1, c. 16, ran against the lord of a manor as well as against any other person. Hence it was said if a house, &c., be built upon the waste, the lord shall take care to have some entry made of it in his books, and reserve some rent or service, otherwise he will lose his right. If a cottage is built upon waste in defiance of a lord of a manor, and quiet possession has been had of it for twenty years, it is within the stat. 21 Jac. 1, c. 16;

but if it were built at first by the lord's permission, or any acknowledgment have been since made (though it were 100 years since), that statute would not run against the lord (Bull. N. P. 104, cited 3 B. & C. 414; see *Doe* v. *Wilkinson*, 3 B. & C. 413; *Doe* v. *Clarke*, 8 B. & C. 717; *R.* v. *Cuddington*, 2 New Sess. C. 10; L. J. 1845, M. C. 182; *R.* v. *Woburn*, 10 B. & C. 846). A mere licensee is in this respect on the same footing as a tenant (*Doe* v. *Baytup*, 3 Ad. & Ell. 188). As to licence for an encroachment on a common given by a commoner, see *Harvey* v. *Reynolds*, 1 C. & P. 141. If a person inclose a portion of the lord's waste by the licence of the lord, such person cannot be turned out of the possession of it by the lord without revocation of the licence (*Doe* v. *Williams*, 7 C. & P. 332; see *Doe* v. *Wilson*, 11 East, 56; *Doe* v. *Heakin*, 6 Ad. & Ell. 495).

3 & 4 Will. 4, c. 27, s. 2.

ments from waste.

Before 3 & 4 Will. 4, c. 27, if no other title appeared, possession for twenty years was strong presumptive evidence of a fee (*Doe* v. *Barnard*, Cowp. 595); and though gained by manifest wrong, and though liable to be defeated by the entry of the rightful owner, was a title as against strangers (*Doe* v. *Webber*, 1 Ad. & Ell. 119; *Doe* v. *Parke*, 4 Ad. & Ell. 816); and conferred on the possessor, on ouster or trespass by a stranger, the ordinary remedies for such injuries (See 3 Man. & Ry. 112, n.) Where a plaintiff in ejectment proved twenty years' possession immediately preceding possession for ten years by defendant, the former was entitled to recover, his earlier possession prevailing (*Doe* v. *Cooke*, 7 Bing. 346; see *Stokes* v. *Berry*, 2 Salk. 421). Possession of land for any term less than twenty years by a feoffee was not presumptive evidence of livery of seisin (*Doe* v. *Cleveland*, 9 B. & C. 864; *Doe* v. *Davies*, 2 M. & W. 503).

Possessory title before 3 & 4 Will. 4, c. 27.

Shortly after the passing of 3 & 4 Will. 4, c. 27, Lord *St. Leonards* thus described the effect of the act:—"Under the new act possession gives the right, and not only gives the right, but transfers the estate. All former statutes barred the remedy, but did not bar the estate; they did not create an estate, although they enable the party to hold against all the world. But the new statute in point of fact gives the estate, to recover which the remedy is barred, for it bars the remedy and binds the estate" (*Incorporated Society* v. *Richards*, 1 D. & War. 289; and see Sugd. R. P. Stats. 77, 2nd ed.); and the same judge subsequently said: "It is perfectly settled that adverse possession is no longer necessary in the sense in which it was formerly used, but that mere possession may be and is sufficient under many circumstances to give a title adversely; and although perhaps now no better expression than adverse possession can be used, yet it is not adverse in the sense in which that phrase was used before this act was passed" (*Ely* v. *Bliss*, 2 D. M. & G. 476, 477; see *Culley* v. *Doe*, 11 Ad. & Ell. 1008; *Nepean* v. *Doe*, 2 M. & W. 911; *Doe* v. *Barton*, 3 P. & Dav. 198; *Jack* v. *Walsh*, 4 Ir. L. R. 254).

Effect of 3 & 4 Will. 4, c. 27.

Some of the principles, however, laid down in the old cases on adverse possession have been acted on in recent cases (See *Scott* v. *Scott*, 4 H. L. C. 1085). Thus, in *Thomas* v. *Thomas* (2 K. & J. 83), where a father, entering on the estate of his infant children, was held to have been in possession as a bailiff for them, *Wood*, V.-C., applied and acted on the principle (*Doe* v. *Brightwen*, 10 East, 583) that possession is never considered adverse if it can be referred to a lawful title (See *Wall* v. *Stanwick*, 34 Ch. D. 763; *Hobbs* v. *Wade*, 36 Ch. D. 553; *Bolling* v. *Hobday*, 31 W. R. 9). Where a purchaser entered into possession of land, an undivided share in which was vested in a trustee for an infant, who did not join in the conveyance, the purchaser, having notice of the infant's rights, was treated as a bailiff for the infant, and was not allowed to plead the statute (*Young* v. *Harris*, 65 L. T. 45; see *Quinton* v. *Firth*, 2 Ir. Eq. 396; *Allen* v. *Sayer*, 2 Vernon, 368). In *Pelly* v. *Bascombe* (4 Giff. 394), *Stuart*, V.-C., said: "One effect of the statute 3 & 4 Will. 4, c. 27, is materially to alter the law as to what is called adverse possession. The present state of the law is as follows:—The fact of a person receiving the rents of a property raises a presumption that he receives them in the character of owner; but this presumption may be rebutted by express evidence to the contrary; by evidence affecting the person who has entered into possession, or by

Adverse possession since 3 & 4 Will. 4, c. 27.

3 & 4 Will. 4, c. 27, s. 2.

evidence of the mode in which he has dealt with the rents." Accordingly, where a father seised of land made a will invalid as to real estate whereby he appointed his brother, to whom he was indebted, executor, and died leaving two infant daughters, and the uncle entered upon the real estate and kept down the interest on a mortgage, and laid out sums on improvements, his possession was not adverse to his nieces (*Ib.*; affirmed on appeal, 13 W. R. 306). As to a person entering on an infant's estate being a bailiff for him, see also *Crowther* v. *Crowther*, 23 Beav. 305; *Howard* v. *Shrewsbury*, 17 Eq. 398. As to a trustee's possession being set up as adverse to the *cestui que trust's*, see *Stone* v. *Godfrey*, 5 D. M. & G. 76. Before the Act 3 & 4 Will. 4, c. 27, the possession of a *cestui que trust* was not at law adverse to the title of the trustee (*Smith* v. *King*, 16 East, 283), and the same has been held since the act (*Drummond* v. *Sant*, L. R. 6 Q. B. 763). It was said that in the case of a mortgagee the doctrine of adverse possession had been revived by 7 Will. 4 & 1 Vict. c. 28 (*Doe* v. *Eyre*, 17 Q. B. 366). The occupation of a school by a schoolmaster for more than the statutory period did not give him an adverse right against the landlord; for his occupation was the occupation of the landlord, he being in the situation of a servant (*Moore* v. *Doherty*, 5 Ir. L. R. 449; see *Ellis* v. *Crawford*, 5 Ir. L. R. 404; *Montmorency* v. *Walsh*, 4 Ir. L. R. 254; *Gibson* v. *Wise*, 35 W. R. 409). Charitable trustees, however, acquired title by possession under a void grant, although one of their number was the person entitled to dispute the grant (*Churcher* v. *Martin*, 42 Ch. D. 312). See note as to possession, p. 120, *post*.

Receipt of rents by agent.

Where a solicitor received the rents of a mortgaged property, his possession was that of the client, and time did not run against the client (*Ward* v. *Carttar*, 1 Eq. 29). A principal may acquire a possessory title to real estate by receiving the rents through an agent, although that agent is the person really entitled to the estate (*Williams* v. *Pott*, 12 Eq. 149). And see as to receipt of rents by an agent, *Smith* v. *Bennett*, 30 L. T. 100. An owner in fee who had received rents through an agent died intestate. The agent, who continued to receive the rents, was held to act on behalf of the heir (*Lyell* v. *Kennedy*, 14 App. Cas. 437).

Encroachments by tenant adjoining landlord's estate.

According to the law both before and since 3 & 4 Will. 4, c. 27, it is settled that if a tenant makes an encroachment adjoining to the land he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly, from some act done at the time, that the tenant intended to make the encroachment for his own benefit (*Doe* v. *Rees*, 6 C. & P. 610; *Doe* v. *Davies*, 1 Esp. 461; *Brian* v. *Winwood*, 1 Taunt. 208; *Doe* v. *Morris*, 2 Bing. N. C. 189; see *ante*, pp. 39, 40; *Doe* v. *Williams*, 7 C. & P. 332; *Doe* v. *Murrell*, 8 C. & P. 134; *Whitmore* v. *Humphries*, L. R. 7 C. P. 1). As to when encroachments by the tenant on the waste do not belong to the landlord, see *Doe* v. *Mulliner*, 1 Esp. 460.

The landlord of A. and B., adjacent closes, demised A. The tenant of A. built upon B. without leave of the landlord, who, on permission being asked, refused it. The tenant having occupied both A. and B. for twenty years, paying rent to the landlord under the demise of A., but not expressly in respect of B., was held entitled to insist, as against the landlord, on a twenty years' occupation of B. within the 3 & 4 Will. 4, c. 27, ss. 2 and 3 (*Doe* v. *Massey*, 17 Q. B. 373). One who occupies as his own land belonging to another, and afterwards becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession, but can, whilst he remains tenant, acquire as against his landlord a possessory title to the land first occupied (*Dixon* v. *Baty*, L. R. 1 Ex. 259).

Possession under devise by testator with defective title.

Where a man in possession of land with a defective title devises it to A. for life with remainder over, and A. enters under the will, he is estopped from denying the title of the remainderman claiming under the same will (*Re Stringer*, 6 Ch. D. 10; *Board* v. *Board*, 9 Q. B. 48; see also *Hawksbee* v. *Hawksbee*, 11 Hare, 230; *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Yem* v. *Edwards*, 1 De G. & J. 598).

Possession

But the same rule did not apply to the case where the testator had a

good title, but the devise to the tenant for life and remainderman was held void (*Re Stringer*, 6 Ch. D. 1); nor where the particular land was not comprised in the devise to the tenant for life and remainderman (*Paine* v. *Jones*, 18 Eq. 320). See, however, the judgment of *Martin*, B., in *Anstee* v. *Nelms*, 1 H. & N. 225; 26 L. J. Ex. 5. 3 & 4 Will. 4, c. 27, s. 2. under invalid devise.

As to what acts amount to possession, see the note to sect. 3, *post*; as to the effect of certain acts in creating or determining a tenancy at will, see the note to sect. 7, *post*; and as to possessory titles under 3 & 4 Will. 4, c. 27, see the note to sect. 34, *post*.

Every claimant who has such a right of possession as would entitle him to maintain ejectment against a wrongdoer is still competent to take possession, of his own authority, if he can do so without committing a breach of the peace (*Taylor* v. *Cole*, 3 T. R. 292; *Taunton* v. *Costar*, 7 T. R. 431; *R.* v. *Wilson*, 8 T. R. 357; *Rogers* v. *Pitcher*, 6 Taunt. 202; *Turner* v. *Meymott*, 1 Bing. 158; Co. Litt. 245 b; 1 M. & R. 221, n. (c); 5 Nev. & M. 164; *R.* v. *Newlands*, 4 Jurist, 322; *Perry* v. *Fitzhowe*, 8 Q. B. 757); but he cannot turn out the wrongdoer with violence (*Edwick* v. *Hawkes*, 18 Ch. D. 199). As to damages in case of a forcible entry by the rightful owner, see *Beddall* v. *Maitland*, 17 Ch. D. 174. Rights of claimant to take possession.

A landlord cannot lawfully acquire possession by a forcible entry after the expiration of the term (*Newton* v. *Harland*, 1 M. & G. 644; *Jones* v. *Foley*, 1891, 1 Q. B. 732); even under a licence from the tenant to that effect (*Edwick* v. *Hawkes*, 18 Ch. D. 199).

When right shall be deemed to have first accrued.

3. In the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received (*l*); and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death (*m*); and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been

When the right shall be deemed to have first accrued:
in case of an estate in possession,
on dispossession,
on abatement or death,
on alienation:

3 & 4 Will. 4, c. 27, s. 3.

in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person, claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument (*n*); and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession (*o*); and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken (*p*).

in case of future estates:

in case of forfeiture or breach of condition.

(1) Dispossession and discontinuance of possession of land.

(*l*) The first branch of sect. 3 deals with cases of dispossession and discontinuance of possession of land and discontinuance of receipt of rent. Dispossession is where a person comes in and drives out the others from possession: discontinuance of possession is where the person in possession goes out and is followed into possession by other persons (*Per Fry*, J., *Raine* v. *Buxton*, 14 Ch. D. 539). To dispossess a former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it (*Per Bramwell*, L. J., *Leigh* v. *Jack*, 5 Ex. Div. 264, 273). In cases of discontinuance regard must be had to the nature of the property (*Ib.*)

There must be actual possession by another.

There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute (*Smith* v. *Lloyd*, 9 Exch. 562; *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514; see *Rimington* v. *Cannon*, 12 C. B. 1, *post*). And if, before the statutory period has expired, the intruder abandons possession, the rightful owner is in the same position in all respects as before the intrusion (*Trustees' Co.* v. *Short*, 13 App. Cas. 793). To bring a case within the statute, possession must be by the person wishing to assert the statute, and not by third persons, or by the custody of the law (*Howlin* v. *Sheppard*, 19 W. R. 253). As to the party upon whom the onus lies of proving the commencement of the wrongful possession, see *Poole* v. *Griffith*, 15 Ir. C. L. R. 239, 277.

What is actual possession.

A road, the soil of which was vested in A., ran from a highway to a well, the land upon each side belonging to B. B. built a wall across the mouth of the road, leaving a stile for foot passengers, and levelled the fences on each side of the road; it was held that if B.'s acts were done more than the statutory period before the action was brought, A.'s title was barred by the statute (*Tottenham* v. *Byrne*, 12 Ir. C. L. R. 376). As to possession by the erection of a fence, see *Worssam* v. *Vandenbrande*, 17 W. R. 53. As to what acts constitute possession of a ditch, see *Searby* v. *Tottenham R. Co.*, 5 Eq. 409; *Norton* v. *L. & N. W. R. Co.*, 13 Ch. Div. 268; of a boundary wall, *Phillipson* v. *Gibbon*, 6 Ch. 428; *Waddington* v. *Naylor*, 60 L. T. 480; of a gravel pit and road, *Smith* v. *Stocks*, 17 W. R. 1135. Acts done upon part of a piece of land may be evidence of possession of the whole, where there is a common character of locality (*Jones* v. *Williams*, 2 M. & W. 326; *Bristow* v. *Cormican*, 3 App. Cas. 641; *Clark* v. *Elphinstone*, 6 App. Cas. 164).

A title to an underground cellar may be acquired by possession, of which the owner of the surface is ignorant (*Raine* v. *Buxton*, 14 Ch. D. 537). Where a rector built on a piece of land a school, which was placed under a committee of which he was a member, the possession was not

"A title to a tunnel was acquired by possession
(Bevan v. Portland Cement Co.

3 & 4 Will. 4, c. 27, s. 3.

such as to give the rector a statutory title to the land as glebe (*Gibson* v. *Wise*, 35 W. R. 409; see *Churcher* v. *Martin*, 42 Ch. D. 312). A stranger may acquire by possession a title to land of a railway company, whether superfluous (*Norton* v. *L. & N. W. R. Co.*, 13 Ch. Div. 268) or not superfluous (*Bobbett* v. *S. E. R.*, 9 Q. B. D. 424). And a possessory title may be acquired, even though the true owner is under a statutory prohibition against letting or selling (*Brighton* v. *Brighton Guardians*, 5 C. P. D. 368). See further the cases quoted *ante*, pp. 117, 118.

Mines and minerals.

In order to prove possession in an ejectment for mines, it is not sufficient to show that the plaintiff was lord of the manor: an actual possession of them within twenty years must be proved (*Rich* v. *Johnson*, Str. 1142). A verdict for the plaintiff in trover for lead dug out of a mine will not prove possession of the mine; for trover may be brought on property without possession (Bull. N. P. 102; Adams on Ejectment, 263, 4th ed.)

Possession of minerals.

A man who had entered and worked two seams of coal was held under the circumstances to have taken possession of seven seams lying under the same lands (*Low Moor Co.* v. *Stanley Coal Co.*, 34 L. T. 186); in which case, however, it was said, that where a man has entered upon and taken possession of one seam, and by lapse of time has acquired some title to it, the law will not assume that his possession extends to all other seams lying under that one. As to when working one part of a mine is evidence of possession of the whole, see *Taylor* v. *Parry*, 1 M. & Gr. 604; *Wild* v. *Holt*, 9 M. & W. 672. Where a mine owner in working his own coal went on working into the vein, and for more than twenty years worked coal lying under his neighbour's land, it was held under the circumstances that he had not acquired any title to the adjoining mine by possession (*Ashton* v. *Stock*, 6 Ch. D. 719). Acts of trespass by working coal, of which the then owner of the coal mine was ignorant, were held not to constitute adverse possession of the mine within this statute (*Dartmouth* v. *Spittle*, 19 W. R. 444; see as to ignorance, *Rains* v. *Buxton*, 14 Ch. D. 537).

Effect of possession of surface.

When the defendant, being entitled to a mere right of way over land belonging to a stranger which adjoined his farm, used for more than twenty years such adjoining land as part of his farm, he was held to have acquired by possession of the surface a good title to the minerals underlying such adjoining land (*Seddon* v. *Smith*, 36 L. T. 168).

Where title to surface and minerals is not severed; is severed.

A lessee, under a lease in which mines were not reserved, who was in possession of the surface, was held to be in possession of the mines (*Keyse* v. *Powell*, 2 Ell. & Bl. 132). But where the owner in fee of land with minerals under it conveyed the surface to A., excepting the minerals to himself, his heirs and assigns, and reserving liberty to enter and work, and such right of entering had not been exercised for more than forty years, but no other person had worked the mines, it was held that the owner was not barred (*Smith* v. *Lloyd*, 9 Exch. 562; see *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514; *Seaman* v. *Vawdrey*, 16 Ves. 390).

Receipt of profits of land.

Lord *St. Leonards* was of opinion that the expression "in receipt of the profits of any land," is used in the act, in conjunction with the words "in possession of the land," to denote not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land (R. P. Stat. 47). By sect. 35 (p. 169, *post*), the receipt of the rent payable by any tenant from year to year, or other lessee, is, against such lessee or any person claiming under him (but subject to the lease), the receipt of the profits of the land for the purposes of this act. As to receipt of rents by agent, see note, *ante*, p. 118.

Discontinuance of receipt of rent.

The provisions of this section as to discontinuance of the receipt of rent only apply when the party entitled to the rent does not apply for payment, or omits to enforce his remedies with knowledge that the payment has not been made (*Adnam* v. *Sandwich*, 2 Q. B. D. 485).

Point from which time runs.

Where a party has been in receipt of rent and afterwards discontinues such receipt, the statute fixes the point from which time is to run at the day on which the last payment of rent was made, and the party claiming has not the option of calculating from the time when he discontinued the receipt of rent (*Owen* v. *De Beauvoir*, 16 M. & W. 547; 5 Exch. 166; see *Irish Land Commission* v. *Grant*, 10 App. Cas. 27; and the note to

3 & 4 Will. 4, c. 27, s. 3.

sect. 34, *post*). Under 3 & 4 Will. 4, c. 27, a person dispossessed of land is allowed twenty years from the time of his being dispossessed to bring ejectment. But a person disseised of rent has only twenty years from the last payment; and so, if an annual rent has been paid on the day on which it became due, and afterwards unjustly withheld, the party aggrieved has only nineteen years during which he can bring his action or distrain; for during the first year he has no right of distress or action at all (16 M. & W. 565). The Act 37 & 38 Vict. c. 57 (*post*, p. 194), has fixed the period of limitation at twelve, instead of twenty, years.

Where an old rent-charge had always been received from the occupier of one part of the premises charged, and another part for more than the statutory period had been in a separate ownership, and the owner had never paid the rent, the right to distrain on the latter portion was not barred (*Woodcock* v. *Titterton*, 12 W. R. 865; cf. *Dublin* v. *Trimleston*, 12 Ir. Eq. R. 251). Where the rents of mines are reserved by means of payment of produce in specie, time will run under the statute from the receipt and not from the sale of such produce by the lessor (*Denys* v. *Shuckburgh*, 4 Y. & Coll. 42; see *M'Donnell* v. *M'Kinty*, 10 Ir. L. R. 514).

Seizure *quousque*.

Where a copyhold tenant had not paid his fine, and the lord seized *quousque*, and thirty-seven years expired, and the heir of the tenant offered the fine, and then filed a bill to compel admittance; it was held that time ran from the date of the seizure, on the ground that it was the duty of the copyhold tenant to pay the fine (*Walters* v. *Webb*, 5 Ch. 531).

(2) Wrongful possession commencing on death.

(*m*) The second branch of sect. 3 deals with cases where wrongful possession commenced on the death of a rightful owner. "Thus where A., seised in fee in possession dies either intestate, leaving B. his heir, or having devised to B. in fee or for a less estate (*sed qu.*, *James* v. *Salter*, 3 Bing. N. C. 544), and C., a stranger, first obtains possession after the death of A., the time runs against B. from A.'s death, and not from C.'s entry" (1 Hayes, Conv. 248).

Lord *St. Leonards* seems to be of opinion that a rent newly created by will (as in *James* v. *Salter*, 3 Bing. N. C. 544), would fall within this second branch of sect. 3 (R. P. Stat. 22). But this opinion is questioned (Darb. & Bos. Stat. Lim. 228).

A. let land to B. by parol from year to year, reserving rent payable in March and November. The last payment of rent was in March, 1846: A. died in December, 1846; time ran, under sect. 8, from the last payment of rent, and not from A.'s death, under sect. 3 (*Baines* v. *Lumley*, 16 W. R. 674).

(3) Wrongful possession commencing on alienation by rightful owner.

(*n*) The third branch of sect. 3 deals with cases where wrongful possession commenced on alienation by a rightful owner. On the construction of the words "other than a will" in this branch, see *James* v. *Salter*, 3 Bing. N. C. 544.

Cestui que trust in possession.

It was held by the Court of Common Pleas (differing from the Queen's Bench, *Doe* v. *Phillips*, 10 Q. B. 130) that the case of a *cestui que trust* holding land under a trustee does not fall within this clause (*Garrard* v. *Tuck*, 8 C. B. 231).

(4) Future interests.

(*o*) The fourth branch of sect. 3, together with sect. 20, and sect. 2 of 37 & 38 Vict. c. 57 (*post*, p. 194), which has been substituted for sect. 5 of 3 & 4 Will. 4, c. 27, deal with future interests.

The words in this branch of sect. 3, "or other future estate or interest," were said to be large enough to comprehend, and would comprehend, all executory devises (*James* v. *Salter*, 3 Bing. N. C. 554, *ante*, p. 113; see *Doe* v. *Liversedge*, 11 M. & W. 517, *post*, sect. 20, n., for a case of a future estate within these words).

Where a tenant for life aliens in fee, time does not run against the remainderman until the death of the tenant for life (*Doe* v. *Rolfe*, 8 Ad. & Ell. 650; see *Scott* v. *Scott*, 4 H. L. C. 1084).

In 1788 estates were settled to the use of the wife for life, with remainder to her issue in tail, with remainder to the settlor (whose heiress-at-law she was) in fee. In 1818, by deeds to which the husband and wife and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for

life, remainder to the wife for life, remainder to R. G., the son, for life, remainder to his issue in tail, remainder to J. F., his sister, for life, with other remainders over. The husband died in 1819, the wife in 1822, and R. G. in 1828: it was held, that, inasmuch as the estate of J. F. was carved out of the estate by R. G., she had the same period for bringing an ejectment in respect of any estates comprised in the above deeds as he would have had if he had continued alive, viz., twenty years from the year 1822, when his remainder came into possession. The effect of the deed of 1818 and of recovery was to bar all remainders over, and to create new estates out of his estate tail (*Doe* v. *Edmonds*, 6 M. & W. 295). 3 & 4 Will. 4, c. 27, s. 3.

When a landlord merely omits to compel his lessee, during the continuance of a lease, to pay rent, and there has been no payment to any other person, time runs from the determination of the lease (*Doe* v. *Oxenham*, 7 M. & W. 131, 133, 134; see *Grant* v. *Ellis*, 9 M. & W. 113; *Doe* v. *Godsill*, 4 Q. B. 603, n.) Upon the renewal of a lease the landlord's estate became an estate in possession, and his right of action accrued (*Eccl. Commissioners* v. *Rowe*, 5 App. Cas. 741). Landlord and tenant.

For the case of leases containing a clause of re-entry for non-payment of rent, see note to sect. 4, *post*. Husband and wife.

If husband and wife, being seised in fee in right of the wife, convey to a purchaser by a conveyance not operative to bind her, the wife, if she survives, and if not, her heir, may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for forty years. It was held that the right of the wife came within the fourth branch of sect. 3, as being a future estate or interest (*Jumpsen* v. *Pitchers*, 13 Sim. 327). The case would be different if the husband and wife simply discontinued possession (Sugden, R. P. Stat. 83; see also *Cannon* v. *Rimington*, 12 C. B. 1).

See further as to future interests, the notes to sect. 20, and 37 & 38 Vict. c. 57, sect. 2 (*post*, p. 194). (5) Rights arising on forfeiture or breach of condition.

(*p*) The fifth branch of sect. 3 and sect. 4 deal with rights arising on forfeitures and breaches of conditions, as to which see note to sect. 4.

Forfeiture.

4. Provided always, that when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest, in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened (*q*). When advantage of forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession.

(*q*) The above section must be read in connection with, and forms a proviso upon, the last branch of section 3. The words "forfeiture" and "breach of condition" are to be read in their largest sense, including forfeitures which give a right to an estate under a conditional limitation, as well as forfeitures which can only be taken advantage of by the heir (*Astley* v. *Essex*, 18 Eq. 290). See also as to this section the remarks of *Thesiger*, L. J., *Magdalen Hospital* v. *Knotts*, 8 Ch. Div. 727. The proviso contained in sect. 4 in fact preserves the previous law (See 1 Ves. sen. 278; *Doe* v. *Blakeway*, 5 C. & P. 563; *Doe* v. *Danvers*, 7 East, 299).

The lord of a manor is barred by the statute from entering for a forfeiture of copyholds after the expiration of the statutory period (*Witton* v. Entry for forfeiture of copyholds.

3 & 4 Will. 4, c. 27, s. 4.

Peacock, 3 M. & K. 325). Where the lord died before entry or seizure for forfeiture, the reversioner or remainderman could never take advantage of the forfeiture done or committed before their time (*Montagu's case*, Cro. Jac. 301; Co. Cop. s. 60; *Doe* v. *Hellier*, 3 T. R. 162; see *Doe* v. *Trueman*, 1 B. & Ad. 744; *Doe* v. *Bousfield*, 6 Q. B. 492); unless the act of forfeiture destroys the estate (3 T. R. 173). As to the forfeiture of copyholds, see Shelford on Copyholds, pp. 148—172; Scriven, 178 *et seq.*, 6th ed.; *Chamberlain* v. *Drake*, 2 Sid. 8; and for waste, *Eastcourt* v. *Weeks*, Salk. 186; Lutw. 799; *Bird* v. *Kirkby*, 1 Mod. 199; Carter, 237; Gilb. Ten. 249.

Clause of re-entry for non-payment of rent.

With regard to express clauses of re-entry for non-payment of rent, it is settled that in Ireland a landlord is not barred from recovering rent by non-payment for the statutory period (*Cosbie* v. *Sugrue*, 9 Ir. L. R. 17; *Parke* v. *McLoughlin*, 1 Ir. C. L. R. 186; *Spratt* v. *Sherlock*, 3 Ir. C. L. R. 69; overruling *Doe* v. *Bingham*, 3 Ir. L. R. 456). In the case of an English lease containing such a clause, it has been suggested that a fresh right to re-enter accrues every time a fresh default in payment of rent is made (Darb. & Bos. Stat. Lim. 251; see *Doe* v. *Bliss*, 4 Taunt. 725; *Macher* v. *Foundling Hospital*, 1 Ves. & B. 191). In the case of certain covenants and conditions, sect. 14 of the Conv. Act, 1881, now requires notice to be given before a lessor's right of re-entry or forfeiture can be enforced by action. See the section at length, *post*.

Notice of condition.

Where a party is really ignorant of the existence of an instrument in which the condition is contained, and where he would have a good title if there were no such instrument, a neglect of the terms of the condition will not subject him to a loss of the estate; and the party entitled to avail himself of the condition must take care to make it known to the person who was to comply with it (*France's case*, 8 Rep. 89 b; Shep. T. 148; *Mallon* v. *Fitzgerald*, 3 Mod. 28; Skinn. 125; *Doe* v. *Beauclerk*, 11 East, 657). But a person who takes by gift under a will cannot plead want of knowledge of the contents of the will as an excuse for not complying with its provisions (*Astley* v. *Essex*, 18 Eq. 297); unless he is the testator's heir and could, but for the will, have taken as such (*Ib.*; see *Doe* v. *Crisp*, 8 Ad. & Ell. 779; *Porter* v. *Fry*, 1 Vent. 199).

Old law as to conditions of re-entry;

in leases for lives;

in leases for years.

In cases of conditions of re-entry there was a difference between leases for lives and leases for years. As to leases for lives, if the tenant was guilty of any breach of the condition of re-entry the lease was only voidable, and not determined until the lessor re-entered, though the clause of the condition should be that the lease should be void. For it was a rule that where an estate commences by livery it could not be determined before entry (*Browning* v. *Beston*, Plowd. 135, 136). But a lease for years, with a condition that, for non-payment of the rent or the like, the lease should be null and void if the lessee was guilty of any breach of the condition, was absolutely determined (*Goodright* v. *Davids*, Cowp. 804). But if in such a lease the clause was that for non-payment of the rent it should be lawful for the lessor to re-enter, the lease was only voidable, and might be affirmed by acceptance of rent accrued due after, or other act (*Browning and Beston's case*, Plowd. 133; *Pennant's case*, 3 Rep. 64 a, b; 65 a, b; Co. Litt. 215, a; *Goodright* v. *Davids*, Cowp. 804; see 1 Wms. Saund. 441, ed. 1871).

Present state of the law.

Since the statutes 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106, s. 2, estates for life may commence without livery; and the distinction taken above between leases for lives and leases for years (in those cases where the clause is, that the lease shall be void on breach of the condition) seems therefore to be now inapplicable (1 Smith's L. C. 54, 9th ed.) But even in the case of a lease for years which contains a proviso that it shall be void for non-payment of rent or other breach of covenant, the modern authorities seem to establish that such a lease in case of a breach shall be regarded as voidable only, so that the landlord, by the acceptance of rent or the like, with notice of the breach, will waive the forfeiture (*Roberts* v.

Davey, 4 B. & Ad. 664; *Doe* v. *Bancks*, 4 B. & A. 401; *Arnsby* v. *Woodward*, 6 B. & C. 519; *Read* v. *Farr*, 6 M. & S. 121; *Malins* v. *Freeman*, 4 Bing. N. C. 395; *Doe* v. *Birch*, 1 M. & W. 402; *Hyde* v. *Watts*, 12 M. & W. 254; *Hughes* v. *Palmer*, 19 C. B. N. S. 393; compare *Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324). A distress made by a landlord on the assignee of his lessee is a waiver of a forfeiture incurred by a prior breach of covenant; but if there be a continuing breach the landlord is not precluded from taking advantage of it for a time subsequent to the distress (*Doe* v. *Peck*, 1 B. & Ad. 428). A condition of re-entry on breach of covenants in a lease can only operate during the continuance of the lease (*Johns* v. *Whitley*, 3 Wils. 127). See now sect. 14 of Conv. Act, 1881, *post*.

3 & 4 Will. 4, c. 27, s. 4.

[*Sect.* 2 *of* 37 & 38 *Vict. c.* 57 (*which see*, post, p. 194) *has been substituted for sect.* 5 *of* 3 & 4 *Will.* 4, *c.* 27.]

Administrator.

6. For the purposes of this act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration (*s*).

An administrator to claim as if he had obtained the estate without interval after death of deceased.

(*s*) In the case of intestacy, it had been decided that, as to all rights occurring after the death of the intestate, the Statutes of Limitation only began to run from the grant of administration. Hence a right to a chattel interest in lands might have been kept alive, notwithstanding adverse possession, to the expiration of the term, however long, and instances had occurred of serious practical inconvenience from that state of the law (See *Stanford's case*, Cro. Jac. 61; cited in *Cary* v. *Stephenson*, 2 Salk. 421; *S. C.* Carth. 335; Skinn. 555; 4 Mod. 376; *Fairclaim* v. *Little*, cited in 5 B. & Ald. 214). The object of this clause of the act is to make the period of limitation with respect to chattel interests in land begin to run from the time when the right of entry arose and might have been acquired by taking out letters of administration (See 1st Real Prop. Rep. p. 48). It has been held accordingly that time runs against the administrator from the date of the death of the intestate, not from the grant of administration (*Davies* v. *Williams*, 34 Ch. D. 558).

Old rule that time ran from grant of administration.

The section applies to cases arising in respect of charges on land, as well as to cases arising under the earlier part of the act (*Re Bonsor and Smith*, 34 Ch. D. 560, n.)

The distinction between an administrator and an executor is, that an administrator derives his title wholly from the probate court, and has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant (*Woolley* v. *Clark*, 5 B. & Ald. 744). The title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate, so that he may recover against a wrongdoer who has seized or converted the goods of the intestate after his death in an action of trespass or trover (*Tharpe* v. *Stallwood*, 5 M. & G. 760; *Foster* v. *Bates*, 12 M. & W. 233; *Welchman* v. *Sturgis*, 13 Q. B. 552). But this doctrine of relation exists only in cases where the act done is for the benefit of the estate (*Morgan* v. *Thomas*, 8 Exch. 302). An executor, on the other hand, derives his title from the will itself, and the property vests

Distinction between administrator and executor.

3 & 4 Will. 4, c. 27, s. 6.

in him from the moment of the testator's death (*Hickman* v. *Walker*, Willes, 27).

Nature of administrator's rights.

Where letters of administration have been granted, the administrator is entitled to all the rights which the intestate had at the time of his death vested in him; although no right of action accrues to the administrator until he has obtained letters of administration (*Pratt* v. *Swaine*, 8 B. & C. 287). An executor or administrator is not deemed to be in possession of things immoveable, as leases for years or houses, before entry (Went. Off. Ex. 228, 14th ed.); although a reversion of a term, which the testator granted *for part* of the term, is in the executor immediately on the testator's death (*Trattle* v. *King*, T. Jones, 170). But the relation of the grant of administration to the death of the intestate did not, it seems, divest any right legally vested in another between the death of the intestate and the grant, so as to enable an administrator, who had obtained letters of administration after an execution issued against the intestate's tenant, to call on the sheriff to pay one year's rent, pursuant to the stat. 8 Anne, c. 17 (*Waring* v. *Dewberry*, Gilb. Eq. Rep. 223, cited in 1 Str. 97; Fortesc. 360; *S. C.*, Vin. Abr. Executors (Q)). It seems that the grant of administration will have the effect of vesting leasehold property in the administrator by relation, so as to enable him to bring actions in respect of that property for all matters affecting the same subsequent to the death of the intestate, and to render him liable to an account for the rents and profits of it from the death of the intestate (*R.* v. *Horsley*, 8 East, 410):

As to the running of time under 21 Jac. 1, c. 16, in the case of executors and administrators, see *post*, pp. 215, 216.

Tenancy at Will.

In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

7. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee (*t*).

(*t*) This section did not apply to cases where the tenancy at will had been determined before the passing of the act (*Doe* v. *Page*, 5 Q. B. 767, see p. 772; *Doe* v. *Thompson*, 6 Ad. & Ell. 721; *Doe* v. *Bold*, 11 Q. B. 127). But where the tenancy was subsisting at the passing of the act, time ran from the expiration of one year after the expiration of the tenancy (*Doe* v. *Moore*, 9 Q. B. 555).

Where a bargainee took possession of land included in an indenture of bargain and sale which was not enrolled, this operated to make the bargainee a tenant at will, and time began to run in his favour from the end of the first year (*Low Moor Co.* v. *Stanley Co.*, 34 L. T. 186). The occupation for twenty-six years by guardians of public offices belonging to a corporation without payment of rent was held to be a tenancy at will, the guardians acquiring a title under this section (*Brighton* v. *Brighton Guardians*, 5 C. P. D. 368).

Tenancies at will of waste.

A tenancy at will of the waste of a manor was held to be created by a licence from the lord (*A. G.* v. *Tomline*, 15 Ch. Div. 150, 157), even where

a yearly rent was reserved (*Hodgson* v. *Hooper*, 29 L. J. Q. B. 222); in which last case it was said that each successive payment of rent was a fresh acknowledgment that the land was held by permission of the lord. But where a lessee, with the verbal consent of his lessor, enclosed land adjoining his holding (which land was in fact copyhold waste belonging to the lessor as lord of a manor), this did not create such a tenancy as is referred to in sect. 7 (*Whitmore* v. *Humphries*, L. R. 7 C. P. 1). 3 & 4 Will. 4, c. 27, s. 7.

Where, after the expiration of one year from the commencement of a tenancy at will, the tenancy has been determined, time runs not from the determination, but from the expiration of the year (*Doe* v. *Carter*, 9 Q. B. 863; *Doe* v. *Turner*, 7 M. & W. 226). Tenancy at will determined after expiration of one year.

In a case before the Privy Council, it was said that where time has begun to run after the expiration of one year from the commencement of a tenancy at will, the question of a subsequent determination of the original tenancy is only relevant so far as it may be preliminary to the creation of a fresh tenancy at will after the determination of the first, and within the period of limitation (*Day* v. *Day*, L. R. 3 P. C. 751). In the event of such new tenancy being created, time runs from the determination of such new tenancy, or from the expiration of one year after the commencement thereof, without regard to the original tenancy (*Locke* v. *Matthews*, 13 C. B. N. S. 753; 11 W. R. 343; *Turner* v. *Doe*, 9 M. & W. 643; see *Doe* v. *Rock*, 4 M. & Gr. 30; *Thorp* v. *Facey*, 35 L. J. C. P. 349). New tenancies were held to have been created in *Locke* v. *Matthews* and *Turner* v. *Doe*, *sup.* Tenancy at will determined; new tenancy created.

Where parish overseers determined a pauper's tenancy at will by turning him out, and he subsequently resumed possession, no new tenancy at will being created, time ran against the overseers from the pauper's subsequent resumption of possession without any regard to the original tenancy (*Randal* v. *Stevens*, 2 E. & B. 641). And where A., the true owner of a garden, which by his permission was occupied by B., from time to time came on the land and gave directions as to cutting trees, it was said that every time A. came on the land, time commenced afresh to run against him (*Allen* v. *England*, 3 F. & F. 49). Tenancy at will determined, and resumption of possession by landlord.

An estate at will, being the lowest estate which can arise by the agreement of the parties, is not bounded by definite limits with respect to time; but as it originated in mutual agreement, so it depends upon the concurrence of both parties (See Litt. ss. 68, 82). As it depends upon the will of *both*, although it is expressed to be at the will of *one* only (Co. Litt. 55 a), the dissent of either may determine it. An estate at will may arise by implication, as well as by express words. The definition of an estate at will is, "where lands and tenements are let by one man to another, to have and hold at the will of the lessor, and the tenant by force of this lease obtains possession" (Litt. s. 68; 2 Bl. Com. 145). Thus, where a person makes a feoffment, and delivers the deed to the feoffee, without giving him livery of seisin, and the feoffee enters, he becomes tenant at will (Litt. s. 70). And a person who entered and enjoyed lands under a void lease, and paid rent, was held to be tenant at will (*Denn* v. *Fearnside*, 1 Wils. 176). A simple permission to occupy may create a tenancy at will unless an intention appears to create a yearly tenancy by an agreement to pay rent quarterly, or some other aliquot part of a year. Under an agreement to let premises so long as both parties like, and receiving a compensation accruing *de die in diem*, and not referable to a year or any aliquot part of a year, a tenancy at will, strictly so called, is created (*Richardson* v. *Langridge*, 4 Taunt. 128; *Doe* v. *Wood*, 14 M. & W. 687; see *Braythwayte* v. *Hitchcock*, 10 M. & W. 497; *Cox* v. *Bent*, 5 Bing. 185). A tenancy from year to year will not be presumed against the clearly expressed intention of the parties. By a proviso in a deed, A. agreed to become tenant to C. at his will and pleasure, at the rate of 25*l.* 4*s.* per annum, payable quarterly; it was held that A. was tenant at will (*Doe* v. *Cox*, 11 Q. B. 122). A party in possession as apparent owner was, under the circumstances of the case, held to be tenant at will, his conduct amounting to an admission to this effect (*Doe* v. *Groves*, 10 Q. B. 486). Creation of tenancy at will.

3 & 4 Will. 4, c. 27, s. 7.

In *Ley* v. *Peter* (3 H. & N. 101; 6 W. R. 437), a letter was held to be no evidence of such a tenancy.

An entry by a person under a contract for the purchase of an estate, or an agreement for a lease with the consent of the vendor, or of the person agreeing to grant the lease, will create a tenancy at will between the parties (*Hegan* v. *Johnson*, 2 Taunt. 147; *Dunk* v. *Hunter*, 5 B. & Ald. 322; *Doe* v. *Lawder*, 1 Stark. 308; *Right* v. *Beard*, 13 East, 210; *Doe* v. *Jackson*, 1 B. & C. 448; *Doe* v. *Sayer*, 3 Camp. 8; *Doe* v. *Stanion*, 1 M. & W. 700; *Ball* v. *Cullimore*, 2 C. M. & R. 120), even where he pays interest after the rate of 5*l.* per cent. per annum on the purchase-money (*Doe* v. *Chamberlaine*, 5 M. & W. 14; see *Saunders* v. *Musgrove*, 8 B. & C. 524). But where the purchaser is already in possession as tenant from year to year, it must depend upon the intention of the parties, to be collected from the agreement, whether a new tenancy at will is created or not, and from what time (*Doe* v. *Stanion*, 1 M. & W. 695; see *Souter* v. *Drake*, 5 B. & Ad. 992).

Determination of tenancy at will.

The most obvious mode of determining an estate at will is an express declaration that the lessee shall hold no longer, either made on the land, or by notice given to the lessee (Co. Litt. 55 b). Any act of ownership exercised by the landlord, which is inconsistent with the nature of the estate, will operate as a determination of it (*Ib.*; Co. Litt. 245 b). Thus, any conveyance by the lessor of the property, held at will, is evidence of dissent, and operates as a determination of the will (*Dinsdale* v. *Iles*, 2 Lev. 88). It may be determined by demand or by entry (*Doe* v. *Chamberlaine*, 5 M. & W. 16). It is clearly laid down, "that if the lessor, without the consent of the lessee, enter into the land, and cut down a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawful, albeit the will doth continue" (Co. Litt. 55 b). So a tenancy at will is determined by the landlord's entry on the land without the consent of the tenant, and cutting and carrying away stone therefrom (*Doe* v. *Turner*, 7 M. & W. 226). So in *Ball* v. *Cullimore* (2 C. M. & R. 120), it was held, that a feoffment by the lessor, with livery of seisin on the land, operates as a determination of the will, although the tenant at will be off the land at the time when the livery is made, and have no notice of the determination of the will. A tenancy at will is determined by an agreement to purchase (*Daniels* v. *Davison*, 16 Ves. 252). A letter from the owner to the tenant at will, stating that unless the latter paid what was due to the former, immediate measures would be taken to recover possession of the property, was held sufficient to determine the estate at will (*Doe* v. *Price*, 9 Bing. 356). Neither party can determine an estate at will at a time which would be prejudicial to the other (Co. Litt. 55 b, n. 16; *Leighton* v. *Theed*, 1 Ld. Raym. 707; *Peacock* v. *Peacock*, 16 Ves. 57). A tenant at will cannot put an end to his tenancy, even by an assignment, without giving notice to his landlord (*Pinhorn* v. *Souster*, 8 Exch. 763; see *Melling* v. *Leak*, 16 C. B. 669). For the case where the lessor became an insolvent debtor, see *Doe* v. *Thomas*, 6 Exch. 854. The granting of a lease to a third person by the lessor of a tenant at will, though it determines the tenancy at will as against the lessor, does not give him such a right of entry as is contemplated by 3 & 4 Will. 4, c. 27, s. 2 (*Hogan* v. *Hand*, 14 Moore, P. C. C. 310; 9 W. R. 673).

See further, as to the creation and determination of tenancies at will, the notes to *Richardson* v. *Langridge* (Tudor, L. C. Conv. 12, 3rd ed.); and *Clayton* v. *Blakey* (2 Smith, L. C. 118, 9th ed.; Woodfall, 237, 14th ed.)

Proviso as to mortgagors and *cestui que trusts*.

The proviso as to mortgagors and *cestui que trusts* was introduced to prevent the title of the mortgagee or trustee from being barred in twenty-one years in those cases in which a mortgagor or *cestui que trust* in possession was held to be tenant at will to the mortgagee or trustee.

Relation between mortgagee and mortgagor in possession.

The relation between mortgagor and mortgagee is perfectly anomalous and *sui generis* (2 Jac. & W. 183). The mortgagor is only like a tenant at will to the mortgagee, his *legal* interest being inferior to that of a strict tenant at will (Doug. 22, 282, 283). A mortgagor in possession

may be described in pleading as the tenant of the mortgagee in an action by a third party (*Partridge* v. *Bere*, 5 B. & Ald. 604). The legal interest of the mortgagor after default is not more than that of a tenant by sufferance, and he may be treated as such or as a trespasser, at the election of a mortgagee (*Doe* v. *Maisey*, 8 B. & C. 767; see *Wheeler* v. *Montefiore*, 1 Gale & D. 493); and the mortgagor, or his tenant coming in after the mortgage, may be ejected without any demand of possession having been made (*Ib.*), either by the original mortgagee or by his assignee (*Thunder* v. *Belcher*, 3 East, 449); whereas a tenant at will cannot be ejected on a demise laid previous to the determination of the will (4 T. R. 680); and the mortgagor is not entitled to the growing crops after the will is determined, as in the case of a tenant at will (1 T. R. 383; see Coote on Mortgages, 325—330; *Walmsley* v. *Milne*, 7 C. B. N. S. 133; 5 B. & Ald. 605, n.) "It is now established, that a mortgagor only holds the possession of the land, and receives the rent of it, by the will or permission of the mortgagee, who may by ejectment, *without giving notice*, recover against him or his tenant. In this respect, the estate of a mortgagor is inferior to that of a tenant at will" (*Bird* v. *Wright*, 1 T. R. 378; see 4 Bligh, 97; *Partridge* v. *Bere*, 5 B. & Ald. 604; *Hitchman* v. *Walton*, 4 M. & W. 415; *Doe* v. *Olley*, 12 Ad. & Ell. 481). And this is so, even where by the mortgage deed the mortgagor attorned to the mortgagee as tenant at a quarterly rent, which was stated to be done for the purpose of securing the principal and interest, and in contemplation and part discharge thereof (*Doe* v. *Tom*, 4 Q. B. 615). In *Doe* v. *Barton* (11 Ad. & Ell. 314), *Denman*, C. J., said, "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other in any other terms than those very words; but thus much is established by the cases of *Partridge* v. *Bere* (5 B. & Ald. 604), and *Hitchman* v. *Walton* (4 M. & W. 409), that the mortgagee may treat the mortgagor as being rightfully in possession, and himself as reversioner, so that as long as he be not treated as a trespasser, his possession is not hostile to, nor inconsistent with, the mortgagee's right. (We purposely avoid the expression 'is not adverse,' by reason of the statutes 3 & 4 Will. 4, c. 27, and 7 Will. 4 & 1 Vict. c. 28.)" A mortgagor may be tenant at will to the mortgagee notwithstanding the reservation of a yearly rent by the mortgage deed (*Doe* v. *Davies*, 7 Exch. 89; *Doe* v. *Cox*, 11 Q. B. 122; *Walker* v. *Giles*, 6 C. B. 662; see the *Metropolitan Co.* v. *Brown*, 4 H. & N. 428). Where a mortgagee recognizes a tenant as being in lawful possession of the premises at a given time by the receipt of rent, it is not competent to him to say afterwards that at that time he was a trespasser (*Doe* v. *Hales*, 7 Bing. 322). But in ejectment by a mortgagee, the mere fact of his having received interest on the mortgage down to a time later than the day of the demise in the declaration did not amount to a recognition by him that the mortgagor or his tenant was in lawful possession, and consequently was no defence to the ejectment (*Doe* v. *Cadwallader*, 2 B. & Ad. 473).

3 & 4 Will. 4, c. 27, s. 7.

A mortgagor in possession may, as against a mortgagee, grant certain leases (Conv. Act, 1881, s. 18); and where the mortgagee has not given notice of his intention to take possession or enter into receipt of rents, the mortgagor may sue for rent or possession (Jud. Act, 1873, s. 25 (5)).

See further, as to the relation subsisting between a mortgagee and a mortgagor in possession, the note to *Keech* v. *Hall* (1 Smith, L. C. 546, 9th ed.), and Watkins on Conveyancing, 13, 9th ed.

By 7 Will. 4 & 1 Vict. c. 28, read in connection with 37 & 38 Vict. c. 57, s. 9 (*post*, pp. 159, 200), mortgagees may bring actions to recover the land mortgaged within twelve years after the last payment of principal or interest.

Where a mortgage was paid off, but no reconveyance executed, the proviso did not apply; and the legal estate of the mortgagee was extinguished by thirteen years' possession of the mortgagor, who was held to be a tenant at will (*Sands* to *Thompson*, 22 Ch. D. 614).

The general rule is, that a *cestui que trust* being in possession of the estate, with the consent, or even the mere acquiescence, of the trustee, is

Relation between trus-

3 & 4 Will. 4, c. 27, s. 7.

tee and *cestui que trust* in possession.

considered as his tenant at will (4 Bac. Abr. 198; *Smith* v. *Pierce*, 3 Mod. 195; *Focus* v. *Salisbury*, Hardr. 400; *Freeman* v. *Barnes*, 1 Ventr. 55, 80; 1 Lev. 270; *Pomfret* v. *Windsor*, 2 Ves. sen. 472, 481; 1 Ventr. 329; *Gree* v. *Rolle*, 1 Ld. Raym. 716). Before the Judicature Acts it was a rule, that however plain the trust might be, yet in a court of law the *legal interest* must prevail (*Doe* v. *Wharton*, 8 T. R. 2); therefore trustees of a meeting-house or of lands, of which they were seised in trust for the support of the minister, might maintain an action of ejectment against him upon a simple demand of possession without any notice to quit (*Doe* v. *Jones*, 10 B. & C. 718; *Doe* v. *M'Keag*, 10 B. & C. 724). But the trustee and visitors of a free grammar school could not recover the schoolhouse in ejectment without having previously determined the schoolmaster's interest by summons (*Doe* v. *Gartham*, 1 Bing. 357; see *R.* v. *Gaskin*, 8 T. R. 209; *R.* v. *Darlington School*, 6 Q. B. 682). The relation between trustee and *cestui que trust* is not analogous to that between mortgagor and mortgagee, as equity never takes away the possession of the *cestui que trust* by delivering it to the trustees, unless there be gross mismanagement; or some other reason for it (9 Mod. by Leach, p. 227; see Watkins on Conveyancing, 16, 9th ed.)

The doctrine that a *cestui que trust* who is in the possession of an estate by the consent or acquiescence of the trustee must be regarded as tenant at will, only applies where the *cestui que trust* is the actual occupant. If he is only allowed to receive the rents, or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees, and if the actual occupier holds for more than the statutory period without paying rent, the trustees lose their title (*Melling* v. *Leak*, 16 C. B. 652).

Meaning of the proviso as to *cestui que trusts*.

The proviso that no *cestui que trust* shall be deemed to be a tenant at will within this clause, was said by the Court of Common Pleas to be equivalent to saying, that the right of entry of a trustee against his *cestui que trust* shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy; and the exception seems to be introduced in order to prevent the necessity of any active steps being taken by the trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time (*Garrard* v. *Tuck*, 8 C. B. 231).

The proviso applies only to cases of declared and expressed trusts, and not to the case of a person holding under an agreement to purchase (*Doe* v. *Rock*, 4 M. & G. 30); nor to the case of a mortgagor who has paid the mortgage debt (*Sands* to *Thompson*, 22 Ch. D. 614). But where articles of agreement for a lease (which was never actually executed) were entered into and the premises occupied pursuant to the articles from 1771 to 1867, it was held that an actual direct trust had been constituted between the owners of the fee and those who held under the articles; and that the *cestuis que trusts* being in possession the estate of the trustees was not destroyed by lapse of time (*Drummond* v. *Sant*, L. R. 6 Q. B. 763).

Tenancy from Year to Year.

No person after a tenancy from year to year to have any right but from the end of the first year or last payment of rent.

8. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent pay-

able in respect of such tenancy shall have been received (which shall last happen) (*u*). 3 & 4 Will. 4, c. 27, s. 8.

(*u*) The 8th section applied to tenancies from year to year, created before and existing at the passing of the act (*Doe* v. *Sumner*, 14 M. & W. 39). Cases under this section.

The lease in writing referred to in this section by which a case would be taken out of its operation, must be not merely an instrument which was evidence of the conditions of holding but one passing an interest (*Doe* v. *Gower*, 17 Q. B. 599).

Where A. was in receipt of rents as agent for B., an owner in fee; and after B.'s death intestate continued in receipt, paying the rent into a bank and stating he was acting on behalf of the heir, but these statements were not communicated to the heir: it was held that A. must be taken to have been in receipt of the rent for his own benefit; that having regard to sect. 34 it was not competent for the heir after the expiration of the statutory period to ratify A.'s acts, so as to make A.'s receipt of rent the heir's receipt, and that the heir was barred under sect. 8 (*Lyell* v. *Kennedy*, 18 Q. B. Div. 796).

Evidence of payment of rent.

The reservation and receipt of any rent, however small, will create the legal relation of tenancy from year to year for the purposes of the act (*Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324). The rent may be any service for which distress may be made (sect. 1, *ante*), and accordingly includes cleaning the parish church and ringing the bell (*Doe* v. *Benham*, 7 Q. B. 976). Where the tenancy is disputed, the circumstances connected with the annual payments are very important, for if the person paying makes the payment expressly or impliedly on account of something else than rent of land of which he is tenant, that would not be a payment of rent within this section (*A. G.* v. *Stephens*, 6 D. M. & G. 146). Payment of rent within this section may be proved by parol admission (*Doe* v. *Beckett*, 4 Q. B. 601). Where after the expiration of twenty years during which no rent had been paid, the tenant within five years before action paid some arrears, time ran under this section from the last payment of rent; and sect. 34 did not extinguish the title of the reversioner (*Bunting* v. *Sargent*, 13 Ch. D. 330; see, however, as to this last point, *Sanders* v. *Sanders*, 19 Ch. Div. 373). Where A. let land to B. by parol from year to year, reserving rent payable in March and November, the last payment of rent was in March, 1846. A. died in December of the same year, and B. retained possession. Time ran from the last payment of rent, and not from the death of A. (*Baines* v. *Lumley*, 16 W. R. 674).

Creation of tenancy from year to year.

An estate from year to year may be created either by the parol or written agreement of the parties. The qualities that distinguish it from proper terms of years, and from estates at will, are, that it is now raised by construction of law alone instead of an estate at will, in every instance where a possession is taken with the consent of the legal owner, and where an annual rent has been paid, but without there having been any conveyance or agreement conferring a legal interest, and that whether it arises from express agreement, or by implication of law, it may, unless surrendered or determined by a regular notice to quit, subsist for an indefinite period, if the estate of the lessor will allow of it, or for the whole term of his estate, where it is of a limited duration, unaffected by the death either of the lessor or lessee, or by a conveyance of their estate by either of them (*Birch* v. *Wright*, 1 T. R. 380). Although *primâ facie* all leases for uncertain terms create a tenancy at will, the courts of law have for some time past inclined to construe such leases to constitute a tenancy from year to year, especially where an annual rent is reserved (3 Burr. R. 1609; *Roe* v. *Lees*, 2 Bl. R. 1171; *Doe* v. *Weller*, 7 T. R. 478; see *Pope* v. *Garland*, 4 Y. & Coll. 399; *Doe* v. *Watts*, 7 T. R. 83; *Doe* v. *Morse*, 1 B. & Ad. 365); which is certain, or which, from the terms of the agreement, is capable of being ascertained with certainty (*Daniel* v. *Gracie*, 6 Q. B. 145).

3 & 4 Will. 4, c. 27, s. 8.

A tenancy from year to year will not arise by implication where it will work a forfeiture (*Fenny* v. *Child*, 2 M. & S. 255).

Payment of rent is *primâ facie* evidence of a tenancy from year to year (*Doe* v. *Dodd*, 5 B. & Ad. 689); if made with reference to a year or some aliquot part of a year (*Braythwayte* v. *Hitchcock*, 10 M. & W. 497; *Doe* v. *Wood*, 14 M. & W. 687). Although a tenancy from year to year is ordinarily implied from the mere receipt of rent (*Bishop* v. *Howard*, 2 B. & C. 100), it is competent to either the payer or receiver to prove the circumstances under which the payments as for rent were so made, and by such circumstances to repel the legal implication which would result from the payment of rent unexplained (*Doe* v. *Crago*, 6 C. B. 90). A demise "not for one year only but from year to year" operates as a demise for two years, and consequently the tenant cannot be ejected after a notice to quit at the expiration of the first year (*Denn* v. *Cartwright*, 4 East, 31). A lease for one year and so on from year to year, until the tenancy hereby created shall be determined as hereafter mentioned, with a provision that it should be lawful for either of the parties to determine the tenancy by three months' notice, creates a tenancy for two years certain (*Doe* v. *Green*, 9 Ad. & Ell. 658; see *Birch* v. *Wright*, 1 T. R. 378; *Denn* v. *Cartwright*, 2 Camp. 572; *Thompson* v. *Maberley*, 4 East, 29; *Buckworth* v. *Simpson*, 1 C. M. & R. 834).

The defendant, being tenant from year to year at a given rent, the rent was raised. It was held, that a contract for a tenancy for two years certain from the time of raising the rent could not be inferred (*Doe* v. *Geekie*, 5 Q. B. 841). A tenancy from year to year, so long as both parties please, is determinable at the end of the first as well as of any subsequent year, unless, in creating such tenancy, the parties use words showing that they contemplate a tenancy for two years at least (*Doe* v. *Smaridge*, 7 Q. B. 957).

Where a party entered into possession of a farm, and paid rent under an agreement for a lease containing divers covenants applicable to a tenancy from year to year: it was held that where the agreement stipulated for the lease to contain a condition of re-entry, if the tenant should grow two successive crops of white corn without fallowing, that he might be ejected without notice if he committed a breach of the covenant (*Doe* v. *Amey*, 4 P. & Dav. 177; see *Bolton* v. *Tomlin*, 5 Ad. & Ell. 856).

A tenant who holds on after a term has elapsed goes on as tenant from year to year, because in the silence of the parties no other terms can be implied (*Doe* v. *Pullen*, 2 Bing. N. C. 753; *Bell* v. *Nangle*, 2 Jebb & Symes, 259; see *Doe* v. *Watts*, 7 T. R. 83; *Howard* v. *Sherwood*, 1 Alcock & Nap. 217). An undertenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is a quasi tenant at sufferance, and the mere fact of occupation, coupled with payment of rent for such time of occupation, does not raise the presumption of a demise for years, unless there is some evidence to show an agreement for a demise for a term (*Simpkin* v. *Ashurst*, 1 C. M. & R. 261). So long as the occupation is merely continued with the bare acquiescence, or without the disagreement of the person entitled to the possession, a tenancy at sufferance exists (*Sykes* v. *Birkett*, cited 1 T. R. 161; Co. Litt. 270 b; Cro. Jac. 169).

A tenancy from year to year was considered as recommencing every year in the case of *Tomkins* v. *Lawrence* (8 C. & P. 729), but in *Doe* v. *Wood* (14 M. & W. 682), *Parke*, B., said, "Though some doubts may once have existed as to whether, in the case of a tenancy from year to year, there was a fresh tenancy at the end of each year, it is now clear beyond all doubt that the same tenancy continues till the one or the other of the parties determines it at his pleasure." And the same principle must apply to any shorter tenancy, as from week to week (*Per Crompton*, J., *R.* v. *Thornton*, 6 Jur. N. S. 799; 29 L. J. M. C. 162, 164). The non-payment of rent for sixteen years, and no proof of any demand being made, is of itself sufficient evidence to presume the determination of a tenancy from year to year (*Stagg* v. *Wyatt*, 2 Jur. 892).

Though a *parol* agreement for a longer term than three years is void by the Statute of Frauds (29 Car. 2, c. 3, s. 1), as to the duration of the term, yet it creates a tenancy from year to year, regulated in every other respect by the agreement (*Doe* v. *Bell*, 5 T. R. 471; *Clayton* v. *Blakey*, 8 T. R. 3; see *Goodtitle* v. *Herbert*, 4 T. R. 680). By stat. 8 & 9 Vict. c. 106, s. 3 (*post*), a lease required by law to be in writing of any tenements or hereditaments "shall be void at law unless made by deed" (*post*), where see note as to the effect of a lease void under that act. 8 & 4 Will. 4, c. 27, s. 8.

The interest of a tenant from year to year does not determine by his death, but devolves to his personal representatives (*Doe* v. *Porter*, 3 T. R. 13; 15 Ves. 241).

A tenancy from year to year may be determined by a notice to quit from either party, which, when there is no agreement, or where the agreement is silent on that point, must be at least half a year's (and not merely six months') notice, requiring from the tenant, or offering on his part, to give up possession at the expiration of the year, computing from the time when the tenancy commenced (*Right* v. *Darby*, 1 T. R. 159). A notice to quit a house held by the plaintiff as tenant from year to year was given to him on the 17th June, 1840, which required him to quit the premises "on the 11th October now next ensuing, or such other day and time as his said tenancy might expire on." The tenancy had commenced on the 11th October in a former year. It was held that this was not a good notice for the year ending on the 11th October, 1841 (*Mills* v. *Goff*, 14 M. & W. 72; see *Doe* v. *Smith*, 5 Ad. & Ell. 350). Notice to quit.

On a demise for one year and six months certain from August 13th, three calendar months' notice to be given before determination of the said tenancy. It was held, that a three months' notice to quit, expiring on 13th August, was proper; and not a notice expiring at the end of a year from the termination of the year and six months (*Doe* v. *Dobell*, 1 Q. B. 806). A tenant from year to year, believing that his tenancy determined at Midsummer, gave a written notice to quit at that period, which the landlord accepted; the tenant having afterwards discovered that his tenancy expired at Christmas gave his landlord another notice accordingly, and on possession being demanded at Midsummer refused to quit the premises. It was held, that the tenancy was not determined by notice, inasmuch as it was not good as a notice to quit, and could not operate as a surrender by note in writing, within the Statute of Frauds, being to take effect *in futuro* (*Doe* v. *Milward*, 3 M. & W. 328; see *Johnstone* v. *Hudlestone*, 4 B. & C. 922; *Weddall* v. *Capes*, 1 M. & W. 50). A tenant from year to year gave his landlord notice to quit, ending at a time within half a year. The landlord at first acquiesced, but ultimately refused to accept the notice. The tenant quitted according to his notice, and the landlord entered, and did some repairs. It was held, that the tenancy was not determined (*Bessell* v. *Landsberg*, 7 Q. B. 638). A notice to quit must be such that the tenant may safely act on it at the time of receiving it; therefore a notice by an unauthorized agent cannot be made good by an adoption of it by the principal after the proper time for giving it. Notice to quit at the end of the current year of tenancy, "on failure whereof I shall require you to pay me double former rent or value for so long as you detain possession," is an unqualified notice, and does not give the tenant an option (*Doe* v. *Goldwin*, 2 Q. B. 143). A notice to quit given by a person authorized by one of several joint-tenants, purporting to be given on behalf of them all, is good for all, because the tenant holds the premises only so long as he and they shall all agree (*Doe* v. *Summersett*, 1 B. & Ad. 135; *Doe* v. *Hughes*, 7 M. & W. 139; see *Doe* v. *Walters*, 10 B. & C. 626).

As to notices to quit in the case of tenancies from year to year of agricultural holdings in England, see now 46 & 47 Vict. c. 61, s. 33; and *Barlow* v. *Teal*, 15 Q. B. Div. 501.

A notice to quit cannot be required by a person holding adversely, but only where there is a subsisting tenancy on both sides, nor is it necessary where the tenant does an act which amounts to a disavowal of the title of

3 & 4 Will. 4, c. 27, s. 8.

the landlord (*Doe* v. *Frowd*, 1 Moore & P. 486). A notice to quit is unnecessary, where on demand of possession the party refuses to give up possession, claiming the property as his own (*Doe* v. *Gower*, 17 Q. B. 589). In *Doe* v. *Pasquali* (Peake's N. P. C. 196), a refusal to pay rent to a devisee under a will, which was contested, was not such a disavowal of his title as to entitle such devisee to maintain ejectment without a previous notice to quit (see *post*, p. 135).

Lease reserving Rent.

Where rent amounting to 20*s*. reserved by a lease in writing shall have been wrongfully received, no right to accrue on the determination of the lease.

9. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent (*charge*), by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent (*charge*) in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent (*charge*), subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled (*x*).

(*x*) According to the judgment of Lord *Denman*, C. J., in *Doe* v. *Angell* (9 Q. B. 356), this section is to be read as if the word "charge" in italics had been interposed (See *Baines* v. *Lumley*, 16 W. R. 675).

Law before the statute.

The rule of law before this statute was, that where there was a subsisting lease, the right of entry was preserved until the determination of the lease although no rent had been received (*Orrell* v. *Maddox*, Runn. Eject. App. No. 1). And the adverse receipt of rent for more than twenty years did not deprive the party of such right of entry (*Doe* v. *Danvers*, 7 East, 299; see *Bushby* v. *Dixon*, 3 B. & C. 304). But in such a case a bill in equity for discovery was dismissed (*Cholmondeley* v. *Clinton*, T. & R. 107). A void lease or an attendant term did not prevent time running (*Taylor* v. *Horde*, 1 Burr. 60).

The mere receipt of rent by a stranger, was not evidence of adverse possession, even although the stranger made a lease by indenture, reserving rent, unless he made an actual entry (Bull. N. P. 104; 1 Roll. Abr. 659; and see *Smith* v. *Parkhurst*, Andr. 324; *Jayne* v. *Price*, 5 Taunt. 326). So if a tenant at will made a lease for years, and the lessee entered, though the estate at will did not warrant the lease, it was only a disseisin at election (*Blunden* v. *Baugh*, Cro. Car. 302). For where a person gains a possession under a title consistent with that of the person having right, it is but a disseisin at election (See 2 Sch. & Lef. 622; 1 Taunt. 599).

The real property commissioners observed, "Where rent is reserved on a lease, we consider it more reasonable that the limitation should run from the time when the rent began to be received by a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to

3 & 4 Will. 4, c. 27, s. 9.

the occupation of the soil: the person who is in the receipt of them can do nothing more to establish his right, and the person to whom they are demised is virtually dispossessed. Where *no rent* or only a *nominal rent* is reserved, very slight negligence can be imputed to the reversioner in merely not requiring a recognition of his title from the tenant, and, in such cases, till the expiration of the lease, we think there should not be a commencement of adverse possession to bar the landlord. Any rent less than 20*s.* a year may for this purpose be considered nominal" (1 Real Prop. Rep. 47).

Cases under sect. 9.

Doe v. *Angell.*

In *Doe* v. *Angell* (9 Q. B. 328), there was an adverse receipt of rent which would have barred an action under this section. In that case Lord *Denman* discussed the meaning of the word rent in the act, pointing out that it meant rent-charge, in sections 2, 3, 4, 5, 7, 8, and 9 (See *Baines* v. *Lumley*, 16 W. R. 675).

When time begins to run.

The right to recover land subject to a lease is to be considered as having accrued not from the time when any person dealing with the leases, or dealing with those entitled to the leases, gets possession, and claims to be entitled to the fee, but from the time when the person claiming under a lease pays rent to a party claiming wrongfully in reversion immediately expectant on such lease (*Chadwick* v. *Broadwood*, 3 Beav. 316; see *Archbold* v. *Scully*, 9 H. L. C. 360; *Twiss* v. *Noblett*, I. R. 4 Eq. 60).

Wrongful receipt of rent within this section.

A person claiming without any real title to be entitled to land is a person "wrongfully" claiming within the meaning of this section, although the claim may be put forward under a mistake, and without any improper intention to deprive others of their property (*Williams* v. *Pott*, 12 Eq. 149). For the bearing of this section on the case where there is a lease and a sub-lease, and the parties claiming under the sub-lease pay their rent directly to the head landlord, see *Drew* v. *Lord Norbury* (3 J. & Lat. 306). See further, as to wrongful receipt of rent within this section, *Sloane* v. *Flood* (5 Ir. C. L. 75); *Shaw* v. *Keighron* (I. R. 3 Eq. 574).

Disclaimer of landlord's title.

A disclaimer imports a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself (1 M. & G. 139). And if a tenant disavowed his landlord's title by attorning to another, and the landlord was apprised of it and acquiesced, the possession of his tenant became adverse, and the statute would have run against the landlord (*Hovenden* v. *Annesley*, 2 Sch. & Lef. 624). But where there is no disavowal of the tenure, the mere nonpayment of rent by the tenant for a number of years did not bar the remedies of the landlord at the expiration of the term (2 Sch. & Lef. 625, 626).

Payment of rent to another party without the consent or knowledge of the landlord, after an adverse possession of twenty-three years, did not amount to an attornment; and the fraudulent act of a tenant in betraying the possession of his landlord by disclaiming tenure under him, and admitting a title in a third person, would not affect the landlord's title, so long as he had a right to consider the person as holding possession as tenant (*Meredith* v. *Gilpin*, 6 Price, 146). Payment of rent by a lessee to a lessor, after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired, and such knowledge is a fact to be decided by the jury (*Fenner* v. *Duplock*, 2 Bing. 10). A tenant, though not permitted to deny the right of demising, may rely upon his landlord's title having expired (*Downs* v. *Cooper*, 2 Q. B. 256).

The act of a tenant in setting up a title adverse to that of his landlord, in order to obtain the freehold, operates as a forfeiture of his term, and it is the same whether he does it himself, or assists another to do it (*Doe* v. *Flynn*, 1 C. M. & R. 137). But a tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own (*Doe* v. *Wells*, 10 Ad. & Ell. 427). In order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation

3 & 4 Will. 4, c. 27, s. 9.

of landlord and tenant; or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it (*Doe* v. *Pasquali*, Peake, N. P. C. 196; *Doe* v. *Stanion*, 1 M. & W. 703; see *Doe* v. *Cooper*, 1 M. & G. 135; *Rees* v. *King*, Forrest, 19). An assertion by a yearly tenant that he has a right to hold at a customary rent amounts to a disclaimer (*Vivian* v. *Moat*, 16 Ch. D. 730). On disclaimer, see Woodfall's L. & T. 376 *et seq.*, 14th ed.

Entry.

A mere entry not to be deemed possession.

10. No person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon (*y*).

(*y*) By stat. 21 Jac. 1, c. 16, it was enacted, that no entry should be made by any man upon lands, unless within twenty years after his right should accrue. By the stat. 4 & 5 Ann. c. 16, s. 14, it was enacted, that no entry upon lands should be of force to satisfy the Statute of Limitations (21 Jac. 1, c. 16), or to avoid a fine levied of lands, unless an action were thereupon commenced within one year after, and prosecuted with effect (See 1 Wms. Saund. 319, n. (1); 10 B. & C. 848).

Acts sufficient to interrupt adverse possession.

The defendant being in adverse possession of a hut and piece of land, the lord of the manor entered in the absence of the defendant, but in the presence of his family said he took possession in his own right, and he caused a stone to be taken from the hut, and a portion of the fence to be removed. It was held that these acts were not sufficient to disturb the defendant's possession under this section (*Doe* v. *Combes*, 9 C. B. 714). But where the only adverse possession taken by the defendant consisted in the erection of a fence, and the plaintiff entered and wholly destroyed the fence, it was held that the defendant's possession was disturbed (*Worssam* v. *Vandenbrande*, 17 W. R. 53).

Continual Claim.

No right to be preserved by continual claim.

11. No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action (*z*).

(*z*) Previously to the enactment in this and the preceding section an actual entry made by one who had a legal right to enter on an estate, or by his agent duly authorized by power of attorney, if made peaceably and repeated once in the space of every year and a day (which was called *continual claim*), was deemed sufficient to prevent the right of entry from being tolled by a descent cast or discontinuance, or barred by the Statute of Limitations (Litt. ss. 414, 415; Runn. Eject. 51, 52, 2nd ed.; Ad. Eject. 101, 3rd ed.; *Ford* v. *Grey*, 1 Salk. 285). Actual entry was sufficient to keep alive the right of a person disseised, but a mere demand, without process or acknowledgment, was not sufficient against the Statute of Limitations (*Hodle* v. *Healey*, 1 Ves. & B. 540).

Coparceners, &c.

Possession of one coparcener, &c. not

12. When any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common,

shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them (*a*).

3 & 4 Will. 4, c. 27, s. 12.

to be the possession of the others.

(*a*) Coparceners, joint tenants, and tenants in common, having a joint possession and occupation of the whole estate, it was a settled rule of law that the possession of any one of them was the possession of the others or other of them, so as to prevent the statutes of limitation from affecting them; nor did the bare receipt of all the rents and profits by one operate as an ouster of the other (Co. Litt. 243 b, n. (1), 373 b; *Ford* v. *Grey*, 1 Salk. 285; 6 Mod. 44; Br. Coparceners; 1 Moore, 868; Burton's Compendium, 395 *et seq.*; see *Doe* v. *Keen*, 7 T. R. 386; *Doe* v. *Pearson*, 6 East, 173; *O'Sullivan* v. *M'Swiney*, 1 Long. & T. 111). But the possession of one heir in gavelkind was held not to be that of the other, where he entered with an adverse intent to oust the other (*Davenport* v. *Tyrrel*, 1 Bl. R. 675).

How coparceners, &c. were affected by old statutes of limitation.

This section makes the possession of one coparcener, joint tenant, or tenant in common, who has been in possession of the entirety, separate from the time of his coming into possession (*Culley* v. *Doe*, 11 Ad. & Ell. 1008; *O'Sullivan* v. *M'Swiney*, 1 Long. & T. 118, 119; *Doe* v. *Horrocks*, 1 Car. & K. 566). Consequently, the entry of one coparcener cannot have the effect of vesting the possession in the other (*Woodroffe* v. *Doe*, 15 M. & W. 792).

Effect of sect. 12.

Lands were conveyed to a trustee and his heirs, in trust for five persons, as tenants in common in fee. For more than twenty years, four of the tenants in common had been, by their agent, in the uninterrupted and exclusive receipt and enjoyment of the rents and profits of all the lands: the trustee never having, in any manner, interfered in the trust. It was held, that the title of the fifth tenant in common was barred; the case not being within the saving of the 25th section, for the defendants had not received the rents under, but in opposition to, the trustees (*Burroughs* v. *M'Creight*, 1 J. & Lat. 290; *Bolling* v. *Hobday*, 31 W. R. 9). And where a father was in receipt of the whole rents of a property one undivided share of which belonged to an infant child, and another share to an adult child, the title of the adult was held barred after the statutory period, although, as regards the infant's share, the father was considered as the infant's bailiff (*Hobbs* v. *Wade*, 36 Ch. D. 553). A presumption that one tenant in common had accounted to his co-tenant for a share of the rents was raised in *Sanders* v. *Sanders* (19 Ch. Div. 373). This section applies, not only to the case where one of several joint tenants has been in possession of the entirety of the whole of the lands held jointly, but also to the case where such tenant has been in possession of the entirety of any portion of such lands (*Murphy* v. *Murphy*, 11 Ir. C. L. R. 205, where *Tidball* v. *James*, 29 L. J. Ex. 91, is explained).

Where two persons were in lawful possession of a copyhold, and the title under which they held came to an end, but they continued in possession for twenty-one years, it was decided that they held on as joint tenants; and inasmuch as they had done nothing to sever their tenancy, the interest of the one who died first determined on his death (*Ward* v. *Ward*, 6 Ch. 789; *Bolling* v. *Hobday*, 31 W. R. 9; see *Williams* v. *Williams*, 2 Ch. 294).

Where one tenant in common as tenant at sufferance occupies the whole property after the expiration of a lease granted to him by his co-tenant, he will be liable for rent to his co-tenant in an action for use and occupation (*Leigh* v. *Dickeson*, 15 Q. B. Div. 60). In partition actions tenants in common have been charged with an occupation rent (*Pascoe* v. *Swan*,

3 & 4 Will. 4, c. 27, s. 12.

27 Beav. 508; *Teasdale* v. *Sanderson*, 33 Beav. 534). In general, however, independently of a lease, mere occupation by one of several tenants in common, if unaccompanied by exclusion, does not make him liable for rent (*M'Mahon* v. *Burchell*, 2 Phil. 127; 1 Coop. 457). Nor can an action for money had and received be maintained, the remedy being an action of account under 4 Anne, c. 16, s. 27 (*Thomas* v. *Thomas*, 19 L. J. Exch. 175); nor in the absence of ouster can trespass be maintained (*Jacobs* v. *Seward*, L. R. 5 H. L. 464). Where one tenant in common of a wall excludes the other by means of an obstruction, the remedy is to remove the obstruction (*Watson* v. *Gray*, 14 Ch. D. 192).

With regard to the statute 4 Anne, c. 16, s. 27, it was held before the Jud. Acts that as the only remedy mentioned was an action, there was no relief in equity unless the case was one in which such action would lie. An executor, who had been co-tenant in common with his testator of a farm which the latter had alone cultivated, claiming to be a creditor of the estate for a moiety of the profits, the court directed an action to be brought to try the right (*Henderson* v. *Eason*, 2 Phil. 308; 17 Q. B. 701; and see further, as to actions under the statute, *Shirton* v. *Richardson*, 13 M. & W. 17; *Gorley* v. *Gorley*, 1 H. & N. 144; *Murray* v. *Hall*, 7 C. B. 441).

One tenant in common of a house who spends money in ordinary repairs has no right of action against his co-tenant for contribution (*Leigh* v. *Dickeson*, 15 Q. B. Div. 60; see *Johnson* v. *Wild*, 44 Ch. D. 146).

Possession of Younger Brother, &c.

Possession of a younger brother not to be the possession of the heir.

13. When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir (*b*).

(*b*) The effect of this section is illustrated in the judgment of the court in *Jones* v. *Jones*, 16 M. & W. 712.

Prior state of the law.

If a man, seised of certain lands in fee, had issue two sons, and died seised of such land, and the younger son entered by abatement into the land, the Statute of Limitations did not operate against the elder son (Litt. s. 396; *Sharington* v. *Shrotton*, Plowd. 306). So where a sister entered (*Page* v. *Selby*, Bull. N. P. 102; 2 Stark. on Ev. 220, 2nd ed.; Co. Litt. 242; Plowd. 298, 306; see *Dowdall* v. *Bryne*, Batty's Ir. R. 373).

A. was possessed of lands for more than twenty years, and died in 1817. His widow had possession from that time until her death in 1838. B. was the eldest son of A. and his wife. It was held, that although B. could not recover in ejectment as the heir of his father, because more than twenty years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B. as heir on her death in 1838 (*Doe* v. *Long*, 9 C. & P. 773; see *Doe* v. *Lawley*, 13 Q. B. 954).

Written Acknowledgment of Title.

Acknowledgment in writing given to the person entitled, or

14. Provided always, and be it further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing, signed by the person in possession, or in receipt of the

profits of such land, or in receipt of such rent, then such possession or receipt, of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom, or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given (*c*). 3 & 4 Will. 4, c. 27, s. 14.

his agent, to be equivalent to possession or receipt of rent.

(*c*) The requiring an acknowledgment in writing to take a case out of the statute 3 & 4 Will. 4, c. 27, was by analogy to the statute 9 Geo. 4, c. 14, adopted in this section, in the 42nd section of this act, in the 5th section of the 3 & 4 Will. 4, c. 42, and in sects. 7 and 8 of 37 & 38 Vict. c. 57. A difference occurs in the language of these sections. Thus, under the 14th section, the acknowledgment is to be given to the party entitled to land or rent, or *his agent*, signed by the person in possession. By sect. 7 of 37 & 38 Vict. c. 57, twelve years' possession by a mortgagee will bar the right of redemption, unless an acknowledgment in writing of such right shall have been given to the mortgagor or some person claiming his estate, or to the *agent* of such mortgagor or person, signed by the mortgagee, or the person claiming through him. By sect. 8 of 37 & 38 Vict. c. 57, money charged upon land and legacies cannot be recovered after the end of twelve years, unless in the meantime some part of the principal, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his *agent*, to the person entitled thereto, or his *agent*. By the 42nd section, no arrears of rent or interest are to be recovered, but within six years after the same shall have become due, or next after an acknowledgment of the same shall have been given to the person entitled thereto, or his *agent*, signed by the person by whom the same was payable, or his *agent*. In the four cases above mentioned, therefore, the acknowledgment is binding if given *to* the party entitled, *or his agent;* but an acknowledgment of title under the 14th section, or of a right to redeem under sect. 7 of 37 & 38 Vict. c. 57, cannot be given *by an agent;* whilst, in the case of money charges, and of arrears of rent or interest, an acknowledgment by an agent will be effectual. The cases as to acknowledgments under the above-mentioned sections, and under 9 Geo. 4, c. 14, are collected in the subsequent notes. By the 5th section of 3 & 4 Will. 4, c. 42 (limiting the time within which actions on specialties are to be brought), any acknowledgment either by writing signed by the party liable by virtue of a specialty, or his *agent*, or part payment or part satisfaction on account of any principal or interest due thereon, will take a case out of that act. Different sections as to acknowledgments in the statutes of limitation.

Sect. 14 of 3 & 4 Will. 4, c. 27, provides that the acknowledgment must be signed by the person in possession: therefore, an acknowledgment signed by an agent will be insufficient (*Ley* v. *Peter*, 3 H. & N. 101). An unaccepted proposal for a lease made by A., who was unable from illness to write, was evidence of an acknowledgment by A. (*Dublin* v. *Judge*, 11 Ir. L. R. 9). By whom acknowledgment must be made under sect. 14.

The acknowledgment must be given to the person entitled or his agent (See *Fursden* v. *Clegg*, 10 M. & W. 572; *Goode* v. *Job*, 28 L. J. Q. B. 1). To whom.

Whether a writing amounts to an acknowledgment of title within this section is a question for the judge, and not for the jury to decide (*Doe* v. *Edmonds*, 6 M. & W. 295; *Morrell* v. *Frith*, 3 M. & W. 402; but see What is an acknowledgment.

3 & 4 Will. 4, c. 27, s. 14.

Incorporated Society v. *Richards*, 1 D. & War. 290; Sugd. R. P. Stat. 67). A party in possession adversely of land, being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows:—"Although if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent on an agreement for a term of twenty-one years:" the bargain subsequently went off, and no rent was paid or lease executed. Held, that this letter was not an acknowledgment of title within this section, because there was no final bargain (*Doe* v. *Edmonds*, 6 M. & W. 295; see *Morrell* v. *Frith*, 3 M. & W. 402).

A deed which purported to bear date more than twenty years before action, but which was in fact executed by the defendant within twenty years, and which contained a recital of the plaintiff's title, was a sufficient acknowledgment (*Jayne* v. *Hughes*, 10 Exch. 430). A correspondence by a party in possession of property with the solicitor of a society, by which he merely professed to hold the estates until an account on the foot of charges, to which he was entitled, should be closed, and offered to refer to arbitration all questions touching such account, as the only matter in dispute, was a sufficient acknowledgment (*Incorporated Society* v. *Richards*, 1 D. & War. 258). A letter was held to amount to a sufficient acknowledgment in *Fursden* v. *Clegg* (10 M. & W. 572). Where two parties are dealing with each other, the one claiming a right to the property, and the other an incumbrance on it, the incumbrancer cannot be heard to say that an acknowledgment, contained in a correspondence between them, is not binding on him, because there might be an infirmity in the title acknowledged, in case some third party were to make a claim (*Incorporated Society* v. *Richards*, 1 D. & War. 258). The acknowledgment must be in writing, and it may be doubted whether parol evidence of the acknowledgment will be excluded (*Haydon* v. *Williams*, 7 Bing. 168). An acknowledgment in an answer sworn to a bill in Chancery filed by the plaintiff in reference to the same property was sufficient (*Goode* v. *Job*, 28 L. J. Q. B. 1).

Where a statutory title has accrued by the expiration of the requisite period, it cannot be defeated by a subsequent acknowledgment (*Sanders* v. *Sanders*, 19 Ch. Div. 373).

When time runs after an acknowledgment.

The moment after an acknowledgment of title, within the meaning of the 14th section, is made, the time begins to run against the person to whom it is made (*Burroughs* v. *M'Creight*, 1 J. & L. 304; *Scott* v. *Nixon*, 3 D. & War. 404). See, however, Darb. & Bos. Stat. Lim. 290.

Time of Limitation enlarged.

Possession not adverse at passing of Act.

Where possession is not adverse at the time of passing the act, the right shall not be barred until the end of five years afterwards.

15. Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or *interest* (*d*), at any time within five years next after the passing of this act (*e*).

(*d*) The word "interest," which is in the parliament roll, appears to be

a mistake for "rent" (*Per* Lord *Denman*, C. J., *Doe* v. *Angell*, 9 Q. B. 360). 3 & 4 Will. 4, c. 27, s. 15.

(*e*) For cases on this section, see *Holmes* v. *Newlands*, 11 Ad. & Ell. 44; *Culley* v. *Doe*, 11 Ad. & Ell. 1008; *O'Sullivan* v. *M'Sweeny*, 2 Ir. L. R. 95, 96; *Doe* v. *Williams*, 5 Ad. & Ell. 296; *Scott* v. *Nixon*, 3 D. & War. 388; *Incorporated Society* v. *Richards*, 1 D. & War. 289; *Doe* v. *Thompson*, 5 Ad. & Ell. 532; *Ex p. Hassell*, 3 Y. & Coll. 617.

3. *Savings in Case of Disabilities.*

Persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, to be allowed ten years from the determination of their disability or death.

16. Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid (*f*), such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy (*g*), coverture, idiotcy, lunacy (*h*), unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened) (*i*).

37 & 38 Vict. c. 57.

In all cases since 1st January, 1879, the question of disabilities depends on 37 & 38 Vict. c. 57, sects. 3 and 4, which have substituted the period of six years for the ten years mentioned in sect. 16 (above), and have abolished the disability arising from absence beyond seas. See the sections given in full; p. 196, *post*. With regard to married women the disability of coverture has been abolished in the case of actions falling within M. W. P. Act, 1882, sect. 1, sub-s. 2 (See *Lowe* v. *Fox*, 15 Q. B. Div. 667; *Weldon* v. *Neal*, 51 L. T. 289; cases decided under 21 Jac. 1, c. 16, s. 7). The following note has reference to 3 & 4 Will. 4, c. 27, s. 16.

(*f*) See sections 2 to 14, *ante*, pp. 112—138. This section was held not to apply to a mortgagor redeeming, such an action not being an action to recover land (*Kinsman* v. *Rouse*, 17 Ch. D. 104; see *Forster* v. *Patterson*, 17 Ch. D. 132).

Disability of infancy.

(*g*) Where an infant's property has been in the possession of the parent of the infant, such parent has been treated as a bailiff for the infant, and time has not run (*Thomas* v. *Thomas*, 2 K. & J. 79; *Wall* v. *Stanwick*, 34 Ch. D. 763; *Hobbs* v. *Wade*, 36 Ch. D. 553). Similarly where an uncle has been in possession (*Pelly* v. *Bascombe*, 4 Giff. 390; on appeal, 13 W. R. 306).

Possession by father of son's estate.

(*h*) See *Fulton* v. *Creagh*, 3 J. & Lat. 329; 3 Y. & Coll. 620.

Successive disabilities in the same person.

(*i*) It was held under 3 & 4 Will. 4, c. 27, s. 16, that when the person to whom the right to bring an action for the recovery of land accrued was under a disability, and before the removal of that disability the same person fell under another disability, his right to bring an action was preserved until ten years after the removal of the latter disability (*Borrows* v. *Ellison*, L. R. 6 Ex. 128; see *Supple* v. *Raymond*, 1 Hayes, Ir. Rep. 6; 2 Prest. Abstr. 340; Blansh. Lim. 21, 22).

But where time had once begun to run no subsequent disability, on the part of the person to whom the right first accrued, or of any one claiming under him, would stop the running of time (See *Doe* v. *Jones*, 4 T. R. 310; *Sturt* v. *Mellish*, 2 Atk. 610—614; Str. 556; 1 Wils. 134; *Cotterell* v. *Dutton*, 4 Taunt. 826; *Doe* v. *Jesson*, 6 East, 80; decided under

3 & 4 Will. 4, c. 27, s. 16.

21 Jac. 1, c. 16, s. 2, the wording of which was very similar; and see *Goodall* v. *Skerratt*, 3 Drew. 216; *Murray* v. *Watkin*, 62 L. T. 796, *post*, p. 196). It was also decided under 21 Jac. 1, c. 16, s. 2, that where an estate descended to parceners, one of whom was under a disability, the disability of the one did not preserve the title of the other (*Doe* v. *Rowlston*, 2 Taunt. 441).

For the bearing of this section upon the construction of the first branch of sect. 3, see *Owen* v. *De Beauvoir* (16 M. & W. 567); *De Beauvoir* v. *Owen* (5 Exch. 166).

Presumption of death where person has not been heard of for seven years.

Where a person has not been heard of for many years, the presumption of the duration of life ceases at the end of seven years, a period which has been fixed from analogy to the statute of bigamy (1 Jac. 1, c. 11, s. 2; see now 24 & 25 Vict. c. 100, s. 57), and the statute concerning leases determinable on lives (19 Car. 2, c. 6)*. Thus, upon a plea of coverture, where the husband had gone abroad twelve years before, the defendant was called upon to prove that he was alive within the last seven years (*Hopewell* v. *De Pinna*, 2 Campb. 113). Where a tenant for life had not been heard of for fourteen years by a person residing on the estate, it was held to be presumptive evidence of his death (*Doe* v. *Deakin*, 4 B. & Ald. 433; see 2 *Id.* 386). It was held, that where no account could be given of a person within the exception of the statute 21 Jac. 1, c. 16, s. 2, he would be presumed to be dead at the expiration of seven years from the last account of him (*Doe* v. *Jesson*, 6 East, 84). It is now settled that if a person has not been heard of for seven years, there is a presumption of law that he is dead (*Re Phene*, 5 Ch. 139; *Nepean* v. *Doe*, 2 M. & W. 894). The presumption of death, however, does not arise where the other circumstances of the case render it probable that he would not be heard of though alive (*Watson* v. *England*, 14 Sim. 28; *Bowden* v. *Henderson*, 2 Sm. & G. 360; *M'Mahon* v. *M'Elroy*, I. R. 5 Eq. 1). Further, in order to raise the presumption, there must have been an inquiry and search made for the man amongst those who if he were alive would be likely to hear of him (*Per* Lord *Blackburn*, *Prudential Co.* v. *Edmonds*, L. R. 2 H. L. 509; *Doe* v. *Andrew*, 15 Q. B. 751; *Re Creed*, 1 Drew. 235).

* Compare the Statutory ... in Section ... of ... Act.

No presumption as to time of death.

But although, if a person has not been heard of for seven years, there is a presumption of law that he is dead; at what time within that period he died is not a matter of presumption but of evidence. And the onus of proving that the person survived any particular period within the seven years lies upon those who claim a right, to the establishment of which that fact is essential (*Re Phene*, 5 Ch. 139, where the cases are collected; see *Nepean* v. *Doe*, 2 M. & W. 894; *Doe* v. *Nepean*, 5 B. & Ad. 86; *R.* v. *Harbourne*, 2 Ad. & Ell. 540; *R.* v. *Twyning*, 2 B. & Ald. 386). Where, accordingly, a legatee has not been heard of for seven years, his death will be presumed, and the onus of proving that he survived the testator lies upon those who claim under him. In the absence of such proof the legacy will be paid to the residuary legatee, or the next of kin of the testator (*Re Lewes*, 6 Ch. 356; *Re Walker*, 7 Ch. 120; see *Re Green*, 1 Eq. 288, a case of next of kin; and *Rhodes* v. *Rhodes*, 36 Ch. D. 586, where the court remained in doubt whether a fund should be paid to the next of kin ascertained at the beginning or the next of kin ascertained at the end of the period).

Effect of circumstances.

After seven years, having got the fact of death, you have a right to look back and inquire into all the circumstances and ascertain when the man died (*Hickman* v. *Upsall*, 4 Ch. Div. 149; *Re Beasney*, 7 Eq. 498; and see the judgment of *Lush*, J., in *R.* v. *Lumley*, L. R. 1 C. C. 196; *R.* v. *Willshire*, 6 Q. B. D. 366).

In *Sillick* v. *Booth* (1 Y. & Coll. C. C. 117), the court concluded that a party died at a particular time within the seven years after he had been last heard of, the particular time being the hurricane months, and the party having sailed from Demerara before the expiration of such hurricane months (See also *Webster* v. *Birchmore*, 13 Ves. 362). The court concluded that a young sailor, who was last seen in the summer of 1840 going to Portsmouth to embark, survived his grandmother, who died in March,

1841 (*Re Tindall*, 30 Beav. 151). A son, first tenant in tail in remainder, left this country on the 11th April, 1858, and was never afterwards heard of. His father, tenant for life, died on the 30th May, 1858. The court concluded, in 1872, that the son survived the father (*Pennefather* v. *Pennefather*, I. R. 6 Eq. 171; see *Lakin* v. *Lakin*, 34 Beav. 443). Where the husband of a woman had, seven years before her death, left this country for America, and had not been heard of since three days after his arrival there, although he had been advertised for in that country, the husband's death was presumed, and probate was granted of his wife's will as if she had died a widow (*Re How*, 1 Sw. & T. 53). As to presuming the death of parties who embarked in vessels lost at sea or not afterwards heard of, see *Re Norris* (1 Sw. & T. 6); *Re Main* (1 Sw. & T. 11); *Re Smyth* (28 L. J. Prob. 1). 3 & 4 Will. 4, c. 27, s. 16.

Where a testator died in 1829, leaving a will in favour of his children, one of whom went abroad in 1809, and had not been heard of since 1815; both before and after the testator's death endeavours were made, by inquiries and advertisements, to ascertain whether such child were living or dead, but without success: it was held, that he must be presumed to have died before the date of the will (*Rust* v. *Baker*, 8 Sim. 443). The certificate of a master, stating that a legatee had been abroad twenty-eight years, and not been heard of for twenty-seven years, and his opinion that he died in the lifetime of the testator, was the foundation of a decree (*Lee* v. *Willock*, 6 Ves. 606; Reg. lib. 1791, fol. 315; see also 13 Ves. 362).

Where a trust was declared by deed in favour of A., A., although he had not been heard of for five years before the date of the deed, was presumed to have been then in existence (*Re Corbishley*, 14 Ch. D. 846).

Security to refund.

In some doubtful cases the court has handed over the property on security to refund being given (*Dowling* v. *Winfield*, 14 Sim. 277; *Cuthbert* v. *Purrier*, 2 Phil. 199; *Re Mileham*, 15 Beav. 507).

Two persons in same wreck.

The testator and his wife were shipwrecked and drowned at sea, one wave sweeping both of them together into the water, after which they were never seen again. It was laid down by the House of Lords that by the law of England the question of survivorship, in cases of the above description, is matter of evidence, and not of positive regulation and enactment (varying according to the ages and sex of the persons dying in the same shipwreck), as it is in the French Code, and in the absence of evidence there is no conclusion of law on the subject (*Wing* v. *Angrave*, 8 H. L. C. 183; see, further, *Gen. Stanwix's case*, Fearne's Post. Works, 38; *R.* v. *D. Hay*, 1 Wm. Bl. 640; Swinburn, part 7, s. 33; *Wright* v. *Netherwood*, 2 Salk. 593, n.; *Hitchcock* v. *Beardsley*, West's Rep. t. Hardwicke, 445; *Bradshaw* v. *Toulmin*, 2 Dick. 633; *Mason* v. *Mason*, 1 Mer. 308; *Taylor* v. *Diplock*, 2 Phill. Ecc. C. 261; *Re Selwyn*, 3 Hagg. Ecc. R. 741; *Colvin* v. *The King's Proctor*, 1 Hagg. Ecc. 92; *Re Alston*, 1892, P. 142).

As to reduction into possession in cases of this kind, see *Scrutton* v. *Pattillo* (23 W. R. 379); *Wollaston* v. *Berkeley* (24 W. R. 360).

In establishing a title upon a pedigree, it is sufficient to show that the person has not been heard of for many years, to put the opposite party upon proof that he still exists (*Rowe* v. *Hasland*, 1 W. Bl. 404; see Fitz. N. B. 196, A. L.) Proof by one of a family, that many years before a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *primâ facie* evidence of his death without issue to entitle the next claimant by descent to recover in ejectment (*Doe* v. *Griffin*, 15 East, 293).

Presumption of death without issue.

Where a man died long ago and there is nothing to show whether he died with issue or without issue, there is no presumption either way (*Greaves* v. *Greenwood*, 2 Exch. Div. 295). The court concluded that a man had died without issue in *Rawlinson* v. *Miller* (1 Ch. D. 52; see *Re Pople*, 40 Ch. D. 589).

3 & 4 Will. 4, c. 27, s. 17.

Extreme Period of Limitation fixed.

Forty Years.

But no action, &c. shall be brought beyond forty years after the right of action accrued.

17. Provided nevertheless, and be it further enacted, that no entry, distress or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years, from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired (*k*).

37 & 38 Vict. c. 57.

(*k*) In all cases since 1st January, 1879, reference must be had to 37 & 38 Vict. c. 57, s. 5 (given at length *post*, p. 197), which has prescribed thirty years as the utmost allowance for disabilities.

Before 3 & 4 Will. 4, c. 27, the period during which a vendor of land on an open contract was bound to show title was sixty years, and sect. 17 of the act did not alter this rule (*Cooper* v. *Emery*, 1 Ph. 388; *Moulton* v. *Edmonds*, 1 D. F. & J. 250). Now by 37 & 38 Vict. c. 78, s. 1, the period is forty years.

Where husband and wife abandon possession of wife's property.

A *feme sole* seised in fee married, and she and her husband ceased to be in the possession or enjoyment of the land. They both died at times which were not shown to be within forty years from their ceasing to occupy. The wife's heir-at-law brought ejectment against the person in possession within twenty years of the husband's death, and within five years of the passing of 3 & 4 Will. 4, c. 27, but more than forty years after the husband and wife ceased to occupy: it was held, that the heir-at-law was barred by the 17th section of the statute, though it did not appear when or how the defendant came into possession, and though proof was offered that the wife had levied no fine (*Doe* v. *Bramston*, 3 Ad. & Ell. 63). There is a material distinction between the case of a husband and wife making the possession derelict as was the case in *Doe* v. *Bramston*, and the case where the husband and wife are seised in fee in right of the wife, and the husband, by a conveyance which does not bind the wife, purports to convey the fee. Because the effect at law is, that such conveyance merely passes to the grantee of the husband that estate which he had and might have held during the continuance of the coverture. In such case the right of the wife comes within the fourth description of interest in the 3rd section of the stat. 3 & 4 Will. 4, c. 27. If husband and wife, being seised in fee in right of the wife, convey to a purchaser by deed without fine, the wife, if she survives, and if not her heir, may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for more than forty years (*Jumpsen* v. *Pitchers*, 13 Sim. 327).

Where husband purports to convey wife's property by a conveyance which does not bind her.

In 1787, a lease was made by a lunatic to his brother for lives renewable for ever. The lessee, who was the last life in that lease, died in 1836. Various proceedings were had in the lunacy matter respecting the lease and the rent reserved thereby, the result of which was that, without recognizing the lease as a valid demise, the lessee was permitted to hold part of the lands demised, paying the entire reserved rent. From 1836 to 1842 the profits were received by the heir of the lessee. In 1842 the lessor died, and the fee descended upon the heir of the lessee, who was also heir of the lessor. It was held, on a bill filed by a judgment creditor of the

lessee, that the latter had not acquired either the fee-simple, subject to a perpetual rent equal to the rent reserved, or a right to a renewal, by reason of the Statute of Limitations (3 & 4 Will. 4, c. 27), length of time, or the proceedings in the lunacy matter; and that the profits received by the heir of the lessee, from 1836 to 1842, were not assets of the lessee (*Fulton* v. *Creagh*, 3 J. & Lat. 329).

3 & 4 Will. 4, c. 27, s. 17.

Successive Disabilities.

18. Provided always, and be it further enacted, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person (*l*).

No further time to be allowed for a succession of disabilities.

(*l*) In cases since 1st January, 1879, this section is to be read substituting the periods of twelve years and six years respectively for the periods of twenty years and ten years mentioned in the section (37 & 38 Vict. c. 57, s. 9, *post*, p. 200). As to how far sect. 18 was retrospective, see *Devine* v. *Holloway*, 14 Moore, P. C. C. 290. As to successive disabilities in the same person, see note to sect. 16, *ante*.

37 & 38 Vict. c. 57.

Beyond the Seas.

19. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney or Sark, nor any islands adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this act (*m*).

Scotland, Ireland, and the adjacent islands not to be deemed beyond seas.

(*m*) See sect. 16, *ante*, p. 141, and 19 & 20 Vict. c. 97, s. 12, *post*, p. 228; *Ex p. Hassell*, 3 Y. & Coll. 617; *Battersby* v. *Kirk*, 2 Bing. N. C. 603; *Lane* v. *Bennett*, 1 M. & W. 70; *Ruckmaboye* v. *Mottichund*, 8 Moore, P. C. C. 4. No time is now allowed for absence beyond seas (37 & 38 Vict. c. 57, s. 4, *post*, p. 196).

---

4. *Concurrent Rights.*

20. When the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in posses-

When the right to an estate in possession is

3 & 4 Will. 4, c. 27, s. 20.

sion, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession (*n*).

barred, the right of the same person to future estates shall also be barred.

Cases on the construction of this section.

(*n*) This section so far as applicable to future estates and interests, must be read in connection with the fourth branch of sect. 3 (*ante*, p. 120), and sect. 2 of 37 & 38 Vict. c. 57 (*post*, p. 194).

This section is in derogation of the old maxim, borrowed from the civil law, "*quando duo jura concurrunt in unâ personâ equum est ac si essent in diversis*" (4 Rep. 118; 7 Rep. 2 b, 14 b; Plowd. 368). Under the statute 21 Jac. 1, c. 16, s. 1, a party might have pursued his right of entry twenty years after it attached, although in the meantime the party might have had a different right, of which he was barred by more than twenty years' adverse enjoyment (*Hunt* v. *Bourne*, 1 Salk. 339; 2 *Id.* 421; 4 Br. P. C. 66).

Copyhold land was surrendered, in 1798, to a husband and wife, with remainder to the heirs of the husband. In 1805, the husband absconded. In 1807, a commission of bankruptcy issued against him, and the usual assignment of his estate was made to his assignee. The wife occupied the copyhold estate until her death in 1841: it was held, that an ejectment by the assignee brought within twenty years after her death was in time; for that the husband's reversion in fee was a future estate within the meaning of 3 & 4 Will. 4, c. 27, s. 3. The court thought it clear that the husband, if he had not been bankrupt, would have been entitled to the possession during the joint lives of himself and wife, and that upon his death (which the court presumed to have taken place in 1812), the wife was entitled to possession for her life, and the heirs of the husband on the expiration of their joint lives. The court thought, supposing the twentieth section to apply, the proviso at the end of it applied also, because the wife had been in possession until her death; and this was a sufficient *recovery* for the purpose of that section (*Doe* v. *Liversedge*, 11 M. & W. 517). Where A. was entitled to a leasehold interest in land for lives as heir of B., and to the reversion fee as heir of C., adverse possession during the lease barred his original right of entry, and he had no new right of entry on the determination of the lease (*Doe* v. *Moulsdale*, 16 M. & W. 689). A testator devised lands to A., with a gift over to B. in case either of two events should happen. Both events having happened, it was held that sect. 20 deprived the plaintiff of the benefit of the new right of action which accrued on the happening of the second event (*Clarke* v. *Clarke*, I. R. 2 C. L. 395).

5. *Operation of the Statute in Cases of Estates Tail.*

Where Time has run against Tenant in Tail.

Where tenant in tail is barred, re-

21. When the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the

same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right, which such tenant in tail might lawfully have barred (*o*).

3 & 4 Will. 4, c. 27, s. 21.

mainderman whom he might have barred shall not recover.

(*o*) Land was devised to the father of the plaintiff in tail general. The plaintiff's father received the rents and profits from 1799 to 1807, at which time he was succeeded by a person through whom the defendant claimed. Held, in an action of ejectment brought in 1853, that under this section, since the tenant in tail was barred, the issue in tail was also barred (*Austin* v. *Llewellyn*, 9 Exch. 276). An estate tail was limited to A., remainder in tail to B., remainder to C. A. dies, then B. dies within twenty years, and C. becomes entitled in possession, being at the time under disability. It was held, that under the 21st and 22nd sections of this act time commenced running against C. from the death of A., and that having commenced to run C. was not saved from its operation under 16th section by being under disability (*Goodall* v. *Skerratt*, 3 Drew. 216). The 21st section does not apply to the case where the tenant in tail has conveyed away his own right to another and put it out of his power to enter (*Cannon*, dem., *Rimington*, ten., 12 C. B. 1, 18). In this last case the estate of a tenant in tail in possession is considered as coming within this section (12 C. B. 34). But it has been said by *Bramwell*, B., that the sects. 21 and 22 refer only to estates in remainder and reversion, the estate of the tenant in tail which descends to his issue being provided for by sect. 2 (*Alergavenny* v. *Brace*, L. R. 7 Ex. 149, 173). See further, pp. 114, 115, *ante*.

Cases under this section.

Where Time has commenced running against Tenant in Tail.

22. When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred shall make an entry or distress, or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action (*p*).

Possession adverse to a tenant in tail shall run on against the remainderman whom he might have barred.

(*p*) Under 21 Jac. 1, c. 16, where an estate was limited to one in tail, with remainder to another in fee, the remainderman might, at any time within twenty years after the failue of the issue in tail, have recovered the estate (*Taylor* v. *Horde*, 1 Burr. 60).

Possession under Defective Conveyance by Tenant in Tail.

23. When a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the

Where there shall have been possession, under an assurance, by a tenant in

3 & 4 Will. 4, c. 27, s. 23.

tail, which shall not bar the remainders, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.

time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be, and be deemed to have been, effectual as against any person claiming any estate, interest or right to take effect after or in defeasance of such estate tail (*q*).

37 & 38 Vict. c. 57.

(*q*) From 1st January, 1879, sect. 6 of 37 & 38 Vict. c. 57, *post*, p. 197, has by sect. 9 of the same act been substituted for sect. 23 of 3 & 4 Will. 4, c. 27. Sect. 6 of 37 & 38 Vict. c. 57, fixes the period of limitation at twelve years, but is in other respects substantially similar to sect. 23 of 3 & 4 Will. 4, c. 27. The following note has reference to the last-mentioned section.

Old law.

As to the law before 3 & 4 Will. 4, c. 27, see *Doe* v. *Pike* (3 B. & Ad. 742); *Woodroffe* v. *Doe* (15 M. & W. 769; 2 H. L. C. 811); *Doe* v. *Woodroffe* (10 M. & W. 608).

Remarks of Real Property Commissioners.

The proposition of the Real Property Commissioners on the subject of this section was, "That on any alienation by tenant in tail, by any assurance not operating as a complete bar to the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of the estate tail, possession under such assurance shall have the same effect in barring the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of the estate tail, as if such possession had been adverse to the said estate tail, or to the said estates, rights or interests" (1 Real Prop. Rep. 79, pl. 15; and see *Ib.* p. 46).

Cases under sect. 23.

The object of this section was to give effect to acts of a tenant in tail against remaindermen and reversioners, and to give effect to assurances, which, although they were effectual to bar the issue, were ineffectual to bar those entitled in remainder. There are prior clauses in the statute which show what the operation is as to the issue, and those clauses [*qu.* this clause] seem to be studiously worded so as to be confined only to the case of persons entitled after the expiration of the estate tail (*Penny* v. *Allen*, 7 D. M. & G. 426; *Morgan* v. *Morgan*, 10 Eq. 99).

The section applies to cases where a tenant in tail executes a deed enrolled under 3 & 4 Will. 4, c. 74, which, for want of the consent of the protector, operates only to create a base fee, and possession is obtained under the deed (Sugd. V. & P. 483, 14th ed.) The "possession by virtue of such assurance," however, mentioned in the section, must be a possession by virtue of an assurance which turns an estate tail into a base fee. And where a conveyance comprised a base fee and also a preceding life estate, time did not commence to run in favour of the possession taken under such conveyance until the determination of the life estate (*Mills* v. *Capel*, 20 Eq. 692).

As to whether the section extends to fines and recoveries previous to 3 & 4 Will. 4, c. 74, see 1 Hayes' Conv. 264, 5th ed.; Sugd. R. P. Stat. 89; and the argument in *Anderson* v. *Anderson* (30 Beav. 207).

3 & 4 Will. 4, c. 27, s. 24.

6. *Limitation of Time as to Suits in Equity.*

Time of Limitation fixed with reference to the Legal Limitation.

24. No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity (*r*).

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

(*r*) Since 1st January, 1879, the act 37 & 38 Vict. c. 57, *post*, p. 194, has prescribed fresh periods of limitation, which, by the express terms of the act, were extended to "suits."

How far courts of equity bound by Statutes of Limitation.

Prior to 3 & 4 Will. 4, c. 27, courts of equity had acted in obedience to the Statutes of Limitation in the case of legal demands, and by analogy to the rules laid down by those statutes in other cases (*Hovenden* v. *Annesley*, 2 Sch. & Lef. 629; *Smith* v. *Clay*, 3 Bro. C. C. 639, n.; *Cholmondeley* v. *Clinton*, 2 Jac. & W. 156). The act 3 & 4 Will. 4, c. 27, was intended to put an end to the discretion of courts of equity where they had acted by analogy to the time limited at law (*Berrington* v. *Evans*, 1 Y. & C. 439). But sect. 24 only barred equitable rights so far as they would have been barred if legal (*Archbold* v. *Scully*, 9 H. L. C. 360).

Independently of statute, time is a bar in equity to stale demands where there has been improper delay (*Harcourt* v. *White*, 28 Beav. 303; *Forster* v. *Thompson*, 4 Dr. & War. 318; *Coppin* v. *Gray*, 1 Y. & C. C. C. 205; *Blair* v. *Ormond*, 1 De G. & Sm. 428).

As to the proceedings under the old practice in equity sufficient to prevent the operation of the statute, see *Coppin* v. *Gray* (*sup.*); *Purcell* v. *Blennerhassett* (3 J. & Lat. 24); and as to amended bills, see *Byron* v. *Cooper* (11 Cl. & Fin. 556); *Plowden* v. *Thorpe* (7 Cl. & Fin. 164); *Blair* v. *Ormond* (1 De G. & Sm. 428); *A. G.* v. *Hall* (11 Price, 760).

Equitable waste.

The statutory rule, 3 & 4 Will. 4, c. 27, ss. 2, 3, 4, 5, which gave to a remainderman twenty years from the time when his title accrues in possession, for bringing an action or suit for the property, applied to a claim for compensation for equitable waste (*Leeds* v. *Amherst*, 2 Phill. 117; *Morris* v. *Morris*, 4 Jur. N. S. 964; 6 W. R. 427). As to legal waste, see *Seagram* v. *Knight* (2 Ch. 628); *Higginbotham* v. *Hawkins* (7 Ch. 676); *Birch Wolfe* v. *Birch* (9 Eq. 683).

Legal waste.

Foreclosure actions.

A foreclosure action is an action for the recovery of land within sects. 2 and 24 of this statute, and not an action for the recovery of the mortgage money within sect. 40 (*Heath* v. *Pugh*, 6 Q. B. Div. 340; *Harlock* v. *Ashberry*, 19 Ch. Div. 539; following the opinion of Lord *St. Leonards* in *Wrixon* v. *Vize*, 3 Dr. & War. 104; and R. P. Stat. 121, 2nd ed.; and overruling, on this point, *Dearman* v. *Wyche*, 9 Sim. 570; *Du Vigier* v. *Lee*, 2 Hare, 326; and *Sinclair* v. *Jackson*, 17 Beav. 405). But for purposes of practice, an action for foreclosure and delivery of possession is not an action for the recovery of land within the R. S. C. (Ord. 18, r. 2).

In the case of an equitable charge on a reversionary interest in land, the statute commences to run against the right to foreclose from the time when the interest falls into possession (*Hugill* v. *Wilkinson*, 38 Ch. D. 480).

A bill filed by the lord of a manor to recover his title deeds and court rolls was held barred by this section (*Wells* v. *Doddington*, 2 Coll. C. C. 73).

Charities.

Charities are within the operation of this section (*A. G.* v. *Magdalen Coll.*, 6 H. L. C. 189; see the note to sect. 25, *post*).

Effect of appointment of a receiver.

Although the appointment of a receiver by the court does not prevent the bar under the statute *against* a stranger, yet it will prevent time running in *favour* of a stranger to the suit (*Wrixon* v. *Vize*, 3 Dr. &

3 & 4 Will. 4, c. 27, s. 24.

War. 104, see p. 123; *Parkinson* v. *Lucas*, 28 Beav. 627). But under special circumstances the possession of a receiver prevented time running against a stranger to the action (*Penney* v. *Todd*, 26 W. R. 502). The possession of the receiver in a cause in which a trustee of the legal estate is made a party as such, may fairly be treated as the possession of the trustee. For many purposes the possession of the receiver is the possession of the party entitled to the lands, and time will not run against a person in possession (*Gresley* v. *Adderley*, 1 Swans. 579; *Boehm* v. *Wood*, T. & R. 345; *Wrixon* v. *Vize*, 3 Dr. & War. 104; see *Groome* v. *Blake*, 8 Ir. C. L. R. 428; *Re Butler*, 13 Ir. Ch. R. 453; *Dixon* v. *Gayfere*, 17 Beav. 421). The appointment of receiver in the matter of an infant will not prevent the operation of the statute on a claim affecting the minor's estate, notwithstanding the fact that the master, in a report ascertaining the nature of the minor's property, has expressly found that the minor's estate was subject to that incumbrance (*Harrison* v. *Duignan*, 2 Dr. & War. 295; see *Greenway* v. *Bromfield*, 9 Hare, 203).

See further the note as to Courts of Equity and the Statutes of Limitation, *post*, pp. 232 *et seq.*

Repeal of formal words.

53 & 54 Vict. c. 51, has repealed formal words which occurred in the following sections of this act, viz.:—24, 29, 30, 33, 39, 41, 42, and 43, and which have accordingly been omitted in the present edition.

Express Trust.

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

25. Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him (*s*).

Trustee Act, 1888.

(*s*) In the case of proceedings against trustees commenced after 1st January, 1890, regard must be had to sects. 1, 8, and 12 of the Trustee Act, 1888, *post*, p. 231.

The following note relates to the law, irrespective of that act.

Old law.

Before 3 & 4 Will. 4, c. 27, it was held that the rule that trusts are not within the Statute of Limitations would not apply where a claim was made after a great length of time against a trustee by *implication* of law arising upon a doubtful equity (*Townshend* v. *Townshend*, 1 Cox, 28; 1 Bro. C. C. 550), and where relief would originally have been given upon the ground of constructive trust, it was refused to a party, who, after long acquiescence, came into a court of equity to seek that relief (*Beckford* v. *Wade*, 17 Ves. 97; *Ex p. Hassell*, 3 Y. & Coll. 622; *Bell* v. *Bell*, 1 Lloyd & G. temp. Plunket, 65; see *Bonny* v. *Ridgard*, cited 4 Br. C. C. 138).

This section applies to express trusts only.

Sect. 25 is confined to express trusts—that is, trusts expressly declared by deed or will or other written instrument. It does not apply to a trust made out by circumstances (*Petre* v. *Petre*, 1 Drew. 393; see *Banner* v. *Berridge*, 18 Ch. D. 263). "In order to bring a case within the 25th section there must be a trustee in whom the land is vested; there must be an express trust, by which I understand the legislature to mean a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience, a trust arising upon the words of the instrument itself. Therefore these three things must concur—there must be land, there must be a trustee of the land, and there must be a *cestui que trust* for whose benefit in this respect the

land is to be held—and all that must be found upon the construction of the instrument" (*Per* Lord *Cairns*, *Cunningham* v. *Foot*, 3 App. Cas. 984). This section does not apply to trusts resulting or trusts by operation of law (*Dickinson* v. *Teesdale*, 1 D. J. & S. 59), or a trust which arises from acts of parties (*Sands* to *Thompson*, 22 Ch. D. 617). 3 & 4 Will. 4, c. 27, s. 25.

Who are express trustees.

It was held that there was an express trust within this section where a testator devised land upon trust for sale, the proceeds to be considered as part of his personal estate (*Mutlow* v. *Bigg*, 18 Eq. 246; reversed, on other grounds, 1 Ch. Div. 385), but not where a testator devised lands to his son and his heirs male in the fullest trust and confidence that he would not defeat the subsequent limitations (*Dawkins* v. *Penrhyn*, 4 App. Cas. 51). A *cestui que trust* of real estate under a will was discharged in 1825 under the Insolvent Act, but omitted the estate from his schedule. In 1831 he became bankrupt, and his assignee in bankruptcy took a conveyance of the legal estate from the trustee, in trust for the creditors under the bankruptcy: held, that the legal estate thereby became vested in the assignee upon an express trust within this section—viz., the trust declared by the will, the benefit of which belonged to the creditors under the insolvency (*Sturgis* v. *Morse*, 3 De G. & J. 1).

One of several tenants in common who entered into possession of the lands and procured a fee-farm grant to himself was not a trustee within this section for himself and his co-tenants (*Re Dane*, I. R. 5 Eq. 498), nor was a purchaser from an executor at an undervalue with notice of the trusts of the will (*Pyrah* v. *Woodcock*, 24 L. T. 407; see, as to a purchaser with notice from an express trustee, *Young* v. *Harris*, 65 L. T. 47; *A. G.* v. *Magdalen College*, 18 Beav. 223; 6 H. L. C. 189). A paid-off mortgagee is not, within this section, an express trustee of the legal estate for the mortgagor (*Sands* to *Thompson*, 22 Ch. D. 614), even where the mortgage is in the form of a trust for sale (*Locking* v. *Parker*, 8 Ch. 30; *Johnson* v. *Mounsey*, 11 Ch. Div. 284). Where trustees of a will entered on and administered as part of a testator's estate land of which he was held to die intestate, they were not express trustees under this section (*Yardley* v. *Holland*, 20 Eq. 428; see *Churcher* v. *Martin*, 42 Ch. D. 312); but an express trust for the benefit of an heir-at-law was held to arise as against trustees in the possession of lands devised by a will which did not declare any trust of the surplus rents (*Salter* v. *Cavanagh*, 1 Drury & Walsh, 668). So where the will did not declare trusts of part of the real estate (*Patrick* v. *Simpson*, 24 Q. B. D. 129). And where a person acted as trustee of a will containing express trusts of realty, though the estate was not vested in her, she had placed herself in the position of an express trustee (*Life Association of Scotland* v. *Siddal*, 3 D. F. & J. 58).

Before 37 & 38 Vict. c. 57, s. 10 (*post*, p. 200), it was held that sect. 25 qualified sects. 40 and 42, where land was vested in trustees upon an express trust to secure charges, &c. (See note to sects. 40 and 42, *post*, pp. 181, 189); and in connection with this doctrine, it was held, that where an annuity was given by will, and the real estate of the testator was charged with the payment of it, and then the estate was simply devised charged with the payment of the annuity, it was not an express trust within the 25th section (*Francis* v. *Grover*, 5 Hare, 39). A devise of realty subject and charged with legacies did not create an express trust in favour of the legatees within this section (*Proud* v. *Proud*, 32 Beav. 234). A vendor's lien was not an express trust within this section (*Toft* v. *Stephenson*, 7 Hare, 1; *Dundas* v. *Blake*, 11 Ir. Eq. R. 138; *Henderson* v. *Atkins*, 28 L. J. Ch. 913). Where a testator charged his real estates with his debts, and he devised his C. plantation in trust to pay his debts, it was held, that as to the C. plantation a trust had been created in favour of the creditors, but that as to the other real estates they had a mere charge (*Jacquet* v. *Jacquet*, 27 Beav. 332). On the construction of an entire will, it was held in one case that an express trust arose to secure a legacy (*Thomson* v. *Eastwood*, 2 App. Cas. 215), and in another that there was no express trust to secure annuities (*Cunningham* v. *Foot*, 3 App. Cas. 974).

Time no bar between *cestui*

In the case of a direct or express trust, as where an estate is conveyed

3 & 4 Will. 4, c. 27, s. 25.

que trust and trustee.

to the use of A. and his heirs in trust for B. and his heirs, no time, as between the trustee and *cestui que trust*, can operate as a bar to the equitable right of the latter (Barnard, C. R. 449; *Townshend* v. *Townshend*, 1 Br. C. C. 551). The possession of the trustees is the possession of the *cestui que trust*, and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title (*Hovenden* v. *Annesley*, 2 Sch. & L. 633).

Where trustee in possession.

In the case of a strict trustee, it is his duty to take care of the interest of his *cestui que trust*, and he is not permitted to do anything adverse to it; a tenant also has a duty to preserve the interests of his landlord; and many acts therefore of a trustee and a tenant, which if done by a stranger would be acts of adverse possession, will not be so in them, from its being their duty to abstain from them (*Per* Lord *Eldon*, 2 Jac. & W. 190; see *Latter* v. *Dashwood*, 6 Sim. 462; *Faussett* v. *Carpenter*, 5 Bligh, N. S. 75). But where any doubt arises as to the existence of a trust, and it is possible to reconcile such enjoyment with the facts of the case, the utmost regard is then to be paid to the length of time during which there has been an enjoyment of the property inconsistent with the supposed trust (*A. G.* v. *Fishmongers' Co.*, 5 M. & C. 16). Where estates were devised to trustees upon trust to sell and to pay debts, and subject thereto for the testator's infant children, and the surviving trustee retained possession of one of the estates in satisfaction of debts which he alleged himself to have paid, the testator being insolvent: on a bill for an account and conveyance of the estate, by one of the children and the representatives of another child, forty-five years after the testator's death, stating that they had recently discovered the facts, special inquiries were directed to ascertain whether they had any notice of the circumstances, whether they had in any manner released, and whether the trustee had advanced money to the amount of the value of the estate (*Chalmer* v. *Bradley*, 1 Jac. & W. 51, where numerous cases on this subject are cited).

As to the effect of fines formerly between trustee and *cestui que trust*, see Gilb. Ch. 62; *Bell* v. *Bell*, 1 Ll. & G. temp. Plunket, 59; *Earl Pomfret* v. *Lord Windsor*, 2 Ves. sen. 472, 481; *Reynolds* v. *Jones*, 2 Sim. & Stu. 206; 1 Sand. on Uses, 291, 3rd ed.; 5 Cruise, Dig. 208—213.

A deed of direction was held to constitute the receivers and the trustee of rents of realty, express trustees for the benefit of certain annuitants (*Knight* v. *Bowyer*, 2 De G. & J. 421); and where some *cestuis que trusts* received from a trustee the whole rents of real estate to the exclusion of another, the latter was not barred (*Ib.*)

Trustees in possession of land paid the rents by mistake for more than twenty years to a person not entitled; but it was held that the right of the actual *cestui que trust* was not barred (*Lister* v. *Pickford*, 34 L. J. Ch. 582; 13 W. R. 827; see *Churcher* v. *Martin*, 42 Ch. D. 312).

Where *cestui que trust* in possession.

In general the possession of the *cestui que trust* is not adverse against the trustee if the possession of the former is consistent with the terms of the deed and the object of the trust (*Keene* v. *Deardon*, 8 East, 248; *Smith* v. *King*, 16 East, 283). A *cestui que trust* who is let into possession of the trust estate by the trustee becomes tenant at will to the latter, and while the estate at will remains the statute does not operate (*Garrard* v. *Tuck*, 8 C. B. 231). Articles of agreement for a lease (which was never actually executed) were entered into, and the premises occupied pursuant to the articles: held, that a direct trust was constituted between the owners of the fee, and those who held under the articles; and that the *cestui que trust* being in possession, the estate of the trustees was not destroyed by lapse of time (*Drummond* v. *Sant*, L. R. 6 Q. B. 763).

Where a legal estate was vested in trustees on trust for five tenants in common, and the trustees not acting, the whole rents were received by some of the tenants in common; those who had received the whole rents acquired a title against the claim of another tenant in common who had been out of such receipt (*Burroughs* v. *M'Creight*, 1 J. & Lat. 290).

Where stranger in

The rule that a trust is not barred by length of time does not apply between *cestui que trust* and trustee on one side, and strangers on the

3 & 4 Will. 4, c. 27, s. 25.

possession time bars both trustee and *cestui que trust*.

other. Therefore, where a *cestui que trust* and his trustee have been both out of possession for the time limited, the party in possession has a good bar against both (*Llewellyn* v. *Mackworth*, Barnard, C. R. 445; 15 Vin. Abr. 125, n. to pl. 1; and see *Townshend* v. *Townshend*, 1 Br. C. C. 550; *Clay* v. *Clay*, 3 Br. C. C. 639, n.; Ambl. 645; *Hercy* v. *Ballard*, 4 Br. C. C. 469; *Harmood* v. *Oglander*, 6 Ves. 199; 8 Ves. 106; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 629; Sugd. V. & P. 610—612, 11th ed.)

On the question whether, when a stranger has acquired a title by possession against a trustee, the *cestui que trust* is also barred, see *Scott* v. *Scott*, 4 H. L. C. 1065, discussed in Darb. & Bos. Stat. Lim. 329—333; see also the argument in *Young* v. *Harris*, 65 L. T. 45, where the *cestui que trust* was an infant.

Where trustee alienates for value.

The 25th section, providing for express trusts, renders lapse of time unimportant in all cases within the section, that is, between the *cestui que trust* and his trustee, until the trust is disturbed, and that disturbance can only be effected by such a denial of the trust as takes place when the trustee sells to a third party for valuable consideration the property so held by him in trust (*Law* v. *Bagwell*, 4 Dru. & War. 398). In such a case a lapse of the statutory number of years from the date of the conveyance will bar the *cestui que trust*; but it seems that time will not commence to run if the rights of the *cestui que trust* are reversionary, or if he be under disability at the date of the conveyance (*Thompson* v. *Simpson*, 1 Dru. & War. 489; *A. G.* v. *Magdalen College*, 6 H. L. C. 215).

Charities. Law before the statute.

Before the stat. 3 & 4 Will. 4, c. 27, time did not run against charities in a court of equity, neither were charities bound to the times expressed in the statutes, 32 Hen. 8, c. 2, and 21 Jac. 1, c. 16 (Duke, 161; *A. G.* v. *Coventry*, 3 Madd. 368; 2 Vern. 399; *A. G.* v. *Christ's Hospital*, 3 M. & K. 344; *A. G.* v. *Bristol*, 2 Jac. & W. 321; *A. G.* v. *Poulden*, 8 Sim. 472; *A. G.* v. *Smythies*, 2 M. & K. 749; *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; Shelford on Charities, p. 563). At law the old Statute of Limitations operated against all claimants, although they held in trust for charities; but in the Court of Chancery, unless in the case of a purchaser for value, they had no operation (43 Eliz. c. 4; Sugd. V. & P. 944, 945, 11th ed.)

Present law.

The stat. 3 & 4 Will. 4, c. 27, does not contain any saving in favour of charities, and they are within its provisions (*Magdalen Hospital* v. *Knotts*, 4 App. Cas. 324).

The stat. 9 Geo. 2, c. 36, not extending to Ireland, a testator by his will, in 1812, devised a rent-charge as a salary for a schoolmaster, to be appointed by the owner for the time being of the estate on which the rent was charged. A schoolmaster was never appointed. In 1839, an information was filed to carry the said trust into execution. It was held, that the statute could not run until a schoolmaster was appointed (*A. G.* v. *Persse*, 2 Dru. & War. 69).

Express trusts for charities.

Property given upon express trust for a charity is within sect. 25 (*Commrs. of Donations* v. *Wybrants*, 2 J. & Lat. 182). Where the Attorney General, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they are barred by lapse of time, he is equally barred (*A. G.* v. *Magdalen College*, 18 Beav. 223; 6 H. L. C. 189). This section barred relief where charity land had not been aliened in fee, but had been held under a lease granted in breach of trust for 500 years at a rent which had been regularly paid (*A. G.* v. *Davey*, 4 De G. & J. 136; *A. G.* v. *Payne*, 27 Beav. 168).

Purchasers with notice of charitable trusts.

It was formerly held that length of time would not protect a purchaser with notice of charitable trusts (*A. G.* v. *Christ's Hospital*, 3 M. & K. 344; see *A. G.* v. *Bristol*, 2 Jac. & W. 321; *A. G.* v. *Poulden*, 8 Sim. 472). It seems now that time will commence to run in his favour from the date of the conveyance (*A. G.* v. *Magdalen College*, 6 H. L. C. 189; see *A. G.* v. *Flint*, 4 Hare, 147; *A. G.* v. *Davis*, 18 W. R. 1132).

As to the length of time during which an account of rents will be directed in the case of trustees for charities, see the note to sect. 42, *post*.

3 & 4 Will. 4, c. 27, s. 25.

Jud. Act, 1873, s. 25 (2).

The principle of sect. 25 has now been extended to personal estate by Jud. Act, 1873, s. 25, subs. 2, *post*, p. 234 (See *Banner* v. *Berridge*, 18 Ch. D. 262).

Fraud.

In cases of fraud, no time shall run whilst the fraud remains concealed.

26. In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or, with reasonable diligence, might have been first known or discovered: provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed (*r*).

Pleading concealed fraud.

(*r*) Before the Jud. Acts, it was held that an ejectment bill might properly be filed in a court of equity on the ground of fraud under this section (*Chetham* v. *Hoare*, 9 Eq. 571); but that a case of concealed fraud could not be set up on petition (*Ex p. Breach*, 12 W. R. 769).

Since the Jud. Acts, it has been held that concealed fraud must be pleaded with the utmost particularity (*Riddell* v. *Strathmore*, 3 Times Rep. 329; *Lawrance* v. *Norreys*, 15 App. Cas. 210). The circumstances alleged must lead to the reasonable inference that fraud was the cause of the deprivation, and exclude other possible causes (*Lawrance* v. *Norreys*, *sup.*) On the argument of a demurrer put in to a bill raising a case of concealed fraud, *James*, L. J., said that the court had then nothing to do with the probability or improbability of the plaintiff's ultimate success at the hearing (*Vane* v. *Vane*, 8 Ch. 395); and see the same point discussed on an application to strike out under Ord. 25, r. 4, *Boaley* v. *Holder* (54 L. T. 298). On the whole materials before it, the court struck out as vexatious a claim raising concealed fraud (*Lawrance* v. *Norreys*, 39 Ch. Div. 213; 15 App. Cas. 210).

What is concealed fraud within this section.

Mere ignorance does not prevent the operation of the statute (*Dawkins* v. *Penrhyn*, 6 Ch. Div. 324). Thus it was held that the occupation of an underground cellar without the knowledge of the owner of the surface was not a case of concealed fraud within this section (*Rains* v. *Buxton*, 14 Ch. D. 537). This section does not mean the case of a party entering wrongfully into possession, but it applies to a case of designed fraud, by which a party, knowing the rightful owner, conceals the circumstances giving the right, and who by means of such concealment is enabled to enter and hold (*Petre* v. *Petre*, 1 Drew. 397; see *Dean* v. *Thwaite*, 21 Beav. 621).

The concealed fraud must be fraud of or imputable to the person setting up the Statute or some person through whom he claims. In re McCallum. McCallum v. M. XVII. T.L.R. 112.

An allegation that, with a view to deprive the true owner of his right, the person in possession conspired with his solicitors to destroy the deeds, was a sufficient allegation of concealed fraud within this section (*Lawrance* v. *Norreys*, 39 Ch. D. 224; see 15 App. Cas. 213). As to whether preventing information as to the title from reaching the true owner would amount to concealed fraud, see 39 Ch. Div. 228; 15 App. Cas. 215. Bringing up an eldest son in the belief that he was a younger son was held to be a case of concealed fraud within this section (*Vane* v. *Vane*, 8 Ch. 383). The procuring instruments of conveyance and devise to be executed by a person of unsound mind is a fraud within this section

(*Lewis* v. *Thomas*, 3 Hare, 26; as to a conveyance by a lunatic, see *Price* v. *Bevington*, 3 Mac. & G. 486). But a suit cannot be maintained in equity, to set aside a compromise of an action to recover large estates made eighty years before, upon the ground that the compromise was a fraud upon the plaintiff in the action, and that he was a man of such dull intellect (actual lunacy not being proved) that, though cognizant of all the facts, it was necessarily a concealed fraud as to him (*Manby* v. *Bewicke*, 3 Kay & J. 342). In 1825, A., on his insolvency, omitted from his schedule (which he verified on oath) an estate to which he was entitled. In 1853, his assignee filed a bill against the assignees under a subsequent bankruptcy and others for the recovery of the property. It was held, that there had been a concealed fraud within this section (*Sturgis* v. *Morse*, 24 Beav. 541). This decision was affirmed on grounds independent of the question of concealed fraud (3 De G. & J. 1). **3 & 4 Will. 4, c. 27, s. 26.**

As to what constitutes reasonable diligence in the discovery of concealed fraud, see *Chetham* v. *Hoare* (9 Eq. 571); and the judgment of *Malins*, V.-C., *Vane* v. *Vane* (8 Ch. 390, n.); *Willis* v. *Howe* (43 L. T. 375). **Reasonable diligence.**

A purchaser for value is not entitled to the protection of this proviso, if his agent who negotiated the purchase had in the course of the transaction actual knowledge of the fraud, or had reason to believe that a fraud had been committed (*Vane* v. *Vane*, 8 Ch. 383). **Proviso as to *bonâ fide* purchasers.**

In a case which arose before this statute, circumstances of a fraudulent nature relating to a sale were not discovered until thirty-seven years after the date of the conveyance, and it was held that they furnished an answer to the objection arising upon the length of time during which the transaction had remained unimpeached. It was said that it is the duty of the court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances of the case, and to consider what evidence there may have been, which from lapse of time may be lost. But beyond this, in cases of fraud, time has no effect (*Charter* v. *Trevelyan*, 11 Cl. & Fin. 740).

Though courts of equity will interpose in order to prevent those mischiefs which would probably result from persons being allowed at any distance of time to disturb the possession of another, or to bring forward stale demands; yet as its interference proceeds upon principles of conscience, it will not encourage nor in any manner protect the abuse of confidence, and therefore no length of time will bar a fraud (1 Fonbl. Eq. 331; *Cotterill* v. *Purchase*, Forrest, 61; *Alden* v. *Gregory*, 2 Eden, R. 230; *Whalley* v. *Whalley*, 1 Mer. 436; *S. C.*, 3 Bligh, 1; as to length of time being no bar in cases of fraud, see also *Deloraine* v. *Browne*, 3 Bro. C. C. 633; *Smith* v. *Clay*, *Ib.* 639, n.; *Hercy* v. *Dinwoody*, 4 Bro. C. C. 258; 2 Ves. jun. 87; *Yate* v. *Moseley*, 5 Ves. 480; *Moth* v. *Atwood*, 5 Ves. 845; *Purcell* v. *Macnamara*, 14 Ves. 91; *Beckford* v. *Wade*, 17 Ves. 87; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 607, 630; *Moore* v. *Blake*, 1 Ball & B. 62; *Medlicott* v. *O'Donnell*, *Ib.* 156; *Gould* v. *Okenden*, 4 Br. P. C. 198, Toml. ed.; *Morse* v. *Royal*, 12 Ves. 355; *Pickering* v. *Lord Stamford*, 2 Ves. jun. 272; *Byrne* v. *Frere*, 2 Molloy, 176; *Hatch* v. *Hatch*, 9 Ves. 292). An agreement on settlement of family disputes, where one party had been guilty of gross fraud and concealment of the rights of the other, was set aside after a great length of time (*Gordon* v. *Gordon*, 3 Swanst. 400). As to fraud in the case of levying fines, see *Langley* v. *Fisher* (9 Beav. 90). **When time bars in cases of fraud.**

A court of equity refused to impeach a transaction on the ground of fraud, where the fact of the alleged fraud had been within the knowledge of the party many years; but held that every new right of action in equity which accrued to the party must be acted on at the utmost within twenty years, except in the case of a trustee whose possession was consistent with the title of the claimant (*Hovenden* v. *Annesley*, 2 Sch. & Lef. 637; see *Redgrave* v. *Hurd*, 20 Ch. D. 13). Where a party is to be constituted a trustee, by the decree of a court of equity, founded on fraud or the like, his possession is adverse, and the Statute of Limitations will run from the time the circumstances of the fraud were discovered (2 Sch. & Lef. 633; 2 Ball & B. 129; *Brooksbank* v. *Smith*, 2 Y. & Coll. 58; *Blen-*

3 & 4 Will. 4, c. 27, s. 26.

nerhasset v. *Day*, 2 Ball & B. 118). But a party who had received money under a misapprehension of his rights was held not bound by it, as in the case of a contract for a disputed title, or the compromise of a litigated right (*Ib.* 128).

See further the note as to Courts of Equity and the Statutes of Limitation, *post*, pp. 232 *et seq.*

Acquiescence.

Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

27. Provided always, and be it further enacted, that nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act (*s*).

Acquiescence

(*s*) If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence (*Leeds* v. *Amherst*, 2 Phil. 123). It may be defined as "quiescence under such circumstances as that assent may be reasonably inferred from it" (*De Bussche* v. *Alt*, 8 Ch. Div. 314). Every presumption that can be fairly made will be raised against a stale demand. It may arise from the acts of the parties, or the very forbearance to make the demand affords a presumption either that the claimant is conscious it is satisfied, or intended to relinquish it (*Pickering* v. *Stamford*, 2 Ves. jun. 280).

imports knowledge.

Parties, however, cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them (*Marker* v. *Marker*, 9 Hare, 16). And the doctrine does not apply where there is a common mistake (2 Mer. 362). Where executors took upon themselves to distribute the personal property of a testator, in thirds, without consulting a legatee, and the shares were paid without her authority, upon her supposition that their construction of the will was right, it was held that the legatee was not precluded from relief on the discovery of the mistake of the executors (*Newton* v. *Ayscough*, 19 Ves. 539; *Brooksbank* v. *Smith*, 2 Y. & C. 59; see *Knatchbull* v. *Fearnhead*, 3 M. & C. 122).

Acquiescence generally.

Acquiescence for nearly fifty years in a mortgage transaction, liable to have been impeached, was held a bar to relief (*Hicks* v. *Cooke*, 4 Dow. 17). Long acquiescence by a party acquainted with the facts is a bar to equitable relief for setting aside a lease, upon the ground of fraud or mistake (*Selsey* v. *Rhodes*, 1 Bligh, N. S. 1). An heir-at-law has also been held not entitled to an issue *devisavit vel non* after twenty years' acquiescence in his ancestor's will (*Tucker* v. *Sanger*, M'Clel. 424; 13 Price, 119). An acquiescence of twenty-three years, with a knowledge of the will, is a good bar to a claim by a residuary legatee against an executor for an account, on the ground of neglect or misfeasance, and that independently of the stat. 3 & 4 Will. 4, c. 27 (*Portlock* v. *Gardner*, 11 L. J. Ch. 313). A wife was held to be bound by the declaration of her husband alone of the uses of a fine levied of her lands after having acquiesced fifteen years from his death (*Swanton* v. *Raven*, 3 Atk. 105). Where the shareholders of a canal had acquiesced for forty-seven years in an agreement for letting tolls not warranted by an act of parliament, it was held, that it was not competent for the shareholders to impeach such agreement in respect of the public interest (*Gray* v. *Chaplin*, 2 Russ. 126). Acquiescence will not be held to have taken place, so long as the same circumstances of undue influence on one side, and distress on the other, in which the oppression commenced, continue to operate (*Purcell* v. *Macnamara*, 14 Ves. 106, 121, 122). A claim by mortgagees to make legatees refund was barred after twenty years by acquiescence (*Blake* v. *Gale*, 32 Ch. Div. 571).

3 & 4 Will. 4, c. 27, s. 27.

Length of time, when it does not operate as a statutory or positive bar, operates simply as evidence of acquiescence. A bar by length of time and by acquiescence are said not to be two distinct propositions. They constitute one proposition, and that proposition, when applied to a question of a breach of trust, is, that the *cestui que trust* assented to the breach of trust. A *cestui que trust*, whose interest is reversionary, is not bound to assert his title until it comes into possession, but the mere circumstance that he is not bound to assert his title does not bear upon the question of his assent to a breach of trust. He is not less capable of giving such assent when his interest is in reversion than when it is in possession. But where the trust is definite and clear, it seems that a breach of trust will not be held to have been sanctioned or concurred in by the mere knowledge and non-interference on the part of the *cestui que trust* before his interest has come into possession (*Per Turner*, L. J., *Life Association* v. *Siddal*, 3 D. F. & J. 72, 74; see *Brown* v. *Cross*, 14 Beav. 105; *March* v. *Russell*, 3 M. & C. 31). Acquiescence imports knowledge, for a man cannot be said to have acquiesced in what he did not know; and in cases involving a breach of trust, acquiescence imports full knowledge. It is a settled rule that a *cestui que trust* cannot be bound by acquiescence, unless he has been fully informed of his rights, and of all the material facts and circumstances of the case (*Per Turner*, L. J., *Life Association* v. *Siddal*, *sup.*) A *cestui que trust* who, knowing that his trustee has committed a breach of trust, obtains from him part only of that to which he is entitled, does not thereby waive his claim to further relief, unless such an intention can be clearly inferred from the surrounding circumstances (*Re Cross*, *Harston* v. *Tenison*, 20 Ch. Div. 122).

Acquiescence in breaches of trust.

In the case of a trustee's purchasing the trust property, the question of acquiescence cannot arise until it is ascertained that the *cestui que trust* knew that his trustee had become the purchaser (*Randall* v. *Errington*, 10 Ves. 427, 428; *Morse* v. *Royal*, 12 Ves. 335). Lord *Eldon* said, "It is established by all the cases, that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust, and either concurrence in the act, or acquiescence without original concurrence, will release the trustees; but that is only a general rule, and the court must inquire into the circumstances which induced concurrence or acquiescence; recollecting, in the conduct of that inquiry, how important it is on the one hand to secure the property of the *cestui que trust*, and on the other not to deter men from undertaking trusts" (*Walker* v. *Symonds*, 3 Swanst. 64). All *cestuis que trusts*, who (being of age and under no incapacity) have had full information of the conduct of their trustees, which was liable to objection, and openly or tacitly acquiesced in it during a considerable time, are held to have authorized or adopted such conduct, and precluded themselves from all remedy in that respect (*Brice* v. *Stokes*, 11 Ves. 319; *Ryder* v. *Bickerton*, 3 Swanst. 83, n.; *Underwood* v. *Stevens*, 1 Mer. 712; *Trafford* v. *Boehm*, 3 Atk. 444). See further, as to acquiescence in breaches of trust, Lewin on Trusts, 1054 *et seq.*, 9th ed.

Laches.

"Where there is a Statute of Limitations the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing, it means more than laches. If a party who could object lies by, and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce: but the fact of simply neglecting to enforce a claim for the period which the law permits delay without losing right, I conceive cannot be any equitable bar" (*Archbold* v. *Scully*, 9 H. L. C. 383). A testator bequeathed to his widow a pecuniary legacy and a life annuity. She survived him twenty-eight years, and after her death her executrix filed a bill for their recovery. No explanation was given of the circumstances, and no proof of any intermediate payment. The bill was dismissed on the ground of great laches (*Pat-*

3 & 4 Will. 4, c. 27, s. 27.

tison v. *Hawkesworth*, 10 Beav. 375). See *Sibbering* v. *Balcarras* (3 De G. & Sm. 737), where the court refused to entertain a suit for setting aside the sale of a reversionary interest after the lapse of several years; and see *Spackman* v. *Evans* (L. R. 3 H. L. 220). Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy (*Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 239; adopted by *Kekewich*, J., *Allcard* v. *Skinner*, 36 Ch. D. 163).

In the case of legal right, courts of equity will not refuse relief on ground of delay, unless sufficient to create statutory bar (*Three Towns' Co.* v. *Maddever*, 27 Ch. Div. 523; *Re Baker*, *Collins* v. *Rhodes*, 20 Ch. Div. 230). So in the case of an injunction to aid a legal right (*Fullwood* v. *Fullwood*, 9 Ch. D. 176).

See further the note as to Courts of Equity and the Statutes of Limitation, *post*, pp. 232 *et seq.*

7. *Limitation of Time between Mortgagor and Mortgagee.*

Time of Limitation fixed—Twenty Years.

Mortgagor to be barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment.

28. When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage-money or land or rent by, from or under him or them, and any person or

persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged* money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage-money which shall bear the same proportion to the whole of the mortgage-money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage (*t*).

3 & 4 Will. 4, c. 27, s. 28.

*Lege mortgage.

(*t*) Doubts were entertained whether a mortgagee, who was not proved to have been in possession or receipt of the profits within twenty years, and to whom no acknowledgment in writing had been given according to the 14th section (*ante*, p. 138), was not barred of his ejectment by the 2nd and 3rd sections, inasmuch as the mortgagee's right had accrued more than twenty years previously (*Doe* v. *Williams*, 5 Ad. & Ell. 291). These doubts have been removed by the following enactment.

By statute 7 Will. 4 & 1 Vict. c. 28, reciting that, "doubts have been entertained as to the effect of a certain act of parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled 'An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto,' so far as the same relates to mortgages; and it is expedient that such doubts should be removed:" it is declared and enacted, "that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, any thing in the said act notwithstanding."

7 Will. 4 & 1 Vict. c. 28.

Mortgagees of "land" within the definition in 3 & 4 Will. 4, c. 27, s. 1, may bring actions to recover land within twenty years after last payment of principal or interest.

From the 1st January, 1879, sect. 7 of 37 & 38 Vict. c. 57 (given at length, *post*, p. 197), has, by sect. 9 of the same act, been substituted for sect. 28 of 3 & 4 Will. 4, c. 27. Sect. 7 of 37 & 38 Vict. c. 57, fixes the period of limitation for bringing an action for redemption at twelve years, but in other respects is substantially similar to 3 & 4 Will. 4, c. 27, s. 28. The following note has reference to 3 & 4 Will. 4, c. 27, s. 28.

37 & 38 Vict. c. 57.

A trust for sale of land by way of security for money lent was a mortgage within sect. 28 (*Locking* v. *Parker*, 8 Ch. 30). After the statutory period the mortgagor's rights are barred, not only in the land but also in the purchase-money, whether such money arise under such a trust for

CASES AS TO MORTGAGOR'S RIGHTS UNDER SECT. 28.

3 & 4 Will. 4, c. 27, s. 28.

sale (*Re Alison, Johnson* v. *Mounsey*, 11 Ch. Div. 284), or under an ordinary power of sale (*Chapman* v. *Corpe*, 41 L. T. 22).

Possession of mortgagee.

A mortgagee in possession of part of the land comprised in the mortgage could, under this section, acquire title to such part, although the remaining part is in possession of the mortgagor (*Kinsman* v. *Rouse*, 17 Ch. D. 104). The rule before this statute was different (*Rakestraw* v. *Bruyer*, Moseley, 189).

A husband separated from his wife, becoming mortgagee in possession of her separate estate for twenty years, cannot set up the statute (*Booth* v. *Purser*, 1 Ir. Eq. R. 33). A solicitor who pays off a mortgage debt due from client must be taken to act as the agent of the client, and if he receive the rents of the mortgaged property the possession is that of the client, and time will not run against the client (*Ward* v. *Cartlar*, 1 Eq. 29). A mortgagee in possession for six years, without making any acknowledgment of the mortgagor's title, then purchased the interest of the tenant for life of the equity of redemption, and continued in possession for twenty years longer. It was held, that such possession was not adverse during the existence of the life estate, and this section was not a bar to any suit for redemption (*Hyde* v. *Dallaway*, 2 Hare, 528; *Raffety* v. *King*, 1 Keen, 601).

"I am disposed to think that the statute cannot apply so as to make the mere possession by the mortgagee for twenty years without acknowledgment a bar to redemption, where the original contract is in terms that the mortgagor may redeem at any time during a period extending beyond the twenty years" (*Per* Lord *Cranworth*, *Alderson* v. *White*, 2 De G. & J. 109).

Where a man by his will creates particular estates and remainders and then mortgages his estate, of course he and his devisees have only in common the period of time to claim against the mortgagee in possession, and the will cannot give to the devisees successive rights (*Browne* v. *Bishop of Cork*, 1 Dru. & Wal. 700; Sugd. R. P. Stat. 38; see *Raffety* v. *King*, 1 Keen, 601).

A mortgagee who holds property in pledge is responsible for it in its integrity. Therefore, where a mortgagee of lands allowed the owners of adjacent coal mines to enter and work a mine for the purpose of exploring, which they did, and sold the coals, an account was directed against them all for the benefit of the mortgagor upon a bill to redeem, and the statute was held not to apply to a case of this kind, as between mortgagor and mortgagee (*Hood* v. *Easton*, 2 Giff. 692).

Acknowledgments.

For acknowledgments of the mortgage title under the old law, see *Hodle* v. *Healey*, 6 Madd. 181; *Price* v. *Copner*, 1 S. & S. 347. In a case under the law before this statute an acknowledgment of the mortgagor's title made by the mortgagee after the expiration of the statutory period, revived the equity of redemption (*Pendleton* v. *Booth*, 1 D. F. & J. 81). A similar decision was given in one case under this statute (*Stansfield* v. *Hobson*, 1 D. M. & G. 620). But this seems inconsistent with sect. 34, *post* (See *Brassington* v. *Llewellyn*, 27 L. J. Ex. 297, there quoted; Darb. & Bos. Stat. Lim. 364); and has been doubted (*Markwick* v. *Hardingham*, 15 Ch. Div. 339).

Acknowledgment must be made to the mortgagor or his agent.

The section has been held to operate retrospectively as to acknowledgments (*Batchelor* v. *Middleton*, 6 Hare, 75). An acknowledgment by the mortgagee (in writing signed by himself) of his mortgage title to a third person is not sufficient (*Batchelor* v. *Middleton*, 6 Hare, 83, 84; *Markwick* v. *Hardingham*, 15 Ch. Div. 339). When a mortgagor became bankrupt a letter written to him subsequently did not operate as an acknowledgment either of his title or that of the assignee to the equity of redemption (*Markwick* v. *Hardingham*, *sup.*) Where a mortgagee in possession conveyed the land to a purchaser, subject expressly to the equity of redemption of the mortgagor, it was held, that the deed was not such an acknowledgment of the mortgagor's title as to make the estate redeemable (*Lucas* v. *Denison*, 13 Sim. 584). A mortgagee in possession of lands at Hendred, having received from the grandfather of the infant heir of the mortgagor

a letter, the contents of which did not appear, wrote in answer as follows:— "Concerning the business at Hendred, which you know nearly as well as myself, as there has been nothing kept from you, which I am very willing to settle if your granddaughter is of age, I never told you any otherwise, as I have been informed she is the heiress of what there is. The difference is not worth much. I shall hear from your granddaughter about the business." It was held, that the letter was an acknowledgment of the heir's right to redeem the mortgage, and that when she came of age she was entitled to consider her grandfather as having acted as her agent (*Trulock* v. *Robey*, 12 Sim. 402). It was said that it was not necessary, to make a person an agent to receive an acknowledgment, that he should have at the time an actual authority to act (*Ib.*) A letter written by a mortgagee in possession to the mortgagor's solicitors, containing a general denial of the mortgagor's title, with an additional statement that even if the mortgagor were entitled, he would derive no benefit from the account, was held not to amount to an acknowledgment within this section (*Thompson* v. *Bowyer*, 11 W. R. 975). Letters were held to amount to an acknowledgment in *Richardson* v. *Younge* (10 Eq. 275).

3 & 4 Will. 4, c. 27, s. 28.

Who is agent.

It seems that the keeping of accounts by the mortgagee in possession is not an acknowledgment within this section (See *Baker* v. *Whetton*, 14 Sim. 426). In *Re Alison*, *Johnson* v. *Mounsey* (11 Ch. Div. 284), where the mortgagor was held barred, accounts had been kept by the mortgagee in possession.

Whether mortgagee's accounts amount to acknowledgment.

An acknowledgment of a mortgagor's title given by one only of two joint mortgagees, who were, on the face of the mortgage deed, shown to advance the money on a joint account as trustees, was held inoperative. "The provision in this section as to acknowledgment by some of several mortgagees applies only where they have separate interests either in the money or the land" (*Per Mellish*, L. J., *Richardson* v. *Younge*, 6 Ch. 478).

Acknowledgment by one of several mortgagees.

There are no savings for disabilities of the mortgagor or his heirs in regard to the bar created by the 28th section. And sect. 16 (*ante*, p. 141) does not apply; an action to redeem not being "an action to recover land" within that section (*Kinsman* v. *Rouse*, 17 Ch. D. 104; see *Forster* v. *Patterson*, 17 Ch. D. 132, decided under 37 & 38 Vict. c. 57).

Disabilities.

CASES AS TO MORTGAGEE'S RIGHTS.

By 37 & 38 Vict. c. 57, s. 9 (*post*, p. 200), the period of twelve years is substituted for twenty years in 1 Vict. c. 28.

The Act 1 Vict. c. 28, does not itself create a bar in any case in which it had not been already created by the act which it explains. It only declares (in conformity, and with manifest reference to the rule which had before prevailed in Equity) that nothing in that act shall bar the title of a mortgagee (continuing to be such) who has received any payment on account of principal and interest from the person entitled to the equity of redemption within the statutory period before the commencement of any action (*Per Lord Selborne*, *Heath* v. *Pugh*, 6 Q. B. Div. 362).

1 Vict. c. 28.

A foreclosure action is an action for the recovery of land within 1 Vict. c. 28 (*Harlock* v. *Ashberry*, 19 Ch. Div. 539). And if a mortgagee obtains an order for foreclosure absolute, this is a new title (*Heath* v. *Pugh*, 6 Q. B. Div. 360, 361), which accrues within 3 & 4 Will. 4, c. 27, s. 2, at the date of the order (*Pugh* v. *Heath*, 7 App. Cas. 238). For purposes of practice, however, an action for foreclosure and delivery of possession is not an action for recovery of land within the meaning of the R. S. C. (Ord. 18, r. 2). In the case of an equitable charge on a reversionary interest, the statute commences to run against the right of foreclosure from the time when the interest falls into possession (*Hugill* v. *Wilkinson*, 38 Ch. D. 480). And see, as to a mortgagee's action to recover a reversionary interest in land comprised in his security, *Henry* v. *Smith*, 2 Dr. & W. 381; and the judgment of Stirling, J., *Re Lake*, 63 L. T. 416.

Foreclosure.

Where the mortgage deed contains no provision that the mortgagor may enjoy the land in the interval between the execution of the deed and default in payment of the mortgage-money, the mortgagee has an immediate right of entry upon the execution of the deed; and, if he

Ejectment.

3 & 4 Will. 4, c. 27, s. 28.

brings ejectment, it must be brought within the statutory period reckoned from that time, if no interest has been paid (*Doe* v. *Lightfoot*, 8 M. & W. 553; see *Wilkinson* v. *Hall*, 3 Bing. N. C. 508; *Fisher* v. *Giles*, 5 Bing. 421; Shep. Touch. 272 (8th edit.); *Thorp* v. *Facey*, 35 L. J. C. P. 349).

Where a mortgagee is also tenant for life of the mortgaged estate, the statute does not begin to run against the mortgage title until his death; and the same rule applies where the mortgagee is a tenant in common with others of the mortgaged estate (*Wynne* v. *Styan*, 2 Phill. C. C. 303; see *Topham* v. *Booth*, 35 Ch. D. 607). Under certain circumstances a mortgagor in possession is held to be tenant at will to the mortgagee (See the note to 3 & 4 Will. 4, c. 27, s. 7, *ante*, p. 128), and time will not in that case run against the mortgagee until the tenancy is determined (Darb. & Bos. Stat. Lim. 355).

Doe v. *Eyre*.

A mortgagee brought ejectment, the mortgagor having, within the statutory period, paid interest on the mortgage. The defendant had been let into possession more than a year before the mortgage by the mortgagor, and suffered by him as a favour to occupy the premises without payment of rent, and without any written acknowledgment: it was held, that 1 Vict. c. 28 preserved to the plaintiff the same right of entry as if 3 & 4 Will. 4, c. 27 had not passed; and that the defendant's possession never having been such as before 3 & 4 Will. 4, c. 27 would have been adverse to the plaintiff, he was entitled to recover, though the mortgagor's right of entry, within the meaning of the 3 & 4 Will. 4, c. 27 had accrued before the mortgage, and was barred under that statute (*Doe* v. *Eyre*, 17 Q. B. 366; *Eyre* v. *Walsh*, 10 Ir. C. L. R. 346; *Ford* v. *Ager*, 2 H. & C. 279; 11 W. R. 1073; see, however, *Hemming* v. *Blanton*, 21 W. R. 636, where a mortgagee was held barred by adverse possession).

Person "claiming under" a mortgage.

On a purchase of mortgaged lands, the purchaser paid the moneys due on the mortgage, and took a conveyance, in which the mortgagor and mortgagee joined, of the premises, and of the mortgagor's interest: held, that the purchaser was a person "claiming under" a mortgage within 1 Vict. c. 28; and that under 3 & 4 Will. 4, c. 27, s. 2, time ran from the paying off of the mortgage and interest (*Doe* v. *Massey*, 17 Q. B. 373). As to whether 1 Vict. c. 28 applies to the grantor of an annuity charged on land, see argument in *Searle* v. *Colt* (1 Y. & C. C. C. 36).

Payments within 1 Vict. c. 28.

A payment to come within 1 Vict. c. 28 must be a payment of principal or interest, and must be made by the mortgagor, or by some person bound to pay principal or interest on his behalf (*Harlock* v. *Ashberry*, 19 Ch. Div. 539). A payment of rent made by a tenant of the mortgaged property to the mortgagee, in consequence of a notice from him, is not such a payment (*Harlock* v. *Ashberry*, *sup.*) And where a mortgagor assigned the equity of redemption, and subsequently paid interest, the payment did not prevent time running in favour of the assignee (*Newbould* v. *Smith*, 33 Ch. D. 127; 14 App. Cas. 423; which case see also as to payment by an agent). As to payment of interest where mortgagor and mortgagee are the same, see *Topham* v. *Booth* (35 Ch. D. 607). Where estates A., B., and C. are included in one mortgage, and the owner of A. pays interest, the mortgagee's remedy against B. and C. is preserved (*Chinnery* v. *Evans*, 11 H. L. C. 115). Compare the discussion on the corresponding New Brunswick Statute (*Lewin* v. *Wilson*, 11 App. Cas. 639).

It was said that the mere laches of the mortgagee to demand interest from the tenant for life of the equity of redemption would not prejudice his claim against those in remainder (*Wrixon* v. *Vize*, 2 Dr. & War. 192; *Loftus* v. *Swift*, 2 Sch. & L. 642). Payment of interest by a tenant for life of the equity of redemption to the right person keeps the mortgage debt alive (*Barclay* v. *Owen*, 60 L. T. 222). But where the tenant for life by deed admitted payment of interest, this was not a sufficient acknowledgment, as against the remainderman, to prevent the statute from operating (*Gregson* v. *Hindley*, 10 Jur. 383). Compare *Re Fitzmaurice* (15 Ir. C. L. R. 445); *Beckett* v. *De la Cour* (11 L. R. Ir. 187).

Welsh mortgages.

A Welsh mortgage is a conveyance of an estate redeemable *at any time* on payment of the principal, with an understanding that the profits in the

meantime shall be received by the mortgagee without account in satisfaction of interest (See *Talbot* v. *Braddyl*, 1 Vern. 395; *Lawley* v. *Hooper*, 3 Atk. 280; *Yates* v. *Hambly*, 2 Atk. 237). But it is probable that at the present day a court of equity will decree an account against the mortgagee of the rents and profits, whether the value was excessive or not beyond the interest, and notwithstanding the agreement that the profits shall be retained in lieu of interest (*Fulthorpe* v. *Forster*, 1 Vern. 477; see Coote on Mortgages, 356, 5th ed.; 5 Jarm. Conveyancing, by Sweet, 96, 101). A Welsh mortgagee has no remedy to compel redemption or foreclosure (*Longuet* v. *Scawen*, 1 Ves. sen. 406); but if a man be permitted to hold for more than the statutory period after the debt has been fully paid, it seems that the mortgagor would be barred (*Fenwick* v. *Reed*, 1 Mer. 125; 5 B. & Ald. 232; and see 2 Spence on Eq. Jurisd. pp. 616—618). As to Welsh mortgages, see further *Teulon* v. *Curtis*, Younge, 610; *Hartpoole* v. *Walsh*, 5 Br. P. C. 267, Toml. ed.; *Balfe* v. *Lord*, 2 Dr. & War. 480; Fisher on Mortgages, 5, 691, 4th ed.

3 & 4 Will. 4, c. 27, s. 28.

8. *Limitation of Time as to Church Property and Advowsons.*

Church Property.

29. Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period (*u*).

No lands or rents to be recovered by ecclesiastical or eleemosynary corporation sole, but within two incumbencies and six years, or sixty years.

(*u*) Before this act, ecclesiastical corporations, and generally all ecclesiastical persons seised in right of their churches, were not within any of the Statutes of Limitation, and therefore could not bar their successors, by neglecting to bring actions for recovery of their possessions within the time prescribed for other persons, although an ecclesiastical person, who was guilty of such neglect, would himself have been barred (Plowd. 358, 538; 11 Rep. 78 b; 7 Roll. R. 151; 2 Bos. & Pull. 546; see 3rd Real Prop. R. 58—62).

Although the Statute of Fines, 4 Hen. 7, c. 24 (*ante*, p. 115), did not operate as a bar to the successors of bishops, rectors, or other ecclesiastical persons entitled to lands in respect of offices for life, yet each particular person was bound by a lapse of five years in his own time after the fine

Law before the statute.

3 & 4 Will. 4, c. 27, s. 29.

had been levied (*Runcorn* v. *Cooper*, 5 B. & C. 696; *Croft* v. *Howel*, Plowd. 358; 1 Prest. Conv. 235; *Magdalen College case*, 11 Rep. 67).

The act 2 & 3 Will. 4, c. 71, for shortening the time of prescription in certain cases, extends to any ecclesiastical person, but tithes are excepted from that act (*ante*, p. 2).

Where lands belonging to a spiritual corporation sole became vested in the Ecclesiastical Commissioners, it was held by the House of Lords that, under the special words of 3 & 4 Vict. c. 113, s. 57, this section extended to the commissioners (*Eccles. Commrs.* v. *Rowe*, 5 App. Cas. 736); but it does not extend to an ordinary lay successor to a spiritual corporation (*Irish Land Commrs.* v. *Grant*, 10 App. Cas. 14).

Where an ancient rent was payable out of lands A. and B., and the owner of the lands sold B. and charged others to indemnify the purchaser, and continued to pay the whole rent, no payment having been made by the purchaser of B., and the period prescribed by this section had elapsed, it was held that the purchaser's estate was still liable; for time would only begin to run when the person in possession of the rent should, while entitled thereto, have discontinued the receipt of it (See sect. 3, *ante*, p. 119). But here there was a continued receipt of the whole of the rent from the owner of A. (*Dublin* v. *Trimleston*, 12 Ir. Eq. Rep. 251; Sugd. on Real Prop. Stat. 153, 2nd ed.; conf. *Woodcock* v. *Titterton*, 12 W. R. 864).

Advowsons.

Time of Limitation fixed.

No advowson to be recovered but within three incumbencies or sixty years.

30. No person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years (*x*).

Limitation of the right to recover presentations.

(*x*) If a stranger present to a benefice, the recovery of that presentation depends on the statutes 13 Edw. 1, c. 5, s. 2, and 7 Anne, c. 18. "And the law stands upon this reasonable foundation—that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby" (3 Steph. Comm. 531).

Limitation of right to recover advowsons.

By stat. 1 Mary, sess. 2, cap. 5 (repealed by Statute Law Revision Act, 1863), it was enacted that the stat. 32 Hen. 8, c. 2, should not extend to a writ of right of advowson, *quare impedit*, assize *of darrein presentment*, nor *jure patronatus*, but the time of seisin to be alleged in such cases should be as it was at the common law before the making of the said statute, which was from the time of the commencement of the reign of Rich. 1. Before the statute of Mary, if the incumbent of an advowson had lived sixty years and died, and a stranger had presented, the patron could not maintain *quare impedit* or *darrein presentment* (See Plowd. 371 b; Co. Litt. 115 a).

The limitation of the right to recover advowsons laid down by 3 & 4

Will. 4, c. 27, s. 30, was in accordance with a suggestion of Blackstone (3 Steph. Com. 565, where the old law is stated; see *Robinson* v. *Bristol*, 20 L. J. C. P. 208). 3 & 4 Will. 4, c. 27, s. 30.

The limitations prescribed by 3 & 4 Will. 4, c. 27, were expressly applied to a bishop's rights to collate or bestow any ecclesiastical benefice by 6 & 7 Vict. c. 54, s. 3. Bishops' rights. 6 & 7 Vict. c. 54, s. 3.

Lapse.

31. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty, or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop (*y*). Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishoprics.

(*y*) Presentation must be made by a common person within six calendar months after the death of the last incumbent, otherwise the right accrues to the ordinary, which is called a *lapse* (3 Leon. 46; 2 Inst. 273; Wats. Cl. L. c. 12). The six months commence from the time the patron has notice of the avoidance (2 Burn, Eccl. Law, 327); but if the clerk of a stranger be instituted and inducted, and the patron gives no disturbance within six months, he has no remedy for that turn, because induction is an act of which he is bound to take notice (*Ib.* 329). If the avoidance be by resignation or deprivation, the six months do not commence till notice of the avoidance given by the ordinary to the patron (Com. Dig. Esglise, (H. 9)). But where the incumbent is himself patron, a sentence of deprivation is not necessary to render the first living void, the object of such a sentence being to give notice to the patron (*Apperley* v. *Hereford*, 9 Bing. 681). If the bishop should not present within six months after the lapse to him, then the right to present goes to the archbishop (Com. Dig. Esglise (H. 11)); and if neither the bishop nor archbishop present, then to the Crown, which is not confined to any time (Cro. Car. 335; Plowd. 498). It is clear that, as against the bishop at least, the patron may at any time present, notwithstanding six months have elapsed, provided advantage has not been taken of the lapse (3 Moore & Scott, 114). So that if after a lapse and before the bishop or archbishop has collated his clerk, the patron presents one, the latter shall be instituted (Hutt. 24; Hob. 152, 154; 2 Inst. 273). So after a lapse to the king, if the patron's clerk be presented, instituted, and inducted, and die incumbent, before the king has taken advantage of the lapse, his right is gone (Owen, 2—5; Cro. Eliz. 44, 119; 7 Rep. 28). Lapse.

When an incumbent is made a bishop, the right of presentation to livings held by him vests for that turn in the king, and is called a *prerogative* presentation. This right of the Crown was formerly doubted (*Wentworth* v. *Wright*, Owen, 144), but has since been fully established and acted on, but the right must be exercised in the lifetime of the person promoted, otherwise the turn of the Crown is lost (2 Bl. Rep. 770; *R.* v. *London*, 1 Show. 464; *S. P.*, Show. P. C. 185; Com. Dig. Esglise (H. 6); *Armagh* v. *A. G.*, 2 Br. P. C. 514). If after a grant of the next presen- Prerogative presentation.

3 & 4 Will. 4, c. 27, s. 31.

tation to a living the incumbent be made a bishop, by which the living becomes vacant, and the king is entitled to present, the grantee may present on the next vacancy occasioned by the death or resignation of the king's presentee (*Calland* v. *Troward*, 2 H. Bl. 324; 8 Br. P. C. 71). The right of the Crown to present to an English benefice upon the appointment of the incumbent to a bishopric, is not barred by the Crown having before such appointment granted the advowson to a subject. But no such right exists in the case of an appointment to the bishopric of Christ's Church, in New Zealand (*R.* v. *Eton College*, 8 Ell. & Bl. 610).

Universities. The right of presentation given to the universities by the statutes 3 Jac. 1, c. 5, ss. 18, 19, 20; 1 Will. & M. c. 26, s. 2, and 13 Anne, c. 13, s. 1, arises only in the case of a sole patron, or all of several patrons professing the Roman Catholic religion. Where two are jointly seised of an advowson, the one being a Roman Catholic, the other a Protestant, the sole right is in the latter (*Edwards* v. *Exeter*, 5 Bing. N. S. 652; see *Cottington* v. *Fletcher*, 2 Atk. 155). By statute 13 Anne, c. 13, the presentation to any benefice by any Roman Catholic is void (See *Boyer* v. *Norwich*, 1892, P. 41). And by stat. 11 Geo. 2, c. 17, s. 5, every grant made of any advowson or right of presentation, collation, nomination or donation, by any person professing the Catholic religion, or by any mortgagee or trustee of such person, is void, unless it be for valuable consideration to a Protestant purchaser (See 9 & 10 Vict. c. 59).

Affirmed in the H. L. Oct 1892

Advowson donative. An advowson *donative* being in the patron's disposal by his own deed of donation, without presentation, institution or induction (Co. Litt. 344 a), is not subject to lapse (*Ib.*; *Fairchild* v. *Gayre*, Cro. Jac. 63; *Britton* v. *Wade*, *Ib.* 515), unless such be the terms of the foundation, or unless the donative be augmented by Queen Anne's bounty, in which case it is subject to lapse, by statute 1 Geo. 1, st. 2, c. 10, ss. 6, 14, in case there be no nomination within six months (See *Mutter* v. *Chauvel*, 1 Mer. 475). As to proof of augmentation, see 11 East, 478. The ordinary may, by ecclesiastical censures, compel the patron of a donative to fill the church (3 Salk. 140; *R.* v. *Chester*, 1 T. R. 396).

Pluralities. By stat. 21 Hen. 8, c. 13, if a person having a benefice with cure of souls, of the yearly value of 8*l.* or above, was instituted and inducted into any other benefice with cure of souls, the first benefice became void (See, on the construction of this statute, *Boteler* v. *Allington*, 3 Atk. 453; *Botham* v. *Gregg*, 4 Moore & S. 230; *Halton* v. *Cove*, 1 B. & Ad. 530). The stat. 1 & 2 Vict. c. 106, ss. 1—13, has repealed the stat. 21 Hen. 8, c. 13, and made new provisions as to pluralities, which provisions apply generally to all persons and benefices without distinction of value. By the 11th section of 1 & 2 Vict. c. 106, institution into a second benefice *ipso facto* avoids the first. See *Storie* v. *Winchester*, 9 C. B. 62; *Ex p. Bartlett*, 12 Q. B. 488, as to avoidance by non-residence under ss. 54, 58 of the same statute, when the clerk is in prison.

Estates subsequent to Estates Tail in Advowsons.

When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

32. In the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action or suit, shall be limited accordingly.

Extreme Period of Limitation One Hundred Years.

3 & 4 Will. 4, c. 27, s. 33.

No advowson to be recovered after 100 years.

33. Provided always, and be it further enacted, that no person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title (*z*).

(*z*) It will be observed that there is no saving of the rights of persons under disabilities. It will still be necessary to require abstracts of titles to advowsons to be carried back for a century at least (1 Dart, V. & P. 334, 6th ed.) An abstract of title to an advowson should be accompanied with evidence that the presentations have from time to time been made by the persons appearing to be the owners of the advowson. Sir W. Blackstone observes, that instances are not wanting, wherein two successive incumbents have continued for upwards of 100 years; and states as an instance, that two successive incumbents of the rectory of Chelsfield-cum-Farnborough, in Kent, continued 101 years; of whom the former was admitted in 1650, the latter in 1700, and died in 1751 (3 Chit. Bl. Comm, 250; Co. Litt. 115 a).

9. *Final Extinction of Right.*

At the end of the period of limitation the right of the party out of possession to be extinguished.

34. At the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent or advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished (*a*).

Effect of this section.

(*a*) This section of the act is new in principle, as the former Statutes of Limitation were held not to bar the *right* but merely the *remedy;* but this bars the right as well as the remedy (See 1 Wms. Saund. 283 a, n.; 2 B. & Ad. 413; 1 B. & Ald. 93; 1 Ld. Raym. 422; *Incorporated Society* v. *Richards*, 1 Dru. & War. 289; *Re Alison, Johnson* v. *Mounsey*, 11 Ch. Div. 296). The effect of the act is to make a parliamentary conveyance of the land to the person in possession after the statutory period has elapsed (*Per Parke*, B., *Doe* v. *Sumner*, 14 M. & W. 42).

Thus the legal estate outstanding in a mortgagee was extinguished by this section (*Sands to Thompson*, 22 Ch. D. 614); and the legal estate in trustees being extinguished, the trusts were also extinguished (*Bolling* v. *Hobday*, 31 W. R. 9).

The operation of the section in extinguishing the right to rent-charges was doubted in *Hanks* v. *Palling* (6 E. & B. 659); but there is no sufficient

3 & 4 Will. 4, c. 27, s. 34.

foundation for the doubt (Sugd. R. P. S. 9). It is doubtful whether either heriot service or heriot custom are within the section (*Zouche* v. *Dalbiac*, L. R. 10 Ex. 172).

Extinguished title cannot be revived.

When a title has been extinguished by the statute, the old title cannot be restored by a subsequent acknowledgment (*Sanders* v. *Sanders*, 19 Ch. Div. 379, where *Stansfield* v. *Hobson*, 3 D. M. & G. 620, to the contrary effect was disapproved; see also *Re Alison*, *Johnson* v. *Mounsey*, 11 Ch. Div. 296; *Markwick* v. *Hardingham*, 15 Ch. Div. 346; *Lyell* v. *Kennedy*, 18 Q. B. Div. 796); or by subsequent re-entry (*Bryan* v. *Cowdal*, 21 W. R. 693; *Brassington* v. *Llewellyn*, 27 L. J. Ex. 297). The law before this statute was different (*Pendleton* v. *Rooth*, 1 D. F. & J. 81).

In a case which was held to fall within 3 & 4 Will. 4, c. 27, s. 8, after the expiration of twenty years, during which no rent had been paid, the tenant, within five years before action, paid some arrears. It was held that under sect. 8 time ran from the last payment of rent, and that sect. 34 had not extinguished the title of the plaintiff who was the reversioner (*Bunting* v. *Sargent*, 13 Ch. D. 330; see, however, *Sanders* v. *Sanders*, 19 Ch. Div. 379, and other cases above cited).

Nature of the interest of the person in possession.

It has been suggested that the title gained by a wrongdoer who has been in possession, which may be limited by rights yet remaining unextinguished, is commensurate with the interest which the rightful owners have lost by the operation of the statute, and must therefore have the same legal character, and be freehold, leasehold, or copyhold accordingly (Darb. & Bos. Stat. Lim. 390). Mr. Hayes' view is as follows: "The wrongdoer must be considered according to the principle of the old law as claiming generally, and therefore as claiming the absolute property (unless indeed he expressly qualify his claim), and the statute as merely diminishing from time to time the danger of eviction, till at length his originally precarious fee becomes, by the exclusion of every stronger claim, a firm inheritance" (1 Hayes, Conv. 270, 5th ed.) The latter view seems to be taken (Dart, V. & P. 464, 6th ed.) See further an article, 11 Jur. N. S. 151 (Part 2).

Person in possession has a devisable interest.

A person in possession of land without other title has, even before time has run in his favour under this statute, a devisable interest (*Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Keeffe* v. *Kirby*, 6 Ir. C. L. R. 591; *Clarke* v. *Clarke*, I. R. 2 C. L. 395; see under the old law, *Doe* v. *Birchmore*, 9 Ad. & Ell. 662).

Before this statute twenty years' possession gave a *primâ facie* title against every one, and a complete title against a wrongdoer who could not show any right, even if such wrongdoer had been in possession many years, provided they were less than twenty (*Doe* v. *Cooke*, 7 Bing 346; see *ante*, p. 117). The court thought that the effect of this section would be to give the right to the possessor for twenty years even against the party in whom the legal estate formerly was, and, but for the act would still be, where he had not obtained the possession till after the twenty years; but that such twenty years' possession must be either by the same person or by several persons claiming one from the other by descent, will or conveyance (*Doe* v. *Barnard*, 13 Q. B. 945, 952). As to possession by a series of independent trespassers, see *Doe* v. *Martin* (1 Car. & M. 32); *Doe* v. *Dyball* (3 C. & P. 610).

Possession by succession of independent trespassers.

In *Dixon* v. *Gayfere* (17 Beav. 421), the Master of the Rolls put the case of a series of trespassers, each adverse to one another and to the rightful owner, taking and keeping possession of an estate in succession for various periods, each less than twenty years, but exceeding in the whole twenty years: and he said: "At law, no doubt, the person possessed of the legal estate would obtain possession, or if the legal estate could not be shown to be in anyone, the last possessor, that is, the person actually in possession, would hold the property; but not by reason of the validity of his own title, but by reason of the infirmity of the title of the claimants" (17 Beav. 430). This opinion as to the legal rights of the parties was doubted by *Cockburn*, C. J. (*Asher* v. *Whitlock*, L. R. 1 Q. B. 4). In such a case the true view seems to be that the first trespasser has, at the end of the

statutory period reckoned from his entry, a right to the possession and may maintain ejectment against a subsequent trespasser by whom he has been expelled (Dart, V. & P. 466, 6th ed.; Darb. & Bos. Stat. Lim. 392; see *Trustees' Co.* v. *Short*, 13 App. Cas. 793). 3 & 4 Will. 4, c. 27, s. 34.

Where land which had been in the possession of a trespasser for nineteen and a half years was taken by a railway company, and the purchase-money paid into court, and no claim either to the land or the money was made by the true owner until after twenty years, the trespasser was entitled to the money as against the true owner (*Ex p. Winder*, 6 Ch. D. 696).

The court will compel a purchaser to take a title depending upon parol evidence of adverse possession under this statute (*Scott* v. *Nixon*, 3 Dru. & War. 388). In the subsequent case of *Tuthill* v. *Rogers* (6 Ir. Eq. R. 441), *Sugden*, L. C., observed, that the above decision had been acquiesced in, and in conformity with it he should be compelled in principle to adopt the same construction against the rights of the Crown, if the case came within the provisions of the act 48 Geo. 3, c. 47, by which the right of the Crown is barred, and the estate actually transferred and vested in the person who has held adverse possession for sixty years (See *Lethbridge* v. *Kirkman*, 25 L. J. Q. B. 84; *Moulton* v. *Edmonds*, 1 D. F. & J. 250). Purchaser compelled to accept title depending on the statute.

Where a Statute of Limitations extinguishes the right and does not merely bar the remedy, the defence under such statute may be raised by the defendant, although not in terms pleaded (*Dawkins* v. *Penrhyn*, 6 Ch. Div. 322; 4 App. Cas. 59). See as to old common law rule *De Beauvoir* v. *Owen* (5 Exch. 166); *Owen* v. *De Beauvoir* (16 M. & W. 547). Pleading.

Receipt of Rent.

35. The receipt of the rent payable by any tenant from year to year, or other lessee, shall as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act. Receipt of rent to be deemed receipt of profits.

10. *Abolition of Real and Mixed Actions, &c.*

36. No writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationalibus divisis, writ of right of ward, writ de consuetudinibus, et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonia, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize, of novel disseisin, nuisance, darrein presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui Real and mixed actions abolished after the 31st December, 1834.

3 & 4 Will. 4, c. 27, s. 36.

ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action real or mixed except *a writ of right of dower, or writ of dower unde nihil habet* (*b*) *or a quare impedit* (*c*), *or* an ejectment (*d*), and no plaint in the nature of any such writ or action *except a plaint for freebench or dower*, shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-four.

The words in italics have been repealed (37 & 38 Vict. c. 35).

(*b*) The right to bring real actions was preserved for a limited time by sects. 37 and 38 (*post*) (See *Davies* v. *Lowndes*, 6 M. & G. 529; 1 Phill. C. C. 328; and also *Nesbit* v. *Rishton*, 11 Ad. & Ell. 244; 6 Ad. & Ell. 103; 9 Ad. & Ell. 426; 2 P. & D. 706). It was doubted whether, since the passing of this section, an action of debt would lie for the recovery of the arrears of a rent in fee (*Varley* v. *Leigh*, 2 Exch. 450). It has since been decided that an action lies (*Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *Ex p. Graham*, 42 Ch. Div. 343; *Searle* v. *Cooke*, 43 Ch. Div. 519; see *Whitaker* v. *Forbes*, 1 C. P. Div. 51).

Dower, writ of right of dower and *quare impedit* abolished by 23 & 24 Vict. c. 126, s. 26.

By the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 26, no writ of right of dower, or writ of dower *unde nihil habet*, and no plaint for freebench or dower in the nature of any such writ, and no *quare impedit* shall be brought after the commencement of this act (10th October, 1860), in any court whatsoever, but where any such writ, action, or plaint would now lie, either in a superior or in any other court, an action may be commenced by writ of summons issuing out of the Court of Common Pleas, in the same manner and form as the writ of summons in an ordinary action, and upon such writ shall be indorsed a notice that the plaintiff intends to declare in dower or for freebench, or in *quare impedit*, as the case may be. The service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgment, execution, and all other proceedings and costs upon such writ shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons; and the provisions of the Common Law Procedure Act, 1852, and of the Common Law Procedure Act, 1854, shall apply to the writ and pleadings and proceedings thereupon (23 & 24 Vict. c. 126, s. 27). See now the R. S. C. under the Jud. Acts.

Dower.

A writ of right of dower lay when a widow had dower of part of the lands in the same vill, for then she could not have dower *unde nihil habet* against the same tenant (Com. Dig. Dower (G. 1); see Roscoe on Real Actions, 29). Dower *unde nihil habet* was a writ of right in its nature, and lay in all cases where a woman had a right of dower, except where she had part from the same tenant in the same vill where she then demanded it (Com. Dig. Dower (G. 2); see Roscoe on Real Actions, 39; 2 Wms. Saund. 43—45 d, notes; Roper on Husband and Wife, by Bright, pp. 391—431, where the mode of proceeding is fully explained). And a plaint in the nature of a writ of *dower* lay in the manor court (4 Rep. 30 b; see *R.* v. *Coggan*, 6 East, 431, n.; *Scott* v. *Kettlewell*, 19 Ves. 335; *Widowson* v. *Harrington*, 1 Jac. & W. 532; Scriven on Cop. 69 *et seq.*, 6th ed.) To entitle a woman to damages in dower, it must be alleged and proved that the husband died seised of an estate of inheritance (*Jones* v. *Jones*, 2 C. & J. 601).

Equitable relief in case of dower.

Courts of equity showed great indulgence to a dowress on account of the great difficulty of determining *à priori* whether she could recover at law, ignorant of all the circumstances, and the person against whom she seeks

relief having in his possession all the information necessary to enable her to establish her rights (6 Ves. 89). Therefore a court of equity would assist a woman claiming dower, by putting out of her way a term which prevents her obtaining possession at law; but that was only as against an heir (*Dudley* v. *Dudley*, Prec. Ch. 241); or volunteer; not a purchaser (*Radnor* v. *Rotherham*, Prec. Ch. 65; but see *Williams* v. *Lambe*, 3 Br. C. C. 264, and note by Eden; and see *Wilkins* v. *Lynch*, 1 Hayes' Ir. Rep. 98). 3 & 4 Will. 4, c. 27, s. 36.

Upon the point whether a defence of a purchase for valuable consideration without notice be an answer to a bill by a dowress against a *bonâ fide* purchaser, Lord *Thurlow* held, that such a defence would bar an *equitable*, but not a *legal* title (*Williams* v. *Lambe*, 3 Br. C. C. 264); which was followed in *Collins* v. *Archer* (1 R. & M. 292), where it was held, that such a defence would not be available against a *legal* title on a bill filed for an account of tithes. Plea of purchase for valuable consideration without notice.

Before the Jud. Acts it was laid down generally that the defence could not be raised in the Court of Chancery in cases where that court exercised a legal jurisdiction concurrently with courts of law (*Phillips* v. *Phillips*, 4 D. F. & J. 217). And where, since the Jud. Acts, a plaintiff in the Chancery Division claimed possession of land, and production and delivery of documents, and the defendants raised this defence, and also pleaded possession, they were held not entitled to resist discovery (*Ind Coope* v. *Emmerson*, 12 App. Cas. 300).

If the wife be divorced *à mensâ et thoro*, a court of equity would not assist her in recovering dower, but leave her to her remedy at law (*Shute* v. *Shute*, Prec. Chan. 111; Shelford on the Law of Marriage and Divorce, 420).

As to the recovery of arrears of dower, see 3 & 4 Will. 4, c. 27, s. 41, *post*, p. 185. And as to the law of dower generally, see the notes to 3 & 4 Will. 4, c. 105, *post*.

(c) In a proceeding by *quare impedit* the plaintiff must prove that he, or those under whom he claims, have made a presentation to the living. This is the only legal evidence of the right (*Cook* v. *Elphin*, 5 Bligh, N. S. 126). As to the case of coparceners, see *Gully* v. *Exeter* (10 B. & C. 584; 5 Bing. 171; 2 M. & P. 105; 4 Bing. 525); *Richards* v. *Macclesfield* (7 Sim. 257); *Pyke* v. *Bath and Wells* (Bac. Abr. tit. Joint Tenants (H.), vol. iv. p. 482, 7th edit.) In *quare impedit* the ordinary could not counterplead the patron's title by setting up title in the Queen by lapse (*Storie* v. *Winchester*, 9 C. B. 62). It was not competent to the bishop to dispute the title of the patron, at least before collation, as two persons are never permitted to dispute concerning the title of a third in his absence (*Apperley* v. *Hereford*, 3 M. & Scott, 102; see *Elvis* v. *York*, Hob. 316; and the 1st resolution in *Holland's case*, 4 Rep. 75 b). As to a right of nomination by a majority, see *Harrington* v. *Lichfield* (4 Bing. N. C. 77). If a deanery was in the presentation of the Crown as patron, or if the Crown had a right to nominate a person to the chapter, to be by them presented to the bishop for institution to the deanery (a right of which many instances occur, and which is fully recognized in the books), the proper remedy to admit the nominee of the Crown was by *quare impedit*, and the Court of Queen's Bench never interfered by mandamus when that writ lay (*R.* v. *Exeter*, 12 Ad. & E. 512, 534). *Quare impedit.*

By statute 4 & 5 Will. 4, c. 39, costs might be recovered in actions of *quare impedit*, and if plaintiff was non-suited, &c., the defendant was, with the exception mentioned in the act, to have judgment. A bishop who was a defendant in *quare impedit*, who failed upon demurrer, might be exempted from costs by the certificate of the court under that act (*Edwards* v. *Exeter*, 6 Bing. N. C. 146).

(d) An *ejectment* is a possessory action, wherein the title to lands and tenements may be tried, and the possession recovered in all cases where the party claiming title has a *right of entry*, whether such title be to an estate in fee, fee tail, for life or for years (See 15 & 16 Vict. c. 76, ss. 168—221; 17 & 18 Vict. c. 125, s. 93; 2 Archbold's Pr., by Prentice, 825—883, 13th ed.) Ejectment.

3 & 4 Will. 4, c. 27, s. 39.

[*Sects.* 37 *and* 38, *which contained provisions as to saving rights in respect of real actions, have been repealed by* 37 & 38 *Vict. c.* 35.]

Descent cast, Discontinuance and Warranty.

No descent, warranty, &c. to bar a right of entry.

39. No descent cast, discontinuance, or warranty (*g*), which may happen or be made, shall toll or defeat any right of entry or action for the recovery of land.

Descent.

(*g*) A mere entry is not possession Continual or other claim will no longer preserve any right of entry, or distress or action (*ante*, sects. 10, 11, p. 136). By the common law, descents of corporeal inheritances in fee simple took away the entry of the party who had right (Litt. s. 385); as if a disseisor died seised, and the lands descended to his heir, the entry of the disseisee was thereby taken away unless there had been a continual claim (Litt. s. 414); and the like law was of an abatement and intrusion, and of the feoffees or donees of abators or intruders. But by stat. 32 Hen. 8, c. 33, the "dying seised of any disseisor of and in any lands, &c., having no title therein, shall not be deemed a descent to take away the entry of the person or his heir, who had lawful title of entry at the time of the descent, unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled." If a disseisor died after five years' quiet possession, and the disseisee entered, the heir of the former might have maintained an ejectment, for the right of possession belonged to him, although the mere right was in the disseisee (*Smyth* v. *Tyndall*, 2 Salk. 685). The doctrine of descent cast did not apply, if the claimant was under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm; because in all these cases there was no laches or neglect in the claimant, and therefore no descent took away his entry (Litt. l. 3, c. 6); nor did it affect copyhold or customary estates, where the freehold is in the lord (*Doe* v. *Danvers*, 7 East, 299); nor cases where the party had not any remedy but by entry as a devisee (Co. Litt. 240 b; 7 East, 321. On descent cast, see Co. Litt. 237 b; Bac. Abr. Descent (F) (G) (H); Com. Dig. Descent (D); Roscoe on Real Actions, 81—87; Adams on Ejectment).

Discontinuance.

A discontinuance of estates in lands and tenements is defined by Lord *Coke* to be "An alienation made or suffered by tenant in tail, or by any that is seised in *auter droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action and cannot enter" (Co. Litt. 325 a). At common law, an estate might be discontinued five ways:—1. By feoffment. 2. By fine. 3. By common recovery. 4. By confirmation: and 5. By release with warranty. A grant by deed or fine, of such things as lie not in livery (Litt. s. 618; Co. Litt. 332 a), did not work any discontinuance. A feoffment made after 1st October, 1845, has no tortious operation (8 & 9 Vict. c. 106, s. 4).

A discontinuance of an estate tail could only be made by a tenant in tail in possession (*Doe* v. *Jones*, 1 B. & C. 243; *Trevilian* v. *Lane*, Cro. Eliz. 56; see 1 Rep. 76 a; Litt. s. 658; Co. Litt. 325 a). But the existence of a term of years prior to the estate of a tenant in tail did not prevent a fine levied by him from operating as a discontinuance (*Doe* v. *Finch*, 1 Nev. & M. 130). As to a prior estate by the curtesy, see *Anderson* v. *Anderson*, 30 Beav. 209; see further the notes to *Doe* v. *Finch*, *sup.*, where much learning on the subject of discontinuance, &c., is collected (*S. C.*, 4 B. & Ad. 283). As to discontinuance, see Bac. Abr. and Com. Dig. *Discontinuance;* Co. Litt. 325 a; 347 b, and notes by Butler; Roscoe on Real Actions, 43—53; 1 Prest. on Conv. and on Abst. Index; Roper on Husband and Wife, c. 2, s. 2; *Doe* v. *Ross*, 7 M. & W. 125.

Warranty.

As to the law of warranty, see Com. Dig. *Guaranty;* Co. Litt. 365 a; 393 b, and notes by Butler; Bac. Abr. *Warranty;* Shepp. T. 181—203;

Doe v. *Jones*, 1 Crompt. & Jerv. 528. By stat. 3 & 4 Will. 4, c. 74, s. 14, all warranties of lands which shall be made after the 31st December, 1833, by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail (See *post*). 3 & 4 Will. 4, c. 27, s. 39.

[Sections 40, 41, 42 of this act are inserted pp. 176, 185, *post*.]

11. *Limits of the Act.*

Spiritual Courts.

43. No person claiming any tithes, legacy or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity (*h*). Act to extend to the spiritual courts.

(*h*) The mode of recovering personal legacies in the ecclesiastical courts is stated in 3 Hagg. Eccl. R. 161, 162. See now, however, 20 & 21 Vict. c. 77, s. 23, by which it is provided that the Court of Probate, to which the jurisdiction of the ecclesiastical courts has been transferred, shall entertain no suit for legacies.

Recovery of legacies by action at law.

No action at law lay against an executor for a pecuniary legacy (*Deeks* v. *Strutt*, 5 T. R. 690; see *Southampton* v. *Graves*, 8 T. R. 593; *Atkins* v. *Hill*, Cowp. 284; *Hawkes* v. *Saunders*, Cowp. 289, *contra*); nor against an administrator to recover a distributive share; nor against his executor, although he had promised to pay (*Jones* v. *Tanner*, 7 B. & C. 542; see *Johnson* v. *Johnson*, 3 Bos. & P. 169). But an action at law lay against an executor to recover a specific chattel bequeathed after his assent to the bequest (*Doe* v. *Guy*, 3 East, 120; *Paramour* v. *Yardley*, Plowd. 539; *Westwick* v. *Wyer*, 4 Rep. 28 b); also to recover a pecuniary legacy where the executor had admitted that he held the money to the legatee's use (*Topham* v. *Morecraft*, 8 E. & B. 972; *Barlow* v. *Browne*, 16 M. & W. 126). So an action of assumpsit for money had and received, and on an account stated, was maintainable by a residuary legatee against an executor "on the ground of a certain sum being received and retained to the plaintiff's use" (*Hart* v. *Minors*, 2 C. & M. 700; see *Gregory* v. *Harman*, 1 M. & P. 209; 3 C. & P. 205; *Corporation of Clergymen's Sons* v. *Swainson*, 1 Ves. sen. 75; *Reech* v. *Kennegal*, *Ib.* 123; *Rogers* v. *Soutten*, 2 Keen, 598; *Bothe* v. *Crampton*, Cro. Jac. 612; *Davis* v. *Reyner*, 2 Lev. 3; *Goring* v. *Goring*, Yelv. 10; *Rann* v. *Hughes*, 7 T. R. 350, n.; *Childs* v. *Monins*, 2 Brod. & Bing. 460; 5 B. Moore, 282; *Bradley* v. *Heath*, 3 Sim. 543; *Holland* v. *Clark*, 1 Y. & Coll. N. C. 151; see Wms. Exors. 1941 *et seq.*, 8th ed.) In an action against executors upon an account stated for a legacy, it is competent to the plaintiff to impeach any particular item or items on the credit side of the account (*Rose* v. *Savory*, 2 Scott, 199; 1 Hodges, 269; *Gorten* v. *Dyson*, 1 Brod. & B. 219; *Moert* v. *Moessard*, 1 M. & P. 8; *Wasney* v. *Earnshaw*, 4 Tyrw. 806; *Roper* v. *Holland*, 3 Ad. & Ell. 99). A testator devised lands in fee, after the determination of certain life estates, to A., B., and C., as tenants in common, subject to and charged with the payment of 200*l*., which he thereby bequeathed to and to be equally divided among the children of his niece. A. and B., during the life of one of the tenants for life, granted their reversion in two undivided third parts of the lands to mortgagees for 500 years: it was held,

3 & 4 Will. 4, c. 27, s. 43. that an action of debt could not be maintained against the termors for a share of the 200*l.* so bequeathed (*Braithwaite* v. *Skinner*, 5 M. & W. 313).

Scotland and Ireland.

Act not to extend to Scotland nor to advowsons in Ireland.

44. Provided always, and be it further enacted, that this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit * to or bestow any church, vicarage or other ecclesiastical benefice, extend to Ireland (*i*).

* *Lege* present.

(*i*) The provisions of 3 & 4 Will. 4, c. 27, relating to advowsons, &c., were extended to Ireland by 6 & 7 Vict. c. 32, and 7 & 8 Vict. c. 27, and the words of this section excluding Ireland have been repealed (37 & 38 Vict. c. 35). See 32 & 33 Vict. c. 42.

The colonies. This act applies to New South Wales (*Day* v. *Day*, L. R. 3 P. C. 751; *Trustees Co.* v. *Short*, 13 App. Cas. 793); and to New Zealand (*Plimmer* v. *Wellington*, 9 App. Cas. 708), but does not apply to Jamaica (*Pitt* v. *Dacre*, 3 Ch. D. 295). Where a Hindoo banker claimed as a creditor in an English administration action, the English statute applied (*Finch* v. *Finch*, 35 L. T. 235). But the Indian statute was held to govern the case of money in an English court representing land in India (*Re Peat*, 7 Eq. 302). As to which statute, see also *Hay* v. *Gordon* (21 W. R. 11). See also the questions raised as to bonds charged on the revenues of Oudh in *Doss* v. *Secretary, &c. of India* (1875, W. N. 59); and as to the Bombay Civil Service Fund, in *Edwards* v. *Warden* (1 App. Cas. 281). By the law of Lower Canada, the period of prescription is thirty years (*Herrick* v. *Sixby*, L. R. 1 P. C. 436; *Macdonald* v. *Lambe*, *ib.* 539). As to adverse possession in Nova Scotia, see *Des Barres* v. *Shey* (22 W. R. 273); and in Ceylon, see *Clark* v. *Elphinstone* (6 App. Cas. 164). See as to the period of limitation in New Brunswick, *Lewin* v. *Wilson*, 11 App. Cas. 639.

PLEADING AND PRACTICE AS TO THE STATUTE OF LIMITATIONS.

Raising the statute: By R. S. C. Ord. 19, r. 15, a party must raise by his pleading all such grounds of defence or reply as, if not raised, would take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as, for instance, Statute of Limitations.

by pleading; In *Dawkins* v. *Penrhyn* (4 App. Cas. 59; an action commenced in 1877, when demurrer was permitted), Earl *Cairns* held that in personal actions the statute must be pleaded; but that in the case of real property, where it was a question of title, the statute might be raised by demurrer (See further, *Re Burge*, *Gillard* v. *Lawrenson*, 57 L. T. 364; *Noyes* v. *Crawley*,

by demurrer. 10 Ch. D. 31). Since *Dawkins* v. *Penrhyn* demurrer has been abolished, but in lieu thereof a party can raise by his pleading a point of law (R. S. C. Ord. 25).

Where an action is brought to recover land of which the defendant is in possession, the statute is often pleaded expressly (*Lyell* v. *Kennedy*, 18 Q. B. Div. 796; *Pedder* v. *Hunt*, *ib.* 565). In *Heath* v. *Pugh* (6 Q. B. Div. 353), it was said that in such a case the defence of the statute might be raised under the plea of possession in a general form (Ord. 21, r. 21).

Renewal of writ to save statute. Ord. 8, r. 1, provides that no original writ of summons shall be in force for more than twelve months from the date thereof. Ord. 6, r. 1, provides for the issue of concurrent writs, such writs only to be in force for the period during which the original writ is in force. Under Ord. 8, r. 1, however, upon application before the expiration of the twelve months, the writ or concurrent writ may for good reason be renewed for six months, and so from time to time. Under Ord. 64, r. 7, times may be enlarged.

Where the plaintiff's claim would, in the absence of renewal, be barred by statute, the time for renewing a writ will not usually be enlarged, but the court has a discretion (*Doyle* v. *Kaufmann*, 3 Q. B. Div. 7, 340; *Hewett* v. *Barr*, 1891, 1 Q. B. 98). Where, however, the original writ was issued and renewed in proper time, the time for issuing a concurrent writ was enlarged, although the operation of the statute was thereby affected (*Smalpage* v. *Tonge*, 17 Q. B. Div. 644). 3 & 4 Will. 4, c. 27, s. 44.

Where a writ was issued in due time in the Common Pleas to recover a debt, which writ was never served; and six months later (when, unless saved by the writ, the debt was barred) the plaintiff took out an administration summons in chancery; such summons was held barred, the writ not keeping the debt alive for the purpose of proceedings in another court (*Manby* v. *Manby*, 3 Ch. D. 101. Compare *Hurst* v. *Hurst*, 21 Ch. Div. 291, 295).

In the case of pleadings, a party cannot by amendment set up fresh claims which since the writ have become barred by statute (*Weldon* v. *Neal*, 19 Q. B. Div. 394; see *Steward* v. *North Metropolitan Co.*, 16 Q. B. Div. 556; *Hudson* v. *Fernyhough*, 61 L. T. 722). As to raising by amendment a case of concealed fraud to meet the statute, see *Lawrance* v. *Norreys* (39 Ch. Div. 235). Amendments.

LIMITATIONS OF TIME IN PRACTICE.

With regard to appeals to the Court of Appeal, Ord. 58, r. 15, provides that no appeal from any interlocutory order or from any order, whether final or interlocutory, in any matter not being an action, shall, except by leave, be brought after twenty-one days, and no other appeal shall, except by leave, be brought after one year. These times may be enlarged under Ord. 64, r. 7, but not except under very special circumstances (*Collins* v. *Paddington*, 5 Q. B. Div. 368). Limitations in practice. Appeals to the Court of Appeal.

In the case of ordinary appeals to the House of Lords, Standing Order No. 1 provides that the petition of appeal must be lodged within one year from the date of the last decree, order, or judgment appealed from. In case, however, the appellant be an infant or *feme covert* or *non compos mentis*, or imprisoned, or out of Great Britain and Ireland, he may appeal within one year after the disability ceases; but no longer time than five years will be allowed. If this standing order can be suspended at all, it will only be on some extremely exceptional and extraordinary ground (*Phillips* v. *Fothergill*, 11 App. Cas. 466). Appeals to the House of Lords.

Appeals to the House of Lords in matrimonial causes must be from a decision of the Court of Appeal, and must be brought within one month after such decision if the House of Lords is then sitting; if not, within fourteen days after its next sitting (*Cleaver* v. *Cleaver*, 9 App. Cas. 631).

With regard to pleading the Statute of Limitations in county courts, it is provided by 9 & 10 Vict. c. 95, s. 76, that no defendant in any court holden under the act shall be allowed to set off any debt or demand claimed, or recoverable by him from the plaintiff, or to set up by way of defence, and to claim and have the benefit of infancy, coverture, or any Statute of Limitations, or of his discharge under any statute relating to bankrupts, or any act for relief of insolvent debtors, without the consent of the plaintiff, unless such notice thereof as shall be directed by the rules made for regulating the practice of the court shall have been given to the clerk of the court; and in every case in which the practice of the court shall require such notice to be given, the clerk of the court shall, as soon as conveniently may be after receiving such notice, communicate the same to the plaintiff by the post, or by causing the same to be delivered at his usual place of abode or business, but it shall not be necessary for the defendant to prove on the trial that such notice was communicated by the plaintiff to the clerk. Practice in the county court as to the Statutes of Limitation. Notices to be given to the clerk of county court of special defences, who shall communicate the same to the plaintiff.

The County Court Rules further provide that when a defendant intends

3 & 4 Will. 4, c. 27, s. 44.

to rely upon the defence of any Statute of Limitations, he shall file a notice stating thereon his name and address, together with a concise statement of such ground, five clear days before the return day. And the registrar shall, within twenty-four hours after receiving the same, transmit by post one copy of such notice and particulars to the plaintiff. But on non-compliance with the rule the judge has a power of adjournment (Ord. 10, r. 10). And further, that where a defendant intends to rely on the defence of any Statute of Limitations, he shall in his statement specify the date from which he alleges that the statute began to run (Ord. 10, r. 14; see also r. 18a).

The rules also provide for the issue of successive summonses to save the statute, viz., ordinary summonses (Ord. 7, r. 6), default summonses (Ord. 7, r. 29), judgment summonses (Ord. 25, r. 20).

II. Limitation of time for the recovery of money charged on land, legacies, arrears of dower, rent, and interest (3 & 4 Will. 4, c. 27, ss. 40—42).

Charges and Legacies.

Money charged upon land and legacies to be deemed satisfied at the end of twenty years, if there shall be no interest paid or acknowledgment in writing in the meantime.

40. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage (*a*), judgment (*b*), or lien (*c*), or otherwise charged upon or payable out of any land or rent, at law or in equity (*d*), or any legacy (*e*), but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same (*g*), unless in the meantime some part of the principal money, or some interest thereon, shall have been paid (*h*), or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, *or his agent*, to the person entitled thereto, or his agent (*i*); and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

This section extended to cases of claims to estates of intestates.

The act 23 & 24 Vict. c. 38, s. 13, enacts, "that after the thirty-first day of December, one thousand eight hundred and sixty, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought, but

within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given" (*f*). 3 & 4 Will. 4, c. 27, s. 40.

From the 1st of January, 1879, sect. 8 of 37 & 38 Vict. c. 57, has, by sect. 9 of the same act, been substituted for sect. 40 of 3 & 4 Will. 4, c. 27. Sect. 8 of 37 & 38 Vict. c. 57, fixes the period of limitation for the recovery of money charged upon land and legacies at twelve years, but in other respects is similar to 3 & 4 Will. 4, c. 27, s. 40. The following note has reference to 3 & 4 Will. 4, c. 27, s. 40, and 23 & 24 Vict. c. 38, s. 13. 37 & 38 Vict. c. 57, s. 8.

(*a*) A foreclosure action is not an action to recover the mortgage money within sect. 40, but is an action to recover land within sects. 2 and 24 of 3 & 4 Will. 4, c. 27 (*Harlock* v. *Ashberry*, 19 Ch. Div. 539; *Wrixon* v. *Vize*, 3 Dru. & War. 104; *Heath* v. *Pugh*, 6 Q. B. Div. 345; 7 App. Cas. 235). For the older law, see *Doe* v. *Williams* (5 Ad. & El. 296); *Dearman* v. *Wyche* (9 Sim. 570); *Du Vigier* v. *Lee* (2 Ha. 326); *Sinclair* v. *Jackson* (17 Beav. 405). In the case of an equitable charge on a reversionary interest in land, the statute runs against the right to foreclose from the time when the interest falls into possession (*Hugill* v. *Wilkinson*, 38 Ch. D. 480). See under the old law *Humble* v. *Humble*, 24 Beav. 535; where a claim to have their debt raised, made by mortgagees holding a mortgage on a reversionary interest in real estate was barred by sect. 40. Mortgages. Foreclosure actions.

Before 3 & 4 Will. 4, c. 27, if the mortgagor continued in possession, and there had been neither payment nor demand of any principal or interest for twenty years, it was sufficient to raise the presumption of payment (1 Ch. R. 59, 105; *Trash* v. *White*, 3 Br. C. C. 289; *Christopher* v. *Sparke*, 2 Jac. & W. 228; *Cooke* v. *Soltau*, 2 Sim. & Stu. 154; *contra Joplis* v. *Baker*, 2 Cox, 118; *Leman* v. *Newnham*, 1 Ves. sen. 51); but such presumption was liable to be rebutted by circumstances, and payment of interest on part of the debt was sufficient to keep the whole alive (*Loftus* v. *Smith*, 2 Sch. & Lef. 642). Presumption of payment before 3 & 4 Will. 4, c. 27.

(*b*) Sect. 40 applies to a case in which a judgment is sought to be enforced against the personal estate, as well as to a case in which it is sought to be enforced against the land of the debtor (*Watson* v. *Birch*, 15 Sim. 523; but see *Henry* v. *Smith*, 2 Dru. & War. 391). Proceedings to revive a judgment are also within this section (*Watters* v. *Lidwill*, 9 Ir. L. R. 362). A writ of *scire facias*, however, will issue to revive a judgment given as a collateral security for the payment of an annuity, although more than twenty years have elapsed since it was signed, if payments of the annuity within that time have been made (*Williams* v. *Welch*, 3 Dowl. & L. 565). Judgments.

In *Wall* v. *Walsh* (I. R. 4 C. L. 103), it was held that a writ of revivor was not an action upon a judgment within sect. 20 of the C. L. P. Act, 1853 (Ireland), and that the period of limitation in such proceedings was still regulated by 3 & 4 Will. 4, c. 27, s. 40.

A *scire facias* on a judgment is not a mere continuation of a former suit, but creates a new right. A judgment was obtained in 1813. It was revived by *scire facias*, in 1828. A bill was filed in 1838, in the Court of Exchequer in Ireland, against the representatives of the debtor, praying for an account, and that the principal and interest due on the judgment might be satisfied out of the debtor's personal or real estate. On a plea of this statute it was held, that the *scire facias* created new rights, and that the plea was no bar to the suit (*Farrell* v. *Gleeson*, 11 Cl. & Fin. 702; see *Farran* v. *Beresford*, 10 Cl. & Fin. 319). Revivor of a judgment on a *scire facias*, although there be no change of parties, gives a new present right to the conusee so as to prevent the operation of this section (*Re Blake*, 2 Ir. Ch. R. 643; see Darb. & Bos. Stat. Lim. 123). Where an action of debt is brought on a judgment and judgment recovered, time runs against the former judgment from its own date, and not from the date of the latter judgment (*Watters* v. *Lidwill*, 9 Ir. L. R. 362; *Kealy* v. *Bodkin*, *Ib.* 383). A revivor by *scire facias* against the conusor of a judgment is sufficient to keep the *Scire facias*. Lands bound by a revivor of judgment.

3 & 4 Will. 4, c. 27, s. 40.

judgment alive as against the terre-tenants of an estate of which the conusor was seised at the date of the rendition of the judgment, but which he had conveyed away before the issuing of the *scire facias* (*Murray* v. *Clarke*, 4 Ir. C. L. R. 610). It seems, however, that a judgment of revivor will not revive the original judgment as against lands of the conusor which have come previous to the revivor into the hands of persons neither parties nor privies to the revivor; nor will a judgment of revivor against an executor revive the original judgment against the heir, or *vice versâ* (*Kirkwood* v. *Lloyd*, 11 Ir. Eq. R. 561; 12 Ir. Eq. R. 585; *Re Bodkin*, 12 Ir. Ch. R. 61). As to revivor against a person in possession of lands under a settlement, see *Ryan* v. *Cambie* (2 Ir. Eq. R. 328); *Franks* v. *Mason* (9 Ir. Eq. R. 358).

It seems that the old writ of *scire facias* can still be issued since the Judicature Acts (*Kipling* v. *Todd*, 3 C. P. D. 350; Lindley's Company Law, 281, 5th ed.) For the proceedings to revive a judgment see 15 & 16 Vict. c. 76, ss. 128—134; and 19 & 20 Vict. c. 97, s. 10, by which a person entitled to revive a judgment, &c., is not entitled to any longer time for doing so by reason of his being beyond the seas, or imprisoned, at the time his right accrued.

Decree in equity.

A decree of a court of equity for the payment of a specific sum was included under judgment in this section (*Dunne* v. *Doyle*, 10 Ir. Ch. R. 502).

Judgment on *post obit* bond, when time begins to run.

The statute does not begin to run against a judgment entered on a *post obit* bond, until the death occurs upon which the bond is payable (*Barber* v. *Shore*, 1 Jebb & S. 610; *Tuckey* v. *Hawkins*, 4 C. B. 655; *Gilman* v. *Chute*, 11 Ir. L. R. 442; *Kennedy* v. *Whaley*, 12 Ir. L. R. 54). As to the running of time in the case of judgments entered on bonds, see *Re Kingston*, (I. R. 3 Eq. 485); *Re Keay* (I. R. 3 Eq. 659).

Presumption of satisfaction of judgments before 3 & 4 Will. 4. c. 27.

Before this statute it appears that if a judgment creditor had lain by for twenty years without any effort to enforce his judgment, and it had not been acknowledged by the debtor within that time, it was presumed to be satisfied (Peake's Ev. 25, n.; Coote on Mortgages, 151, 4th ed.; see 4 Anne, c. 16, s. 12; *Kemys* v. *Ruscomb*, 2 Atk. 45). It was held, that the presumption arising from lapse of time of a judgment having been satisfied, was not rebutted by evidence of the debtor having been in extremely embarrassed circumstances, and, in the opinion of those who knew him, incapable of paying the debt secured by the judgment (*Willaume* v. *Gorges*, 1 Campb. 217; see also *Grenfell* v. *Girdlestone*, 2 Y. & C. 662; *White* v. *Parnther*, 1 Knapp, 228, 229).

Vendor's lien.

(*c*) A vendor's lien for unpaid purchase-money is within this section (*Toft* v. *Stephenson*, 7 Hare, 1; 1 D. M. & G. 28). As to when time commences to run, see *Toft* v. *Stephenson* (5 D. M. & G. 735).

Nature of the lien.

Where a vendor delivers possession of an estate to a purchaser without receiving the purchase-money, equity, whether the estate be conveyed (*Chapman* v. *Tanner*, 1 Vern. 267; *Pollexfen* v. *Moore*, 3 Atk. 272; and see 1 Br. C. C. 302, 424, and 6 Ves. jun. 483; *Mackreth* v. *Symmons*, 15 Ves. 329), and a receipt is indorsed on the conveyance (*Coppin* v. *Coppin*, 2 P. W. 291; 3 Russ. 488), or be not conveyed (*Smith* v. *Hibbard*, 2 Dick. 730; *Charles* v. *Andrews*, 9 Mod. 152), and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold (*Winter* v. *Anson*, 3 Russ. 488), gives the vendor a lien on the land for the money. But the application of this doctrine depends upon the intention of the parties (*Re Albert, &c. Co.*, 11 Eq. 179).

When lost.

Thus, where a vendor took a mortgage of part of the estate, his lien over the rest of the estate was held to be excluded (*Capper* v. *Spottiswoode*, Taml. 21); and where he took a mortgage of the whole estate for part of the unpaid purchase-money his lien for the balance was lost (*Bond* v. *Kent*, 2 Vern. 281; see 1 Sch. & Lef. 135). So there is no lien where the vendor takes a mortgage of another estate (6 Ves. 760), or a charge upon stock (*Nairn* v. *Prowse*, 6 Ves. 752); nor where the consideration for the conveyance was expressed to be the covenant for the payment of an annuity and a sum in gross in the event of the purchaser's marriage (*Clark* v. *Royle*, 3 Sim. 499; see *Stuart* v. *Ferguson*, 1 Hayes, 452; *Parrott* v. *Sweetland*, 3 M. & K. 655; *Dixon* v. *Gayfere*, 21 Beav. 118; 1 De G. & J. 655;

Matthew v. *Bowler*, 6 Ha. 110; *Buckland* v. *Pocknell*, 13 Sim. 406); nor where land was purchased under the Lands Clauses Act, and the consideration was a yearly rent-charge (*Jersey* v. *Briton Ferry Co.*, 7 Eq. 409); nor where the purchase-money of lands sold to a company was expressed to payable out of moneys to be received by the company on sale of shares (*Re Brentwood Co.*, 4 Ch. Div. 562); nor as against the mortgagees of the purchaser where vendor joined in the mortgage (*Cood* v. *Pollard*, 9 Price, 544; *Smith* v. *Evans*, 28 Beav. 59). For the lien in the case of purchases with trust money, see *White* v. *Wakefield* (7 Sim. 401); *Muir* v. *Jolly* (26 Beav. 143). Vendors were held to have lost their lien by permitting the purchaser to register his conveyance with a view to a sub-sale (*Kettlewell* v. *Watson*, 26 Ch. Div. 501; see *Ex p. Parker*, 1 Glyn & J. 228). 3 & 4 Will. 4, c. 27, s. 40.

When not lost.

The lien, however may subsist notwithstanding a personal security is given for the money, whether by bill of exchange (*Hughes* v. *Kearney*, 1 Sch. & Lef. 132; *Grant* v. *Mills*, 2 Ves. & B. 306; *Ex p. Peake*, 1 Madd. 346); or promissory note (*Gibbons* v *Baddall*, 2 Eq. Cas. Abr. 682, n. b; *Ex p. Loaring*, 2 Rose, 79); or bond (*Winter* v. *Anson*, 3 Russ. 488; *Collins* v. *Collins*, 31 Beav. 347). Nor is the lien lost by an improper payment to the vendor's solicitors (*Wrout* v. *Dawes*, 25 Beav. 369).

Against whom it prevails.

The lien prevails against the purchaser and his heir; against volunteers claiming under him; against sub-purchasers with notice; sometimes against sub-purchasers without notice (*Rice* v. *Rice*, 2 Drew. 85; Sugd. V. & P. 682, 14th ed.); and against assignees whether in bankruptcy or claiming under an assignment for the benefit of creditors (*Fawell* v. *Heelis*, Amb. 724).

Is assignable.

The lien is assignable by parol (*Dryden* v. *Frost*, 3 M. & C. 670), but the assignee will take it subject to any prior incumbrances created by the vendor (*Lacy* v. *Ingle*, 2 Ph. 413).

In the case of sales to a railway company.

A vendor of land to a railway company who have entered and used it for the purpose of their railway, is entitled to the same lien on land for the unpaid purchase-money and the same remedies for enforcing it as an ordinary vendor (See *Munns* v. *Isle of Wight R. Co.*, 5 Ch. 414, where an order was made for a receiver, and the cases there quoted; *Wing* v. *Tottenham Co.*, 3 Ch. 740, where the vendor was held entitled to a sale). The company will not be restrained from running trains over the land until the sale (*Lyatt* v. *Stafford Co.*, 13 Eq. 261). The vendor has no lien for the costs of an arbitration under the Lands Clauses Consolidation Act (*Ferrers* v. *Stafford Co.*, 13 Eq. 524).

The word "mortgage" in 17 & 18 Vict. c. 113, has been extended by 30 & 31 Vict. c. 69, so as to include the lien (See 40 & 41 Vict. c. 34; *Broadbent* v. *Groves*, 24 Ch. D. 94). As to a lien on real estate for an unpaid legacy, see *Barker* v. *Barker* (10 Eq. 438).

At common law.

An unpaid vendor has not at law any lien on the title deeds for his purchase-money (*Goode* v. *Burton*, 1 Ex. 189; see also *Hope* v. *Booth*, 1 B. & Ad. 498; *Baker* v. *Dewey*, 1 B. & C. 704; *Lampon* v. *Corke*, 5 B. & Ad. 606; *Oxenham* v *Esdaile*, 3 Y. & J. 362; *Hooper* v *Ramsbottom*, 4 Camp. 121; *Harding* v. *Ambler*, 3 M. & W. 279).

See further, on this subject, *Mackreth* v. *Symmons* (1 White and Tud. L. C. Eq. 355, 6th ed.; Dart V. & P., 825 *et seq.*, 6th ed.)

MONEY CHARGED UPON OR PAYABLE OUT OF LAND.

(*d*) It was questioned in *Pawsey* v. *Barnes* (20 L. J. Ch. 393), whether the share of the produce of real estate, devised to trustees upon trust to sell, was a sum charged upon or payable out of land within this section. Such a share was held to be "money payable out of land," within sect. 42, *post* (*Bowyer* v. *Woodman*, 3 Eq. 313). In *Mutlow* v. *Bigg* (18 Eq. 246), land was devised on trust for sale, and part having been sold, but part remaining unsold, an action was brought for execution of the trust. V.-C. *Hall* held that sect. 40 had no application, except as regards the part sold.

Money due on a bond by an ancestor is not a sum of money payable out of land within this section (*Roddam* v. *Morley*, 2 K. & J. 336; see *Morley* v. *Morley*, 5 D. M. & G. 610).

3 & 4 Will. 4, c. 27, s. 40.

The statute cannot be applied to a case where there is no assignable person liable to pay the charge, no person who by the delay could be induced to suppose that the charge was abandoned or merged, and where the rent out of which the interest of the charge ought to be paid is receivable by, and belongs to, the same person who is entitled to the interest; as where a tenant for life paid off a charge affecting the settled estates (*Burrell* v. *Egremont*, 7 Beav. 206; see *Kensington* v. *Bouverie*, 7 D. M. & G. 144; *Baldwin* v. *Baldwin*, 4 Ir. Ch. R. 501; *Carbery* v. *Preston*, 13 Ir. Eq. R. 455; *Topham* v. *Booth*, 35 Ch. D. 607). To bring a charge within the operation of this section, there must be a hand to receive as well as a hand to pay, and the party to receive must be capable of releasing and giving a discharge (*M'Carthy* v. *Daunt*, 11 Ir. Eq. R. 29; *Carroll* v. *Hargrave*, I. R. 5 Eq. 123). In 1812, A. conveyed lands on trust to pay an annuity, and subject thereto for himself in fee. By a settlement in 1825 he charged the lands with a sum to be raised at his death, and in 1830 he mortgaged the lands by depositing the title deeds and the deed of 1812. The mortgagee, who in 1832 first had notice of the settlement, in 1834 entered and continued in possession, and in 1835 bought in the annuity. A. died in 1866. Held, that the mortgagee had not acquired a title by possession as against the trustees of the settlement of 1825 (*Thorpe* v. *Holdsworth*, 7 Eq. 139).

In 1816, A. mortgaged an estate to B., and covenanted to pay the mortgage-money; and, in July, 1817, A., and B. as his surety, conveyed the property to C., on trust to sell and pay, first, a debt due from A. to C., which A. and B. also covenanted to pay; and, secondly, to pay B.'s debt. In August following, A. executed to B. an equitable charge on other property to secure the same debt. In 1834, C. sold the estate, and applied the produce in part payment of his demand. In 1842, a bill was filed by B. against A. to realize the equitable charge: it was held, that, until the trust of the deed of July, 1817, was exhausted in 1834, the covenant in the deed of 1816 subsisted wholly unaffected by time; that the debt and the personal remedy to recover it subsisted at the time the bill was filed, and that the equitable charge was therefore then operative (*Bennett* v. *Cooper*, 9 Beav. 252).

The section has no application in the case of an annuity charged on real estate in Jamaica (*Pitt* v. *Dacre*, 3 Ch. Div. 295).

Legacies.

(*e*) This section was applicable to legacies payable out of personal estate only (*Paget* v. *Foley*, 2 Bing. N. C. 679; *Sheppard* v. *Duke*, 9 Sim. 569; *Henry* v. *Smith*, 2 Dru. & War. 391; *O'Hara* v. *Creagh*, 1 Long. & T. 65). The section extended to a residue (*Prior* v. *Horniblow*, 2 Y. & Coll. 201); or share of residue (*Christian* v. *Devereux*, 12 Sim. 271); and to an annuity payable out of personalty (*Re Ashwell*, Johns. 112; see *Dower* v. *Dower*, 15 L. R. Ir. 264). As to whether such annuity unsecured by bond or covenant would have been extinguished by twenty years' non-payment, see Sugd. R. P. Stat. 138; Darb. & Bos. Stat. Lim. 126. Where the person liable for payment of a legacy and the person entitled to receive it are the same, no question of limitation could arise (*Binns* v. *Nicholls*, 2 Eq. 256; see *Blachford* v. *Worsley*, 27 Ch. D. 676). As to the effect of an order in lunacy in preserving the right to recover a legacy, see *Re Walker* (7 Ch. 120); and generally as to the running of time in the case of actions to recover legacies, see especially the cases as to a present right to receive a legacy, p. 182, *post*.

An executor who had possessed assets sufficient to pay a legacy, died leaving it unpaid, and having charged his real estates with his debts. The right to sue for the legacy as such having been barred, it could not be claimed under the charge of debts (*Piggott* v. *Jefferson*, 12 Sim. 26).

Presumption of payment of legacies before 3 & 4 Will. 4, c. 27.

Before this act lapse of time was frequently held a bar to a suit for a legacy upon the ground of raising a presumption of payment (*Higgins* v. *Crawford*, 2 Ves. jun. 572; *Pickering* v. *Stamford*, *Ib.* 582; *Jones* v. *Turberville*, *Ib.* 11; *Montressor* v. *Williams*, 1 Rop. on Leg. 792, 2nd ed.; *Campbell* v. *Graham*, 1 R. & M. 453; 2 Cl. & Finn. 429). For cases where the presumption was not raised, see *Shields* v. *Rice* (3 Jur. 970); *Lee* v. *Brown* (4 Ves. 362); *Prior* v. *Horniblow* (2 Y. & Coll. 206); *Ravenscroft* v. *Frisby* (1 Coll. 16).

3 & 4 Will. 4, c. 27, s. 40.

According to the law as it stood before 1879, sect. 25 of 3 & 4 Will. 4, c. 27, qualified sect. 40 where land was vested in trustees upon express trust to secure payment of debts (*Dillon* v. *Cruse*, 3 Ir. Eq. R. 70; *Hunt* v. *Bateman*, 10 Ir. Eq. R. 360; see *Dundas* v. *Blake*, 11 Ir. Eq. R. 138; *Heenan* v. *Bury*, 2 J. & Lat. 303); or of charges (*Young* v. *Waterpark*, 13 Sim. 204; 15 L. J. Ch. 63; *Blair* v. *Nugent*, 3 J. & Lat. 658; *Lawton* v. *Ford*, 2 Eq. 97; see *Burrowes* v. *Gore*, 6 H. L. C. 907); or of legacies or annuities (*Watson* v. *Saul*, 1 Giff. 188; *Ward* v. *Arch*, 12 Sim. 472). But now 37 & 38 Vict. c. 57, s. 10, provides that after 1st January, 1879, no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, except within the time within which the same would be recoverable if there were not any such trust (See *post*, p. 200).

Express trusts —of money payable out of land;

The case of sums of money secured by an express trust of personalty vested in a trustee, but which sums are not charged upon or payable out of land, appears to be unaffected by the last-mentioned section, and in the case of such sums it was held, previously to 37 & 38 Vict. c. 57, that the trust of personalty prevented the statute from operating as a bar (See *Playfair* v. *Cooper*, 17 Beav. 187; compare the Jud. Act, 1873, sect. 25 (2); *Banner* v. *Berridge*, 28 Ch. D. 262). It seems that the last-mentioned rule did not apply to the case where the trust of personalty was one imposed upon an executor (*Cadbury* v. *Smith*, 9 Eq. 42; *Scott* v. *Jones*, 4 Cl. & Fin. 382; *Re Stephens*, *Warburton* v. *Stephens*, 43 Ch. D. 45). But the executor may become a trustee (See *Charlton* v. *Durham*, 4 Ch. 433; Darb. & Bos. Stat. Lim. 119)*; *e.g.*, where he has severed a legacy (*Phillipo* v. *Munnings*, 2 M. & C. 309; explained in *Harcourt* v. *White*, 28 Beav. 309; *Tyson* v. *Jackson*, 30 Beav. 384); or has executed a declaration of trust (*Re Rowe*, *Jacobs* v. *Hind*, 60 L. T. 599). The executor, however, does not become a trustee by assenting to a legacy (*Ib.*)**; or by signing a residuary account (*Re Rowe*, 61 L. T. 581; see *Tyson* v. *Jackson*, 30 Beav. 384). The ordinary implied trust which affects personal estate held by an executor for the benefit of legatees does not prevent the running of time (*Re Davis*, *Evans* v. *Moore*, 1891, 3 Ch. 124).

—of money payable out of personalty.

* See Re Smith Henderson Roe v. Hickins 1 [illegible]

** See Lawrence Dixon v. Burford 19 Beav. 412 Re Smith Henderson Roe v. Hickins 42 Ch. D. 13

In the case of proceedings against trustees commenced after 1st January, 1890, regard must be had to sects. 1, 8, and 12 of the Trustee Act, 1888 (*post*, p. 231).

Trustee Act, 1888.

(*f*) The case of claims to the estates of persons dying intestate is dealt with by 23 & 24 Vict. c. 38, s. 13, which is not affected by 37 & 38 Vict. c. 57. The last-mentioned section is retrospective (*Willis* v. *Howe*, 43 L. T. 375; *Re Johnson*, *Sly* v. *Blake*, 29 Ch. D. 964), and applies to a partial as well as an entire intestacy (*Willis* v. *Howe*, *sup.*) An action was barred by this section in *Martin* v. *Beauchamp* (1888, W. N. 247). The section is no bar to a claim made by the next of kin to leaseholds of the intestate which had been retained by the administrator, who was also heir-at-law to the intestate, under a belief that the property was freehold (*Reed* v. *Fenn*, 35 L. J. Ch. 464). See also, as to lapse of time in the case of claims to an intestate's estate, *Cresswell* v. *Dewell* (4 Giff. 460); and the cases as to a present right to receive, below.

Claims to estates of intestates.

(*g*) It was doubted whether the words "*present right*," *&c.*, mean such a right as the party could render effectual, or whether the disability to proceed effectually either at law or in equity prevents the right from having accrued (See *Dillon* v. *Cruise*, 3 Ir. Eq. R. 82). This section appears to be capable of two interpretations; the one construing the terms within twenty years next after a present right to receive the same to mean, within twenty years after the first present right to receive the same accrued to any person; the other construing them to mean within twenty years next after a present right, established or accrued under any of the securities mentioned in this clause (2 Jebb & Symes, 109). It will be observed that the word "*first*" does not precede the word "accrued" in the 40th section as it does in the 2nd section, and the omission of that word may in many cases make a material difference in the construction of this section (*Ryan* v. *Cambie*, 2 Ir. Eq. R. 334). *Tindal*, C. J., said, "By

"Present right to receive."

3 & 4 Will. 4, c. 27, s. 40.

the words, 'present right to receive the same,' we understand an immediate right without waiting for the happening of any future event" (*Farran* v. *Beresford*, 10 Cl. & Fin. 334).

In the case of a legacy or share of an intestate's estate, the "present right to receive" means the right to receive from the executor or administrator, and does not accrue in the case of a reversionary or outstanding asset before the same has been actually recovered or reduced into possession by him (*Re Johnson*, *Sly* v. *Blake*, 29 Ch. D. 971; compare *Hornsey Board* v. *Monarch Society*, 24 Q. B. Div. 10). If the executor sells the reversionary interest, time runs from the receipt by him of the proceeds (*Ludlam* v. *Ludlam*, 63 L. T. 332). Accordingly claims made more than twenty years after the death were held not barred as to assets received by the defendant within twenty years before action, in the case of legatees claiming residue (*Adams* v. *Barry*, 2 Coll. 290); and next of kin claiming administration (*Re Johnson*, *Sly* v. *Blake*, 29 Ch. D. 964). See form of decree in *Larkins* v. *Phipps* (1873, W. N. 207). Where a legacy was bequeathed payable out of a reversionary fund, a present right to receive the legacy did not accrue until the reversion fell in (*Earle* v. *Bellingham*, 24 Beav. 448; compare *Blachford* v. *Worsley*, 27 Ch. D. 676). In the case of an immediate legacy, it was said that the right to receive it did not arise until twelve months after the testator's death (*Ib.*; see *Benson* v. *Maude*, 6 Mad. 15); but it seems that the statute would commence to run before that time (*Hornsey Board* v. *Monarch Society*, 24 Q. B. Div. 10).

Where a fund is set apart to answer an annuity, the statute cannot be set up against the residuary legatee on the death of the annuitant forty years afterwards; but it can as against a pecuniary legatee whose legacy was payable on the testator's death (*Bright* v. *Larcher*, 27 Beav. 130; 4 De G. & J. 608). Where a testator's estate is so heavily charged with mortgages that it is uncertain whether a legatee will ever be paid his legacy, it seems to be doubtful whether it can be said that he has a present right to receive it within this statute (*Ravenscroft* v. *Frisby*, 1 Coll. C. C. 22). Legatees whose legacies were charged on real estate, subject to prior charges, were not affected by lapse of time so long as any of the prior charges subsisted (*Faulkner* v. *Daniel*, 3 Hare, 212; see, however, *Proud* v. *Proud*, 11 W. R. 101).

Disabilities. The present right to receive must accrue to some persons capable of giving a discharge for or release of the same; and accordingly, where a legacy was bequeathed to an infant, time was held to run from the period when she attained her majority (*Piggott* v. *Jefferson*, 12 Sim. 26). When time has commenced to run against the right of a legatee to recover his legacy, and the executor is subsequently found a lunatic, time will nevertheless continue to run (*Boldero* v. *Halpin*, 19 W. 320).

Part payment. (*h*) The words in sect. 40, "by the person by whom the same shall be payable or his agent," apply equally to the making of a payment and the signing of an acknowledgment (*Chinnery* v. *Evans*, 11 H. L. C. 115, 124; see *Harlock* v. *Ashberry*, 19 Ch. Div. 539). In the latter case, it was said that the underlying principle of all statutes of limitation is that a payment to take a case out of the statute must be a payment by a person liable as an acknowledgment of right (*Ib.* p. 545). Compare the discussion of the corresponding New Brunswick statute (*Lewin* v. *Wilson*, 11 App. Cas. 639).

(i) Payment by a mere stranger will not do (*Homan* v. *Andrews*, 1 Ir. Ch. Rep. 106; *Linsall v. Benson*, 2 Bing. N. C. 245; *Chinnery* v. *Evans*, 11 H. L. C. 115). The person designated in this section as the person by whom money is payable must evidently mean, in the case of a claim by equitable lien, the person entitled to the land on which the charge is sought to be fixed. The money is payable by him in the only sense in which it is payable by any one. Unless he pay it he will lose his land; and it is obviously in that sense that the statute in such a case speaks of the money as payable (*Toft* v. *Stephenson*, 1 D. M. & G. 40; quoted in *Pears* v. *Laing*, 12 Eq. 54). Where a mortgagor assigned the equity of redemption, and subsequently paid interest, the payment did not prevent time running in favour of the assignee (*Newbould* v. *Smith*, 33 Ch. Div. 127;

3 & 4 Will. 4, c. 27, s. 40.

14 App. Cas. 423). The payment of interest on a mortgage, made by the receiver of the mortgagor, is a payment by an agent of the party liable within this section (*Chinnery* v. *Evans*, 11 H. L. C. 115). But the entering by the mortgagee into the receipt of the rents and profits of the mortgaged property is not a payment by the mortgagor, or by any one on his behalf (*Harlock* v. *Ashberry*, 19 Ch. Div. 539; *Cockburn* v. *Edwards*, 18 Ch. Div. 457, overruling on this point *Brocklehurst* v. *Jessop*, 7 Sim. 442; see *White* v. *Hillacre*, 3 Y. & Coll. 597; *Williams* v. *Welch*, 3 D. & L. 565). On the death of a mortgagor, his widow (who was entitled to dower) took possession of the mortgaged estate with the consent of the heir, and paid interest on the mortgage. It was held, that the heir was bound by the payments, the widow being regarded either as his agent, or else as a stranger, in which case the heir himself was barred (*Ames* v. *Mannering*, 26 Beav. 583). Where a mortgagor of a legacy, and another as surety, gave a bond to the mortgagee as a collateral security for the amount, payment of interest by the co-obligor and surety, who was also tenant for life of land on which the legacy was charged, kept the debt alive against the principal debtor, notwithstanding 19 & 20 Vict. c. 97, ss. 5, 14 (*Seager* v. *Aston*, 26 L. J. Ch. 302). Payment of interest by a tenant for life of an equity of redemption will keep the mortgage debt alive (*Barclay* v. *Owen*, 60 L. T. 222). But under special circumstances, payment of interest by a tenant for life was held not to bind the remainderman (*Beckett* v. *De la Cour*, 11 L. R. Ir. 187). Where a mortgagor assigned an annuity to the mortgagee to secure part of the mortgage debt, and the mortgagee received the annuity to an amount which exceeded that part and interest, the surplus was a payment sufficient to keep the mortgage debt alive (*Staley* v. *Barrett*, 26 L. J. Ch. 321). Where a testator devised part of his real estates charged with the payment of half his debts to A., and the other part charged with the payment of the other half of his debts to B., payments by A. of interest on a bond debt of the testator did not keep alive the debt against B. (*Dickenson* v. *Teasdale*, 1 D. J. & S. 52). If estates A., B., and C. are included in one mortgage, and payments of interest are made out of the rents of A., these payments are sufficient to keep alive the remedy of the mortgagee against estates B. and C. (*Chinnery* v. *Evans*, 11 H. L. C. 115). See also *Pears* v. *Laing*, 12 Eq. 41; and the cases quoted under 3 & 4 Will. 4, c. 42, s. 5, *post*, p. 205.

Part-payment by the administrator out of a particular asset which has been recovered by him within the statutory period, will not revive the right to sue for general administration, which was at the time of payment barred (*Re Johnson, Sly* v. *Blake*, 29 Ch. D. 964). Payment of interest under an order made in a foreclosure action to which infants were parties was considered as having been made without prejudice to their rights (*Thwaites* v. *M'Donogh*, 2 Ir. Eq. R. 97).

ACKNOWLEDGMENTS IN WRITING.

(*i*) Under the 40th section, the acknowledgment of the right must be given in writing, signed by the person by whom the same shall be payable or his *agent*, to the person entitled or his *agent*. Under the 42nd section, the acknowledgment must be given to the party entitled to the interest or *his agent*, signed by the person by whom the same was payable or *his agent*. The words of these two sections being nearly the same, the decisions as to acknowledgments under both these sections are arranged in one note. As to acknowledgments under the 14th and 28th sections, see *ante*, pp. 139, 160.

Who is agent.

In reference to this and the other sections, where the acknowledgment to or by the party interested or *his agent* is made sufficient (see *ante*, p. 139), it will be necessary to consider who is in law the agent and by what acts he is so constituted, where no direct proof of agency is produced. An agent need not be authorized in writing (*Coles* v. *Trecothick*, 9 Ves. 250). Wherever a specific appointment of an agent is necessary, a subsequent recognition of acts done by him in that capacity is better even than a previous authority (*James* v. *Bright*, 5 Bing. 533). When one means to act as agent for another, a subsequent ratification by the other

3 & 4 Will. 4, c. 27, s. 40.

is always equivalent to a prior command (*Foster* v. *Bates*, 12 M. & W. 233). See *Trulock* v. *Robey* (12 Sim. 407; *ante*, p. 161), where it was said: "It is not necessary to make a person an agent, that he should have an actual authority to act; it is quite sufficient that the grandfather acted as the agent of his grandchild; and that she, when she came of age, adopted what he had done on her behalf." And see generally, as to the extent and nature of an agent's authority, *Pole* v. *Leask* (28 Beav. 562, affirmed in H. L. 9 Jur. N. S. 829). In *Toft* v. *Stephenson* (1 D. M. & G. 28), an inquiry was directed as to the agency of an attorney who had acknowledged a debt.

The principle of some of the cases, as *Whippy* v. *Hillary* (3 B. & Ad. 399), and *Routledge* v. *Ramsay* (8 Ad. & Ell. 221), decided upon the statute 9 Geo. 4, c. 14, although in language different from that of 3 & 4 Will. 4, c. 27, ss. 40, 42, may be applicable to some cases arising under the latter statute (*Holland* v. *Clark*, 1 Y. & Coll. N. C. 169). See the cases under 9 Geo. 4, c. 14, quoted *post*, pp. 220 *et seq.*

By whom an acknowledgment may be made.

All that the act of 3 & 4 Will. 4, c. 27, ss. 40, 42, requires is, that *some* acknowledgment of the right to the sum claimed shall have been given in writing, signed by the person who represents the estate out of which it is payable, or by his agent. Thus, where an estate was devised to a trustee in trust to sell and pay the testator's debts, and subject thereto in trust for A., an acknowledgment of a debt in writing, *signed by the trustee* or his agent, was held to be sufficient to preserve the creditor's right of suit for twenty years after the acknowledgment was given; but such an acknowledgment will not impose on the trustee any personal liability to pay the debt (*St. John* v. *Boughton*, 9 Sim. 219). An acknowledgment signed by the attorney of the trustees of the will of a deceased purchaser of land who had entered before payment of purchase-money was sufficient (*Toft* v. *Stephenson*, 1 D. M. & G. 28). An acknowledgment by a mortgagor of more than six years' arrears of interest being due upon a first mortgage, does not preclude a *puisne* mortgagee from relying on the statute (*Bolding* v. *Lane*, 1 D. J. & S. 122; see the remarks on this decision in *Chinnery* v. *Evans*, 11 H. L. Cas. 115). In *Re Fitzmaurice* (15 Ir. Ch. R. 445), where the tenant for life of the equity of redemption in a mortgaged estate gave a written acknowledgment to the mortgagee, it was held that the mortgagee's right to recover more than six years' interest was kept alive against the remainderman (See *Beckett* v. *De la Cour*, 11 L. R. Ir. 187; and compare *Gregson* v. *Hindley*, 10 Jur. 383; *Barclay* v. *Owen*, 60 L. T. 222). An acknowledgment by a debtor given after he has transferred his property for the benefit of creditors is not sufficient (*Lyall* v. *Fluker*, 1873, W. N. 208).

To whom.

In admitting acknowledgments, under the 40th section, to the person entitled or his agent, the court has not restricted itself within narrow limits. If it be made in a schedule, affidavit, or answer, it is sufficient, although it may be said that in those cases it is made to the court and not to the party. *Sugden*, L. C., thought the decisions right, and that they proceeded upon a *liberal* but yet a fair and just construction of the statute (*Blair* v. *Nugent*, 3 J. & Lat. 677). An acknowledgment in an answer in Chancery was sufficient (*Ib.* 673). In a case where it was contended that an acknowledgment by the debtor to a third person took a case out of this section, *Alderson*, B., said that will not do; there must be that from which a continuing contract may be inferred. If a man were to write a letter to a third person acknowledging the debt, it would not take it out of the statute. Lord Tenterden's Act (9 Geo. 4, c. 14) explains that (*Grenfell* v. *Girdlestone*, 2 Y. & Coll. 676). In order than an acknowledgment may have the effect of taking a demand out of the operation of the 42nd section of this statute, the acknowledgment must appear to have been made with a view of rendering the party making it liable to the demand, and it must have been made to the party entitled to make the demand (See *Grenfell* v. *Girdlestone*, 2 Y. & Coll. 676). So letters written by one of two executors to the plaintiff were held not a sufficient acknowledgment, because they had been written by the party not for the purpose

of charging himself, but of throwing the burden of payment on the co-executor; and it was said that it was questionable whether they would avail the plaintiff, inasmuch as they were written before the plaintiff had taken out administration to his wife (*Holland* v. *Clark*, 1 Y. & Coll. C. C. 151).

3 & 4 Will. 4, c. 27, s. 40.

A correspondence between the treasurer of a harbour company and a person holding a mortgage on the works and tolls of the company was a sufficient acknowledgment (*Jortin* v. *S. E. R. Co.*, 6 D. M. & G. 270). A written proposal of terms, adding, "This being done, it is hoped the judgment against B. will be satisfied," was a sufficient acknowledgment of the judgment debt (*Vincent* v. *Willington*, 1 Long. & T. 456). It seems that an affidavit made in the suit may be a sufficient acknowledgment within the 42nd section of this act (*Tristram* v. *Harte*, 1 Long. & T. 186). An acknowledgment of a debt in the will of the debtor is sufficient (*Millington* v. *Thompson*, 3 Ir. Ch. R. 236). The report of a master on a reference as to incumbrances, finding the existence of a debt, was not a sufficient acknowledgment (*Hill* v. *Stanwell*, 2 Ir. L. R. 302). In this case the creditor who was held to be barred was not a party to the suit (See *Wrixon* v. *Vize*, 3 Dru. & War. 123). An admission of debt in an insolvent's schedule has been held to be a sufficient acknowledgment within sect. 40 (*Barrett* v. *Birmingham*, 4 Ir. Eq. R. 537; *Morrough* v. *Power*, 5 Ir. L. R. 494; *Hanan* v. *Power*, 8 Ir. L. R. 505).

What amounts to an acknowledgment.

Master's report.

Insolvent's schedule.

Sect. 40 operates only as a suspension of the remedy and not as an extinguishment of the right. So an acknowledgment after the statutory period has elapsed is sufficient (*Harty* v. *Davis*, 13 Ir. L. R. 23; see *Waring* v. *Waring*, 5 Ir. Ch. R. 6; but see *contra*, *Gregson* v. *Hindley*, 10 Jur. 383; *Homan* v. *Andrews*, 1 Ir. Ch. R. 106).

When must the acknowledgment under sect. 40 be made.

Arrears of Dower.

Time of Limitation fixed Six Years.

41. No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit (*l*).

No arrears of dower to be recovered for more than six years.

(*l*) In equity, as at law, there was before this act no limitation to a claim of the *arrears* of dower (*Oliver* v. *Richardson*, 9 Ves. 222; see *Mordaunt* v. *Thorold*, 3 Lev. 375; *Curtis* v. *Curtis*, 2 Br. C. C. 620; *Dormer* v. *Fortescue*, 3 Atk. 130; *Tilley* v. *Bridger*, 2 Vern. 519; Prec. in Ch. 252; *Wakefield* v. *Child*, 1 Fonbl. Eq. 159, n.; 3 & 4 Will. 4, c. 105, for amending the law of dower, *post*; *Bamford* v. *Bamford*, 5 Hare, 203; and *Marshall* v. *Smith*, 5 Giff. 37).

Arrears of Rent or Interest.

Time of Limitation fixed Six Years.

42. No arrears of rent (*m*) or of interest in respect of any sum of money charged upon or payable out of any land or rent (*n*), or in respect of any legacy (*o*), or any damages, in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due (*p*), or next after an acknowledgment of the same in writing shall have been given

No arrears of rent or interest to be recovered for more than six years.

3 & 4 Will. 4, c. 27, s. 42.

to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent (*q*): provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years (*r*).

How far this section retrospective.

(*m*) As to how far this section is retrospective, see *Paddon* v. *Bartlett* (3 Ad. & Ell. 884); *Peyton* v. *M'Dermot* (1 Dru. & Wal. 198); *Vincent* v. *Willington*, (1 Long. & T. 456).

Arrears of rent.

By statute 21 Jac. 1, c. 16, s. 3, actions of debt for arrearages of rent must have been commenced and sued within six years after the cause of such actions had accrued. This statute was confined to actions for arrears of rent upon a demise without deed, and did not extend to cases of rent reserved by specialty (*Freeman* v. *Stacey*, Hutton, 109).

Old law.

Tithe rentcharge and tithes.

Sect. 42 was held in Ireland to include tithe rentcharge (*Ecclesiastical Commrs.* v. *Sligo*, 5 Ir. Ch. R. 46). Only two years' arrears of an ordinary tithe rentcharge can be recovered (54 Vict. c. 8, s. 10, sub-s. 2). As to uncommuted tithes, see 53 Geo. 3, c. 127, and 5 & 6 Will. 4, c. 74 (both repealed except as to uncommuted tithes by 50 & 51 Vict. c. 59, and 51 & 52 Vict. c. 57); *Robinson* v. *Purday* (16 M. & W. 11).

Rent reserved.

So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under this act the amount to be recovered is limited to six years (*Archbold* v. *Scully*, 9 H. L. C. 360), this limit applying in all actions for arrears of rent other than actions on a specialty. In an action on a specialty for arrears of rent, 3 & 4 Will. 4, c. 42, s. 3, applied, and twenty years' arrears were recovered (*Paget* v. *Foley*, 2 Bing. N. C. 679; *Hunter* v. *Nockolds*, 2 D. M. & G. 592, *post*, p. 187). See now 37 & 38 Vict. c. 57, s. 8 (*post*, p. 198), and *Darley* v. *Tennant* (53 L. T. 257). In the case of a lessee who has forfeited his lease by non-payment of rent, the question as to what amount of arrears he will be required to pay to entitle himself to relief in equity, or to have proceedings stayed at law, is discussed (Darb. & Bos. Stat. Lim. 153—156). For the period during which an account of mesne rents will be directed in equity, see *post*, p. 190. The words "arrears of rent" in this section were held to include a portion charged by will upon land, and payable by periodical instalments (*Uppington* v. *Tarrant*, 12 Ir. Ch. R. N. S. 268, 269).

Fee-farm rent.

Arrears of a fee-farm rent were held to be not recoverable for more than six years (*Humfrey* v. *Gery*, 7 C. B. 567).

Annuities.

The 2nd section of the act provides for the case where the right or title to an annuity is disputed (See *ante*, p. 112). The 42nd section provides for the case where the title to the annuity is *not* disputed, but the distress is made for the arrears due (*James* v. *Salter*, 3 Bing. N. C. 552). An annuity charged on land by will comes within the meaning of the word rent in the 42nd section, as explained by the interpretation clause of this act, *ante*, p. 102, and therefore no more than six years' arrears are recoverable (*Ferguson* v. *Livingston*, 9 Ir. Eq. R. 202; *Francis* v. *Grover*, 5 Ha. 39). In *Wheeler* v. *Howell* (3 K. & J. 189), arrears of an annuity charged on a reversionary interest in land were held to be recoverable more than six years after the same became payable. See, however, *Vincent* v. *Going* (1 J. & Lat. 697); *Sinclair* v. *Jackson* (17 Beav. 405). Under

3 & 4 Will. 4, c. 42, s. 3, it was held that arrears of an annuity charged on land and secured by deed might, in an action on the specialty, be recovered for twenty years, notwithstanding 3 & 4 Will. 4, c. 27, s. 42 (*Strachan* v. *Thomas*, 12 Ad. & El. 536). See now *Sutton* v. *Sutton*, 22 Ch. D. 511; *Fearnside* v. *Flint*, 22 Ch. D. 579; *Hughes* v. *Coles*, 27 Ch. D. 231; *post*, pp. 199, 201). 3 & 4 Will. 4, c. 27, s. 42.

An annuity bequeathed out of personalty is not within this section (*Rock* v. *Callen*, 6 Ha. 531; *Re Ashwell*, Johns. 112). Lord *St. Leonards* considered that the words in this section "arrears of interest in respect of any legacy" might well be held to include an annuity which is payable out of personalty and no charge upon the land (R. P. Stat. 138).

(*n*) "Sect. 40 enumerates mortgages, liens, judgments; but sect. 42 adopts the previous general description of money 'charged upon or payable out of land,' a description which includes every security, omitting the enumeration which it was unnecessary to repeat. The enactments are identical. It is impossible to draw any distinction between the sums of money mentioned in the one section and in the other" (Sugd. R. P. Stat. 139; see *Bolding* v. *Lane*, 4 Giff. 574). Arrears of interest.

A mortgagee of canal works was limited under this section to six years' arrears (*Hodges* v. *Croydon Canal Co.*, 3 Beav. 86); and a mortgagee of a reversionary interest in moneys representing the proceeds of lands devised on trust for sale was similarly limited, the mortgagor's property being "money payable out of land" within this section (*Bowyer* v. *Woodman*, 3 Eq. 313). But a mortgagee of turnpike tolls (which are not within the act), were not limited to six years' arrears (*Mellish* v. *Brooks*, 3 Beav. 22). Nor was any such limit applied to the case of a mortgagee of a reversionary interest in trust funds invested on mortgage (*Smith* v. *Hill*, 9 Ch. D. 143; see *Jordan* v. *Young*, 1878, W. N. 229); or in pure personalty (*Mellersh* v. *Brown*, 45 Ch. D. 225, a foreclosure action); nor to the case of a mortgage of a reversionary interest in funds in court, the mortgage containing a covenant that interest in arrear should be capitalized (*Clark* v. *Henderson*, 14 Ch. D. 348). (1) On mortgages.

In some of the cases in England under 3 & 4 Will. 4, c. 27, a difficulty arose in consequence of 3 & 4 Will. 4, c. 42, s. 3 (p. 202, *post*); and the courts treated the provision of the second act as an exception out of the enactments of the former (See *Paget* v. *Foley*, 2 Bing. N. C. 690; *Strachan* v. *Thomas*, 12 Ad. & E. 558). In *Du Vigier* v. *Lee* (2 Ha. 326), it was held that a mortgagee, whose mortgage debt was secured also by a bond and covenant, was entitled to recover twenty years' arrears of interest in a foreclosure suit. This decision was, however, overruled by Lord *Cottenham* in *Hunter* v. *Nockolds* (1 Mac. & G. 640; 19 L. J. Ch. 177), where he laid down that the effect of the conjoint enactment is, that no more than six years' arrears of rent or interest in respect of any sum charged upon or payable out of any land or rent shall be recovered by way of distress, action, or suit, other than and except in actions on covenant or debt on specialty, in which case the limitation is twenty years (See *Harrison* v. *Duignan*, 2 Dru. & War. 298; *Hughes* v. *Kelly*, 3 Dru. & War. 482). Compare *Sutton* v. *Sutton* (22 Ch. Div. 511), and *Fearnside* v. *Flint* (*Ib.* 579), cases under 37 & 38 Vict. c. 57, s. 8 (substituted for sect. 40 of 3 & 4 Will. 4, c. 27), in which the more recent statute was held to control 3 & 4 Will. 4, c. 42, s. 3. See *post*, p. 199. Cap. 27, sect. 42, and cap. 42, sect. 3. *Hunter* v. *Nockolds.*

After *Hunter* v. *Nockolds* it was held, in several cases, that in an action to foreclose real estate, a mortgagee could not recover more than six years of interest, although the mortgage debt was secured by covenant (*Sinclair* v. *Jackson*, 17 Beav. 405; *Shaw* v. *Johnson*, 1 Dr. & Sm. 412; *Round* v. *Bell*, 30 Beav. 121). It made no difference that the property mortgaged was reversionary (*Vincent* v. *Going*, 1 J. & Lat. 697; *Sinclair* v. *Jackson*, 17 Beav. 405; approved by *Hall*, V.-C., *Smith* v. *Hill*, 9 Ch. D. 143; see *contra*, *Wheeler* v. *Howell*, 3 K. & J. 198; *Jordan* v. *Young*, 1878, W. N. 229). As to the interest recoverable in foreclosing personal estate, see *Mellersh* v. *Brown* (45 Ch. D. 225). Arrears of interest recoverable in foreclosing.

In redemption suits a mortgagor can only redeem on payment of all In redeeming.

3 & 4 Will. 4, c. 27, s. 42.

arrears of interest, even exceeding six years (*Edmunds* v. *Waugh*, 1 Eq. 421; see *contra*, *Mason* v. *Broadbent*, 33 Beav. 301). On selling land under his power a mortgagee can retain, out of money in his hands, more than six years' arrears (*Re Marshfield*, *Marshfield* v. *Hutchins*, 34 Ch. D. 721). See in the case of personal estate (*Re Hancock*, *Hancock* v. *Berry*, 59 L. T. 199). And where the executors of a mortgagee sold land and paid proceeds into court in a suit to administer the mortgagee's estate, the mortgagee's representatives were held, on their petition, entitled to be paid more than six years' arrears (*Edmunds* v. *Waugh*, 1 Eq. 418). Arrears, however, were limited to six years in other cases where the mortgaged property was represented by money in court, and petitions were presented for payment out, whether by mortgagee (*Re Stead*, 2 Ch. D. 713) or mortgagor (*Re Slater*, 11 Ch. D. 227).

Tacking.

In *Elvy* v. *Norwood* (5 De G. & S. 240), the heir of a mortgagor who had covenanted for himself and his heirs to pay the mortgage debt and interest, could not redeem without paying twenty years' arrears of interest, as the mortgagee was entitled to tack the arrears to the debt as against the heir. Since 3 & 4 Will. 4, c. 104, a mortgagee of freeholds may tack his simple contract debt in a foreclosure suit as against the heir of the mortgagor (*Thomas* v. *Thomas*, 22 Beav. 341). As to a mortgagee of copyholds, see *Rolfe* v. *Chester* (20 Beav. 610). The question of tacking must be raised on the pleadings (*Sinclair* v. *Jackson*, 17 Beav. 405).

(2) On judgments.

Debts secured by judgments are sums of money charged upon or payable out of land within the meaning of this section of the act, and only six years' arrears of interest can be recovered for such debts. In relation to the Statutes of Limitations, the rights of judgment creditors for arrears of interest, as against the real and personal estates of their debtor, are equal and co-extensive. As far as the bar of the statute operates for the protection of the real estate, to the same extent the personal estate is protected; the statute 3 & 4 Vict. c. 105 (Ireland), s. 26, enacts, that every judgment debt due upon any judgment not confessed or recovered for any penal sum for securing principal and interest shall carry interest, &c. The interest thus given is subject to the limitations of the statute 3 & 4 Will. 4, c. 27, s. 42 (*Henry* v. *Smith*, 2 Dru. & War. 381). Where the interest as well as the principal was secured by the judgment in Ireland, twenty years' arrears could be recovered in an action on the judgment (16 & 17 Vict. c. 113, s. 20). A judgment creditor of a tenant in fee, in remainder after an estate for life, is not entitled to recover out of the lands arrears of interest which accrued due during the existence of the tenancy for life, and more than six years before the commencement of the suit (*Vincent* v. *Going*, 1 J. & Lat. 697; see *Wheeler* v. *Howell*, 3 K. & J. 198; *Sinclair* v. *Jackson*, 17 Beav. 405).

1 & 2 Vict. c. 110, ss. 17, 18.

Formerly a judgment did not carry interest, but interest might be recovered at law, in the shape of damages, by an action on the judgment (*Gaunt* v. *Taylor*, 3 M. & K. 302). Now by 1 & 2 Vict. c. 110, ss. 17, 18 (*post*), every judgment debt carries interest at the rate of 4*l.* per cent. from the time of entering up the judgment until the same is satisfied. As to interest on debts generally, see p. 191, *post*.

(3) On unpaid purchase-money.

A contract for the sale of an estate, made in March, 1811, stipulated that the purchase-money should be paid on the 13th May following. The money was not paid, but the purchaser entered into and continued in possession. In 1849, a bill was filed to enforce the vendor's lien on the estate for the purchase-money. It was held that the principal had not become payable, as no title had as yet been shown by the vendor, and that the interest could not be due within sect. 42 until the principal money became payable. *Turner*, L. J., said that the interest became due upon completion, although it was to be calculated from the inception of the contract (*Toft* v. *Stephenson*, 5 D. M. & G. 735).

(4) On charges.

On a reference as to incumbrances on an estate, a claim for a sum charged thereon, carried in under such inquiry by one not a party to the suit, was held to take the charge as to the interest out of this section, and

the incumbrancer was entitled to arrears of interest for six years antecedent to the claim (*Greenway* v. *Bromfield*, 9 Hare, 201). 3 & 4 Will. 4, c. 27, s. 42.

(*o*) Arrears of interest on legacies can only be recovered for six years, calculated from the filing of the bill (*Hughes* v. *Williams*, 3 Mac. & G. 683; *Chappell* v. *Rees*, 1 D. M. & G. 393; *Re Walker*, 7 Ch. 120; see *Thompson* v. *Eastwood*, 2 App. Cas. 215). But where the assets consisted of a reversion, and for the benefit of the estate realization was delayed, legatees received interest from the expiration of one year from the death of testatrix, a period exceeding six years (*Blachford* v. *Worsley*, 27 Ch. D. 676). As to interest on legacies, see *Lord* v. *Lord* (2 Ch. 782); *Re Richards* (8 Eq. 119); and as to the time from which such interest runs, see *Re Waters* (42 Ch. D. 517); *Re Bignold* (45 Ch. D. 496). (5) On legacies.

(*p*) According to the law as it stood before 1879, it was settled that where there was an express trust sect. 25 of 3 & 4 Will. 4, c. 27, applied, and the claim was not barred by sect. 42. So held in the case of annuities secured on realty (*Ward* v. *Arch*, 12 Sim. 472; *Mansfield* v. *Ogle*, 24 L. J. Ch. 700; *Cox* v. *Dolman*, 2 D. M. & G. 592; *Snow* v. *Booth*, 8 D. M. & G. 69; *Lewis* v. *Duncombe*, 29 Beav. 175; *Knight* v. *Bowyer*, 2 De G. & J. 421; see *Round* v. *Bell*, 30 Beav. 121; *Cunningham* v. *Foot*, 3 App. Cas. 974); in the case of an annuity payable out of personalty (*Playfair* v. *Cooper*, 17 Beav. 187); in the case of a mortgage secured by a term in a trustee (*Shaw* v. *Johnson*, 1 Dr. & Sm. 412); in the case of a simple contract debt charged by will on real estate (*Blower* v. *Blower*, 7 W. R. 101); and in the case of interest on a legacy directed to be raised by a sale of realty (*Gough* v. *Bult*, 16 Sim. 323; *Kellett* v. *Kellett*, I. R. 5 Eq. 298; *Thompson* v. *Eastwood*, 2 App. Cas. 215). But now by 37 & 38 Vict. c. 57, s. 10 (*post*, p. 200), an express trust does not prevent time running in case of arrears of rent or of interest in respect of any money or legacy charged upon or payable out of any land or rent. Express trusts.

In the case of proceedings against trustees commenced after 1st January, 1890, regard must now be had to the Trustee Act, 1888, ss. 1, 8 and 12, *post*, p. 231. Trustee Act, 1888.

(*q*) See the cases as to acknowledgments, *ante*, p. 183. In *Bolding* v. *Lane* (1 D. J. & S. 122), it was said that the words in this section, "by whom the same was payable," do not denote merely the persons who are legally bound by contract to pay the interest, but all the persons against whom the payment of such arrears might be enforced. Acknowledgments.

(*r*) The exception in this clause of the act is, where a man has an estate and there are several incumbrances on it, and one of the incumbrancers enters into possession, the right of the subsequent creditor to recover interest during the full period of such possession, although that period may exceed six years, is saved, provided he come within one year after the determination of that possession. A judgment creditor who has the first security upon the estate, and gets into possession, is a prior incumbrancer in possession within this proviso (*Henry* v. *Smith*, 2 Dru. & War. 390). The prior incumbrance referred to in this exception is one which affects the estate or interest upon which the subsequent incumbrance is also a charge (*Vincent* v. *Going*, 1 J. & Lat. 697). A., being entitled to a mortgage on certain lands vested in a trustee for him, agrees that a subsequent annuity creditor should have precedence over his debt, and joins in a demise of the lands to a trustee for the annuitant, but his trustee who had the legal estate did not join in the demise. A. remains in possession until the death of the grantor of the annuity. The annuitant was held not debarred from recovering more than six years' arrears, as he fell within the terms of the exception (*Drought* v. *Jones*, 2 Ir. Eq. R. 303, "a doubtful authority"; Sugd. R. P. Stat. 146, n.) See also *Montgomery* v. *Southwell*, 2 Con. & Law. 263. Possession of prior incumbrancer.

The nature and object of this exception is explained by Lord *Westbury* in *Chinnery* v. *Evans* (11 H. L. Ca. 115). There a mortgage having been created of certain estates, the mortgagor having subsequently sold the equity of redemption and assigned some outstanding charges to a trustee for the purchaser, and the purchaser having entered into possession, the

3 & 4 Will. 4, c. 27, s. 42.

land was not in the possession of a *bonâ fide* incumbrancer prior to the mortgage within this exception.

Disabilities.

The 42nd section contains no exception in favour of persons under disabilities; and if the act be construed literally, infants and lunatics, and other persons under disabilities, will only be enabled to recover six years' interest. "Even as to legacies charged upon real estates, there is no saving as to arrears of interest for infancy, or the like. In the case of younger children's portions, although by way of legacy, the interest is often allowed to remain in arrear for several years, for the accommodation of the head of the family; and the statute will, unless it be modified, often bar a just claim unnecessarily, and ultimately injure the person whom it was intended to benefit; and whether a legacy be payable out of real or personal estate, of course interest upon it, where it carries interest, ought not to be barred during the infancy of the legatee" (Sugd. V. & P. 638, 11th ed.)

ACCOUNT OF RENTS IN EQUITY.

A suit for the recovery of mesne rents and profits in equity, was not a suit for the recovery of arrears of rent within sect. 42 (*Hicks* v. *Sallitt*, 3 D. M. & G. 816). On the question how far the account was to be carried back in such suits, the following distinctions were laid down. In cases of express trusts, it was said that the Statutes of Limitation would afford no defence, and that an account would be directed from the accruer of the plaintiff's title (*Sturgis* v. *Morse*, 3 De G. & J. 1; *Wright* v. *Chard*, 4 Drew. 673; *Mathew* v. *Brise*, 14 Beav. 341; see now 37 & 38 Vict. c. 57, s. 10, *post*, p. 200). Where there is no express trust, but the person in possession has had notice of the plaintiff's title, it was formerly held, that as at law more than six years' mesne profits could not be recovered, so in equity the account would not be carried back beyond six years from the filing of the bill (*Reade* v. *Reade*, 5 Ves. 744; *Harmood* v. *Oglander*, 6 Ves. 215); and in *Hicks* v. *Sallitt* (3 D. M. & G. 782), where the defendant was a purchaser for value, with notice of the plaintiff's title, *Turner*, L. J., thought that the statute 21 Jac. 1, c. 16, might be applicable, by analogy to the action of account at law. An account for six years was granted in *Hickman* v. *Upsall* (4 Ch. Div. 144); see *Burnell* v. *Burnell* (11 Ch. D. 213). But, "where there is no trust, no fraud, no infancy, no suppression, where, in short, there is a mere *bonâ fide* adverse possession, it is not according to the course of the court to carry back the account of rents beyond the filing of the bill" (*Hicks* v. *Sallitt*, 3 D. M. & G. 782, where Lord *Cranworth* refers to the older cases; see *Thomas* v. *Thomas*, 2 K. & J. 79; *Penny* v. *Allen*, 7 D. M. & G. 409; *Morgan* v. *Morgan*, 10 Eq. 99). The principle of the rule, however, is that in order to disentitle the plaintiff to an account of rents before the institution of the suit, there must be neglect in bringing the suit (*Hickman* v. *Upsall*, 4 Ch. D. 148).

1. From accruer of plaintiff's title.

2. For six years.

3. From filing of bill.

Infancy of plaintiff.

Where the plaintiff has been under the disability of infancy during the possession of the defendant, the latter is regarded as a bailiff for the former, and an account will be directed during the period of infancy (*Blomfield* v. *Eyre*, 8 Beav. 250; *Nanney* v. *Williams*, 22 Beav. 452; *Schroder* v. *Schroder*, Kay, 591; *Pascoe* v. *Swan*, 27 Beav. 508; *Pelly* v. *Bascombe*, 4 Giff. 390; *Thomas* v. *Thomas*, 2 K. & J. 79; *Wall* v. *Stanwick*, 34 Ch. D. 763; see the older cases discussed, *Howard* v. *Shrewsbury*, 17 Eq. 399). But the bill must be filed within six years after the plaintiff comes of age (*Lockey* v. *Lockey*, 1 Eq. Ca. Abr. 304, pl. 10). It has been laid down in Ireland, that a person entering on the estate of an infant, whether the infant has been actually in possession or not, will be fixed with a fiduciary position towards the defendant, (1) when he is the infant's natural guardian; (2) when he is so connected by relationship or otherwise with the infant as to impose upon him a duty to protect, or at least not to prejudice, the infant's rights; (3) when he takes possession with knowledge or express notice of the infant's rights (*Quinton* v. *Frith*, I. R. 2 Eq. 396). See cases quoted *ante*, pp. 117, 118.

Laches.

Where the plaintiff has been guilty of laches an account will only be

directed from the filing of the bill (*Dormer* v. *Fortescue*, 3 Atk. 130; *Pettiward* v. *Prescot*, 7 Ves. 541; *Pickett* v. *Loggan*, 14 Ves. 215; *Schroder* v. *Schroder*, Kay, 591). The right to an account, even in the case of mines, may be lost by laches (*Parrott* v. *Palmer*, 3 M. & K. 632). A party's right to an account may also be restricted in consequence of laches in not finding out a mistake earlier by the means which were in his power (*Denys* v. *Shuckburgh*, 4 Y. & Coll. 42). 3 & 4 Will. 4, c. 27, s. 42.

There is no fixed limit of time in directing an account against the trustee of a charity. In each case the court is bound by the particular circumstances (*A. G.* v. *Exeter*, Jac. 448). An account against a corporation for a breach of trust in receiving charity funds was not confined either to the filing of the information, or to six years before that time (*A. G.* v. *Brewers' Co.*, 1 Mer. 495; *A. G.* v. *Stafford*, 1 Russ. 547). And an account of the rents and profits of a charity estate was decreed for a period of 200 years against the corporation, who, by their answer, admitted the receipt, and stated that they had from time to time debited themselves in their books with the amount (*A. G.* v. *Exeter*, Jac. 443; 2 Russ. 362; 3 Russ. 395; *A. G.* v. *Caius College*, 2 Keen, 110; *A. G.* v. *Pretyman*, 4 Beav. 462; see now 37 & 38 Vict. c. 57, s. 10, *post*, p. 200). Where, however, charitable trustees have acted honestly, though mistakenly, the court will not make them account for rents received prior to the filing of the information (*A. G.* v. *Wax Chandlers' Co.*, L. R. 6 H. L. 14; *A. G.* v. *Christchurch*, 2 Russ. 324). When the court limits an account of the rents and profits of charity estates to the time of filing the information, or to six years before that date, it does not act with reference to the statute. The court proceeds upon the principle that it will not deal harshly with men, who, meaning to discharge their duty faithfully, have nevertheless mistaken it (*A. G.* v. *Exeter*, 2 Russ. 367). The principles upon which the court acts in taking an account against corporations who are trustees of charities, and have misapplied the funds, are discussed in *A. G.* v. *Newbury* (3 M. & K. 647); see *A. G.* v. *Davis* (18 W. R. 1132). In case of charities.

INTEREST ON DEBTS GENERALLY.

At common law, independently of statute, it was the general rule that interest was not payable on any debts, unless expressly agreed on, or unless a promise could be implied from the usage of trade or other circumstances (*Higgins* v. *Sargent*, 2 B. & C. 348; *Rhodes* v. *Rhodes*, Johns. 653; *L. C. & D. R. Co.* v. *S. E. R. Co.*, 1892, 1 Ch. 140). Interest can be demanded only in virtue of a contract expressed or implied, or by virtue of the principal sum of money having been wrongfully withheld (*Caledonian R. Co.* v. *Carmichael*, L. R. 2 H. L. Sc. 66). An agreement was not implied from an account charging interest remaining unquestioned (*Re Edwards, Williams* v. *Trench*, 61 L. J. Ch. 22; 65 L. T. 453). Unless by express agreement, interest can only be claimed on a bill or note as damages (*Ex p. Charman*, 1887, W. N. 184; see *Lawrence* v. *Willcocks*, 1892, 1 Q. B. 696). Interest on debts at common law.

3 & 4 Will. 4, c. 42, enacts (sect. 28) that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demandant shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that the interest shall be payable in all cases in which it is now payable by law. The act provides further (sect. 29), that the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions of policies of assurance made after the passing of this act. 3 & 4 Will. 4, c. 42, ss. 28, 29.

3 & 4 Will. 4, c. 27, s. 42.

The statute was declaratory of the law before the statute (*Webster* v. *British, &c. Co.*, 15 Ch. Div. 173, 178). Under both sect. 28 and sect. 29, any interest given is by way of damages (*Ib.* 174, 175).

Sect. 28.

The act gives the jury a discretion, "if they shall think fit" (*Attwood* v. *Taylor*, 1 M..& G. 322; *A. G.* v. *Ludlow*, 1 Hall & T. 219). And interest will not be given where there has been no default on the part of the person against whom interest is claimed (*A. G.* v. *Ludlow*, *sup.*; *Webster* v. *British, &c. Co.*, *sup.*). There must be either a written demand or a written instrument under which the sum is payable (*Harper* v. *Williams*, 4 Q. B. 219). A written application for a loan was not such a written instrument (*Taylor* v. *Colt*, 3 H. & C. 452; 13 W. R. 78). The instrument must ascertain the sum and the time (*L. C. & D. R. Co.* v. *S. E. R. Co.*, 1892, 1 Ch. 144); and where the instrument makes the day of payment depend upon a future contingent event, such a time is not a time certain within the act (*Ib.* 148). Interest was allowed where the instrument gave data for ascertaining the amount, and a dispute as to such amount was settled by the court (*McIntosh* v. *G. W. R. Co.*, 4 Giff. 683; see *Newton* v. *Nock*, 43 L. T. 197).

Written instrument.

Demand in writing.

A demand in writing may entitle the jury to give interest from date of demand, although the writing claimed interest from a prior date (*Londesborough* v. *Mowatt*, 4 El. & Bl. 1). The demand need not specify the exact amount of the debt (*Mildmay* v. *Methuen*, 3 Drew. 91, a demand for work and labour in an administration suit; *Geake* v. *Ross*, 32 L. T. 666, disapproving *Hill* v. *South Staffordshire Ry. Co.*, 18 Eq. 154). A solicitor may give notice that he will claim interest on his bill of costs delivered (*Berrington* v. *Phillips*, 1 M. & W. 48; see *Ward* v. *Eyre*, 15 Ch. D. 130). A summons in a winding-up was a sufficient demand (*Ex p. Alison*, 15 Eq. 394). But an answer in a Chancery suit was not (*Ward* v. *Eyre*, *sup.*); nor a claim in a writ (*Rhymney R. Co.* v. *Rhymney Iron Co.*, 25 Q. B. Div. 146; see *Wilks* v. *Wood*, 1892, 1 Q. B. 687); nor a statement in a tradesman's bill-head that interest will be charged after a certain time (*Re Edwards*, *Williams* v. *Trench*, 61 L. J. Ch. 22; 65 L. T. 453). Where a written notice as to interest was given under this section, and the defendants paid the principal due into court, the court ordered payment of subsequent interest in addition (*Hull, &c. Co.* v. *N. E. R. Co.*, 5 M. & G. 872).

Sect. 29.

An action for damages for minerals wrongfully taken is not within sect. 29 (*Phillips* v. *Homphray*, 1892, 1 Ch. 465).

Rate.

When the rate of interest is not expressed, the rate is a question for the court (*Gibbs* v. *Fremont*, 11 Exch. 25, where 25 per cent. was allowed). The rule was to recommend the jury to give 5 per cent. (*Re Roberts*, 14 Ch. Div. 52); but the court will follow the current rate at the time (*L. C. & D. R. Co.* v. *S. E. R. Co.*, 1892, 1 Ch. 120, 137; see *Wainwright's case*, 62 L. T. 30, where 4 per cent. was given). The rate usually allowed on bills of exchange is 5 per cent. (Byles, 15th ed. 444). In equity a purchaser of land was ordered to pay his purchase-money with interest at 4 per cent. (*Calcraft* v. *Roebuck*, 1 Ves. jun. 221). Judgment debts carry interest at 4 per cent. (1 & 2 Vict. c. 110, s. 17, *post*, where see note; and see R. S. C. Ord. 42, r. 16; Ord. 55, r. 62). On the recovery of a judgment the debt is merged (*Ex p. Fewings*, 25 Ch. Div. 338; *Re European, &c. Co.*, 4 Ch. Div. 33); and subsequent interest cannot be recovered at a higher rate than 4 per cent., unless there is an independent covenant as to the interest (*Popple* v. *Sylvester*, 22 Ch. D. 98; *Arbuthnot* v. *Bunsilall*, 62 L. T. 234).

Admiralty.

As to the arrears of interest given on damages for a maritime collision, see *The Kong Magnus* (1891, P. 223).

Interest in equity.

The earlier cases in equity as to interest are collected, C. P. Coop. 209—250, n.). The Court of Chancery followed the law in dealing with legal claims (*Booth* v. *Leycester*, 3 M. & C. 459). But it usually decreed interest in cases of purely equitable demands, *e. g.*, suits for equitable waste or against trustees who misapplied trust moneys (*L. C. & D. R. Co.* v. *S. E. R. Co.*, 1892, 1 Ch. 142). See further *Hyde* v. *Price*, 8 Sim. 578; *Re Powell*, 10 Hare, 134; *Martyn* v. *Blake*, 3 Dru. & War. 125; *Mansfield* v. *Ogle*, 4 De G. & J. 38; *Spartali* v. *Constantinidi*, 20 W. R. 823.

The Act 3 & 4 Will. 4, c. 42, applies to calls made in winding up a company where the notice of call states that interest will be charged (*Barrow's case*, 3 Ch. 784). But provisions in articles as to interest on calls do not apply to calls made by liquidators (*Re Welsh Flannel, &c. Co.*, 20 Eq. 360). As regards debts due from a company where under the act interest would be payable, it may be claimed in a winding-up (*Times Assurance Co.'s case*, 2 H. & M. 722). The rule in winding up an insolvent company is that creditors whose debts carry interest get dividends on what was due for principal and interest at the winding-up, but no subsequent interest except there be a surplus (*Warrant Finance Co.'s case*, 4 Ch. 643). Creditors whose debts do not carry interest are not allowed interest in a winding-up (*Re Hatfield Co.*, 11 W. R. 971). But a demand in writing for payment may be made under the act so as to entitle the creditor to interest (*Re East of England, &c. Co.*, 4 Ch. 14; but see *Re Herefordshire, &c. Co.*, 4 Eq. 250). As to the interest now allowed in the case of a company wound up by the court, see the general rules made pursuant to sect. 26 of the Companies Act, 1890, r. 104.

3 & 4 Will. 4, c. 27, s. 42.

Interest in liquidation of a company.

As to the computation of interest between banker and customer, see *Crosskill* v. *Bower* (32 Beav. 86); *Williamson* v. *Williamson* (7 Eq. 542); between trustee and *c. q. t.* (*Jones* v. *Foxall*, 15 Beav. 392; *Penny* v. *Avison*, 3 Jur. N. S. 62); and between principal and agent (*Turner* v. *Burkinshaw*, 2 Ch. 488; *Burdick* v. *Garrick*, 5 Ch. 233; *G. W. R. Co.* v. *Cunliffe*, 9 Ch. 525; *Baring* v. *Stanton*, 3 Ch. D. 502). Where unconscionable bargains have been entered into with money lenders, the court will only allow the sums actually advanced to be recovered together with interest at 5*l.* per cent. (*Miller* v. *Cook*, 10 Eq. 641; *Tyler* v. *Yates*, 6 Ch. 665; *Aylesford* v. *Morris*, 8 Ch. 484). There is no general rule as to the rate of interest the court will allow on repayment of money expressed to be the consideration for an absolute assignment, which is treated only as a security for such consideration money (*Re Unsworth*, 2 Dr. & Sm. 337; where 5*l.* per cent. was allowed). Interest at the rate of 4*l.* per cent. was allowed on a simple contract debt secured by deposit of deeds, where there had been no stipulation as to interest (*Re Kerr*, 8 Eq. 331). As to interest on charges, see *Lippard* v. *Ricketts* (14 Eq. 291); on mortgages, *Thompson* v. *Drew* (20 Beav. 49); *Ashwell* v. *Staunton* (30 Beav. 52); *Re Roberts* (14 Ch. Div. 49); and on mortgagee's costs, *Eardley* v. *Knight* (41 Ch. D. 537). Where an annuity is in arrear "the established rule of the court (which, however, is only general and not inflexible) is, that interest cannot be recovered on the arrears" (*Martyn* v. *Blake*, 3 Dru. & War. 125; *Mansfield* v. *Ogle*, 4 De G. & J. 41; *Blogg* v. *Johnson*, 2 Ch. 228). As to interest on arrears of salary, see *Rishton* v. *Grissell* (10 Eq. 393). Interest was allowed at 5*l.* per cent. where default had been made in the performance of a covenant to pay money (*Knapp* v. *Burnaby*, 9 W. R. 765; see *Mellersh* v. *Brown*, 45 Ch. D. 228). Where a bond does not specify a day for payment, it is payable on the day of date, and interest runs from that day (*Farquhar* v. *Morris*, 7 T. R. 124). It is the general rule both at law (*Brangwin* v. *Parrot*, 2 W. Bl. 1190; *White* v. *Sealey*, 1 Dougl. 49), and in equity, to consider the penalty of the bond as the limit of the debt or damages which can be recovered. But there are exceptions to this rule (See the earlier cases collected in C. P. Coop. 209—230; and see *Clarke* v. *Abingdon*, 17 Ves. 106; *Hughes* v. *Wynne*, 1 M. & K. 20; *Walter* v. *Meredith*, 3 Y. & Coll. 264; and *Mathews* v. *Keble*, 3 Ch. 691, where the interest allowed, together with the principal, exceeded the penalty).

Interest between banker and customer; trustee and *c. q. t.*; principal and agent.

On securities.

Arrears of annuity.

On money due under covenant.

Bonds.

As to deducting income tax on payments in respect of interest, see *Crane* v. *Kilpin* (6 Eq. 33). And as to calculation of interest and apportionment in questions between a tenant for life and remainderman, see *Re Grabowski* (6 Eq. 12); *Cox* v. *Cox* (8 Eq. 343); *Maclaren* v. *Stainton* (11 Eq. 382).

In administration, where a debt of the deceased carries interest, interest is paid accordingly, and where it does not carry interest, interest is paid at the rate of 4*l.* per cent. from the date of judgment out of assets remain-

Computation of interest in administration actions.

3 & 4 Will. 4, c. 27, s. 42.

ing after satisfaction of the costs, debts, and interest in respect of debts carrying interest (R. S. C., Ord. 55, rr. 62, 63). Where the estate is insolvent, interest on a debt carrying interest is calculated up to judgment, and a dividend paid on that amount (*Re Summers*, *Boswell* v. *Gurney*, 13 Ch. D. 136; see *Re Talbot*, *King* v. *Chick*, 39 Ch. D. 567).

As to what interest can be claimed on a writ specially indorsed under R. S. C., Ord. 3, r. 6, see *Wilks* v. *Wood*, 1892, 1 Q. B. 684; *London Bank* v. *Clancarty*, *ib.* 689; *Lawrence* v. *Willcocks*, *ib.* 696; *Gold Ores Co.* v. *Parr*, 1892, 2 Q. B. 14.

Interest in the case of appeals.

Where execution has been delayed by appeal, interest will be allowed (R. S. C., Ord. 58, r. 19; see 3 & 4 Will. 4, c. 42, s. 30; *Garland* v. *Carlisle*, 5 Cl. & F. 355; *Langridge* v. *Levy*, 4 M. & W. 337; *Hooper* v. *Lane*, 6 H. L. C. 443; *Tyne Commissioners* v. *General Steam Co.*, 15 W. R. 875). Where money is paid under an order which is subsequently reversed on appeal, it must be repaid with interest at 4*l.* per cent. (*Rodgers* v. *Comptoir D'Escompte*, L. R. 3 P. C. 465; *Merchant Banking Co.* v. *Maude*, 18 Eq. 659).

On the subject of interest generally, see Fisher's Digest, tit. Interest of Money; 2 Stark. on Ev. 575—579, 3rd ed.

I. & II.—*continued.*

37 & 38 Vict. c. 57.—*An Act for the further Limitation of Actions and Suits relating to Real Property.*

[7th August, 1874.]

37 & 38 Vict. c. 57.

Whereas it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon: Be it enacted as follows:

No land or rent to be recovered but within twelve years after the right of action accrued.

1. After the commencement of this act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same (*a*).

(*a*) By sect. 9 of this act the above section has been substituted for 3 & 4 Will. 4, c. 27, s. 2 (*ante*, p. 112), where see note. Under the same 9th section, the provisions of 3 & 4 Will. 4, c. 27 (except the repealed sections, but including the provisions substituted for such repealed sections), are to be construed together with this act. Accordingly the word "rent" in the present section (interpreted in accordance with sect. 1 of 3 & 4 Will. 4, c. 27), was held to include an annuity charged upon land (*Hughes* v. *Coles*, 27 Ch. D. 231). The period of twelve years prescribed by the present section as the period of limitation has been applied in the case, of tenancies at will (*Sands* to *Thompson*, 22 Ch. D. 614; *Brighton* v. *Brighton Guardians*, 5 C. P. D. 368); of the past instalments of an annuity charged on land (*Hughes* v. *Coles*, 27 Ch. D. 231); and of ordinary adverse possession (*Bobbett* v. *S. E. R. Co.*, 9 Q. B. D. 424).

Provision for case of future estates (*b*).

2. A right to make an entry or distress, or to bring an action (*a*) or suit to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in rever-

sion (β) or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land (γ) or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such lands, or in receipt of such rent (*c*): But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person (*d*) to make such entry or distress, or to bring any such action or suit, shall have been barred under this act, no person (*e*) afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent.

37 & 38 Vict. c. 57, s. 2.

Time limited to six years when person entitled to the particular estate out of possession, &c.

(*b*) By sect. 9 of this act the above section has been substituted for sect. 5 of 3 & 4 Will. 4, c. 27; and the case of future estates and interests now depends upon the above section construed together with the fourth branch of sect. 3 and sect. 20 of 3 & 4 Will. 4, c. 27, *ante*, pp. 120, 145.

The language of sect. 5 of 3 & 4 Will. 4, c. 27, has been repeated in the part of the present section which precedes (*c*), with the addition, however, of the following words in the following places, viz., at (α) "or suit"; at (β) "or remainder or other future estate or interest"; at (γ) "or rent."

Sect. 5 of 3 & 4 Will. 4, c. 27, was held to apply only to cases where a person other than the reversioner was entitled to the particular estate (*Doe* v. *Moulsdale*, 16 M. & W. 689, see p. 698). The saving of the section was applied to a term to secure an annuity (*Re Bermingham*, I. R. 5 Eq. 147). Under 3 & 4 Will. 4, c. 27, it was held, that upon the renewal of a lease the landlord's estate became an estate in possession within sects. 3 and 5 (*Eccl. Commissioners* v. *Rowe*, 5 App. Cas. 736, 741; disapproving of dicta in *Corpus Christi Coll.* v. *Rogers*, 49 L. J. Ex. 4). *See Eccl. Commissioners v. Treemer 1892 W. N. 170.*

In the case of an equitable charge on a reversionary interest in land, time commences to run under this statute against the right to foreclose from the time when the interest falls into possession (*Hugill* v. *Wilkinson*, 38 Ch. D. 480).

37 & 38 Vict. c. 57, s. 2.

(*c*) The proviso which follows here did not occur in 3 & 4 Will. 4, c. 27, s. 5. Where A., tenant for life, aliened, and the alienee entered, and seventeen years afterwards A. died; and the remainderman brought ejectment more than six but less than twelve years after A.'s death, the action was not barred. The proviso did not apply, inasmuch as the alienee and not A. was held to be "the person last entitled to the particular estate." And under the earlier part of the section the plaintiff had twelve years from A.'s death (*Pedder* v. *Hunt*, 18 Q. B. Div. 565).

(*d*) This seems to mean the person becoming entitled in possession to a future estate or interest.

(*e*) This provision seems intended to apply only to persons claiming under the person barred under the earlier part of the section.

The effect of 3 & 4 Will. 4, c. 27 in the cases (1), where the owner of an estate in possession grants out of it a particular estate with reversion or remainders following, after time has commenced to run against him; (2), where the owner of an estate in remainder, deals with it, while time is running against him; and (3), where a tenant for life and remainderman, deal with the estate which time is running against the tenant for life, is discussed Darb. & Bos. Stat. Lim. 236—242.

In cases of infancy, coverture, or lunacy at the time when the right of action accrues, then six years to be allowed from the termination of the disability or previous death.

3. If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years, (as the case may be,) hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened) (*f*).

(*f*) By sect. 9 of this act, sects. 3, 4 and 5 have been substituted for sects. 16 and 17 of 3 & 4 Will. 4, c. 27 (*ante*, pp. 141, 144, where see notes). The saving of this section was applied in the case of *Kennedy* v. *Lyell*, 15 Q. B. D. 498. Where the statute once begins to run as against a tenant in tail, and at that time there is no disability on his part, it does not cease to run by reason of subsequent disability on his part or on the part of issue in tail claiming under him (*Murray* v. *Watkins*, 62 L. T. 796). See the cases under 21 Jac. 1, c. 16, s. 2, quoted *ante*, p. 141.

As to the disability of coverture, see now M. W. P. Act, 1882, s. 1, sub-s. 2; *Lowe* v. *Fox* (15 Q. B. Div. 667); *Weldon* v. *Neal* (51 L. T. 289; 32 W. R. 828).

No time to be allowed for absence beyond seas.

4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims (*g*).

(*g*) See the notes to 3 & 4 Will. 4, c. 77, ss. 16 and 19, *ante*, pp. 141, 145.

37 & 38 Vict. c. 57, s. 5.

Thirty years utmost allowance for disabilities.

5. No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired (*h*).

(*h*) See the note 3 & 4 Will. 4, c. 27, s. 17, *ante*, p. 144. As to the application of the present section to money paid into court under the Lands Clauses Act, 1845, s. 79, see *Ex p. Chamberlain* (14 Ch. D. 323).

In case of possession under an assurance by a tenant in tail which shall not bar the remainders, they shall be barred at the end of twelve years after that period, at which the assurance, if then executed, would have barred them.

6. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail (*i*).

(*i*) By sect. 9 of this act, the above section has been substituted for 3 & 4 Will. 4, c. 27, s. 23 (*ante*, p. 147), where see note.

Mortgagor to be barred at end of twelve years from the time when the mortgagee took possession or from the last written acknowledgment.

7. When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person signed by the mortgagee or the person claiming through him; and in such case no such

37 & 38 Vict. c. 57, s. 7.

action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage (*k*).

(*k*) By sect. 9 of this act, the above section has been substituted for 3 & 4 Will. 4, c. 27, s. 28, as to which see *ante*, p. 158.

The twelve years bar under this section will not be extended by reason of any disability of the mortgagor (*Forster* v. *Patterson*, 17 Ch. D. 132; see under the earlier law, *Kinsman* v. *Rouse*, 17 Ch. D. 104).

Money charged upon land and legacies to be deemed satisfied at the end of twelve years if no interest paid nor acknowledgment given in writing in the meantime.

8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be

brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given (*l*). 37 & 38 Vict. c. 57, s. 8.

(*l*) By sect. 9 the above section has been substituted for 3 & 4 Will. 4, c. 27, s. 40, as to which see *ante*, p. 176.

The present section is entirely prohibitory, and does not remove any bar which previously to its passing existed to the bringing of an action within twelve years (*Frith* v. *Slingsby*, 58 L. T. 483).

Mortgages. The present section barred after twelve years the personal remedy of a mortgagee to obtain payment of his debt from his mortgagor, whether on a collateral bond given by him (*Fearnside* v. *Flint*, 22 Ch. D. 579), or on his covenant in the mortgage deed (*Sutton* v. *Sutton*, 22 Ch. D. 511). In the last-mentioned case, *Cotton*, L. J., referred to *Hunter* v. *Nockolds* (1 Mac. & G. 640, *ante*, p. 187), in which Lord *Cottenham* had held that in actions on covenant or specialty, sect. 42 of 3 & 4 Will. 4, c. 27, was controlled by sect. 3 of 3 & 4 Will. 4, c. 42. It might be right in the case of an act passed in 1833, to read it as explained by an act passed only three weeks later; but in the case of an act passed in 1874, there was no such necessity to explain it by an act passed in 1833 (22 Ch. Div. 519; see *Re Frisby*, 43 Ch. D. 110). The section, however, did not bar an action which was brought, not against the mortgagor himself, but against a surety who had covenanted for payment by the mortgage deed (*Re Frisby*, *Alison* v. *Frisby*, *per Kay*, J., and *Bowen*, L. J., *Cotton*, L. J., differing, 43 Ch. D. 106); or who had given a promissory note (*Re Wolmershausen*, 62 L. T. 541). And it has been held that an action on a bond given by a surety for a mortgagor to recover from the surety an indemnity against the non-payment by the mortgagor of the mortgage debt, is not within this section (*Re Powers*, *Lindsell* v. *Phillips*, 30 Ch. Div. 291). As to the application of the present section to the mortgage of a reversionary interest in personalty, see *Re Lake* (63 L. T. 416).

Judgments. The present section applies to judgments generally, not merely judgments which operate as a charge on land (*Hebblethwaite* v. *Peever*, 1892, 1 Q. B. 124). It barred after twelve years the right of a judgment creditor to obtain an adjudication in bankruptcy against the judgment debtor (*Ex p. Tynte*, 15 Ch. D. 125).

Other charges. The present section did not apply to an action on the personal covenant of a lessee in respect of a royalty (*Darley* v. *Tennant*, 53 L. T. 257). It barred, however, after twelve years the right to recover paving expenses made a charge on land by statute (*Hornsey Board* v. *Monarch Society*, 24 Q. B. Div. 1). Simple contract debts charged by will on real estate are not barred until the expiration of twelve years (*Re Stephens*, *Warburton* v. *Stephens*, 43 Ch. D. 39).

Legacies. The present section barred after twelve years the right to recover residuary estate (*Re Rowe*, *Jacobs* v. *Hind*, 61 L. T. 581; *Re Davis*, *Evans* v. *Moore*, 1891, 3 Ch. 119). An action by a residuary legatee to recover loss which has arisen from the non-realization of such residue, is not an action to recover a legacy within this section (*Swain* v. *Bringeman*, 1891, 3 Ch. 233; see Trustee Act, 1888, s. 8, *post*, p. 231).

"Present right to receive." The words "present right to receive" were considered in *Hornsey Board* v. *Monarch Society* (24 Q. B. Div. 9), where it was said as to charges that in each case the moment to be looked at was the moment when the charge came into present operation.

Part payment. With regard to payments within this section, it has been said that a payment is made whenever there is a render of money to a person entitled to receive it by a person liable to pay it (*Re Frisby*, *Alison* v *Frisby*, 43 Ch. D. 107). In cases within the section, payment of interest by one co-contractor or co-debtor will preserve the remedy against the other, sect. 14 of 19 & 20 Vict. c. 97 not applying (*Re Frisby*, *Alison* v. *Frisby*, 43 Ch. D. 111; see *Re Powers*, 30 Ch. Div. 291).

37 & 38 Vict. c. 57, s. 9.

Act to be read with 3 & 4 Will. 4, c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this act.

9. From and after the commencement of this act all the provisions of the act passed in the session of the third and fourth years of the reign of his late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this act, and shall take effect as if the provisions hereinbefore contained were substituted in such act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the act passed in the session of the seventh year of the reign of his late Majesty King William the Fourth, and the first year of the reign of her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

7 Will. 4 & 1 Vict. c. 28, to be read with this act.

Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising same.

10. After the commencement of this act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust (*m*).

(*m*) By sect. 9 of this act the provisions of 3 & 4 Will. 4, c. 27 (except the repealed sections but including the provisions substituted for such repealed sections), are to be construed together with this act. The present section must accordingly be construed with especial reference to 37 & 38 Vict. c. 57, s. 8 (substituted for 3 & 4 Will. 4, c. 27, s. 40), and 3 & 4 Will. 4, c. 27, s. 42.

Under 3 & 4 Will. 4, c. 27, s. 40, it was held that in a number of cases (*ante*, p. 181) an express trust prevented the section from operating as a bar. By the present section an express trust will make no difference in this respect. And it has been said that simple contract debts, secured by a trust in a will to pay the same out of real estate, may be barred in twelve years (*Re Stephens*, *Warburton* v. *Stephens*, 43 Ch. D. 39). This section prevented a trust to pay debts in a will from keeping alive a claim on a bond (*Fearnside* v. *Flint*, 22 Ch. D. 579).

Legacies not charged upon or payable out of land or rent, which were within 3 & 4 Will. 4, c. 27, s. 40, and are within 37 & 38 Vict. c. 57, s. 8, are not within the present section. In the case of such legacies, accordingly, an express trust would seem to prevent time running (See *Playfair* v. *Cooper*, 17 Beav. 187; see further the note *ante*, p. 181). The ordinary implied trust which affects personal estate held by an executor for the benefit of legatees, does not prevent time running (*Re Davis*, *Evans* v. *Moore*, 1891, 3 Ch. 124). As to arrears of interest on a legacy, see *Blachford* v. *Worsley* (27 Ch. D. 676).

See Re Barker Beaton v. Campbell 1892, 2 Ch.

Again, under 3 & 4 Will. 4, c. 27, s. 42, it was held, that in a number of cases (*ante*, p. 189) an express trust prevented the section from operating as a bar. By the present section an express trust will make no difference as regards arrears. Where land was conveyed to trustees upon trust to pay an annuity to A., his heirs and assigns, and no claim was made by A. for twenty-seven years after the annuity first became payable, A. could not recover any arrears by reason of this section, but was held entitled to the future payments of the annuity, the right to which had been preserved by the express trust (*Hughes* v. *Coles*, 27 Ch. D. 231). In this case the words "any sum of money" were held applicable to each instalment of the annuity as it became due (*Ib.*; see *Edwards* v. *Warden*, 9 Ch. 595).

37 & 38 Vict. c. 57, s. 10.

As regards the matters especially mentioned in it, this section appears to control Jud. Act, 1873, s. 25, subs. 2, which provided generally that no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, should be barred by any Statute of Limitations.

Jud. Act, 1875, s. 25.

In the case of proceedings against trustees and persons claiming through them commenced after 1st January, 1890, regard must be had to the Trustee Act, 1888, *post*, p. 231.

Trustee Act, 1888.

11. This act may be cited as the "Real Property Limitation Act, 1874."

Short title.

12. This act shall commence and come into operation on the first day of January one thousand eight hundred and seventy-nine.

Commencement of act.

III. Of the Limitation of Actions by or against Executors in respect of Injuries to Property and of the Limitation of Actions on Specialties.

3 & 4 William IV. cap. 42, sects. 2—7.

2. And whereas there is no remedy provided by law for injuries to the real estate (*a*) of any person deceased committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another, in respect of his property, real or personal; for remedy, therefore, be it enacted, that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person (*b*); and an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such execu-

3 & 4 Will. 4, c. 42, s. 2.

Executors may bring actions for injuries to the real estate of the deceased, and actions may be brought against executors for injuries to property, real or personal, by their testator.

3 & 4 Will. 4, c. 42, s. 2.

tors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person.

(*a*) It was doubted whether this includes leasehold interests (*Adam* v. *Bristol*, 2 Ad. & Ell. 389).

(*b*) An executor was held entitled to recover damages for an obstruction to the light of a house of his testatrix (*Jones* v. *Simes*, 43 Ch. D. 607).

According to the rule of common law, executors could not be sued for a wrong committed by their testator for which only unliquidated damages could be recovered (*Kirk* v. *Todd*, 21 Ch. D. 489; see *Phillips* v. *Homfray*, 24 Ch. D. 439; *Twycross* v. *Grant*, 4 C. P. D. 45). As an exception to this rule, this section permits executors to be sued for wrongs committed by their testator in respect of property, but the right is subject to the limitations in the section; and where the wrong has been committed more than six months before the testator's death, the section does not apply (*Kirk* v. *Todd*, *sup.*) Where a will provided that the tenant for life should keep devised premises in repair, an action of tort in respect of permissive waste by non-repair lay against the executor of the tenant for life under the above section (*Woodhouse* v. *Walker*, 5 Q. B. D. 404; *Andrew* v. *Williames*, 52 L. T. 41; see *Batthyany* v. *Walford*, 36 Ch. Div. 269, where the settled estates were situate in a foreign country). A claim made more than six months after the death, but within six months after probate was allowed (*Andrew* v. *Williames*, *sup.*)

Within six months after the death of an innkeeper, an action of tort was maintained against his executors for the property of a traveller lost in his house (*Morgan* v. *Ravey*, 30 L. J. Ex. 131); and trespass was maintained against an administrator for coal wrongfully taken from the plaintiff's land by the intestate within six months before his death (*Powell* v. *Rees*, 7 Ad. & Ell. 426).

Limitation of action of debt on specialties, &c.

3. That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon any indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after: provided that nothing herein

contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited. (As to Ireland, see 16 & 17 Vict. c. 113, s. 20) (*a*). 3 & 4 Will. 4, c. 42, s. 3.

(*a*) To an action of covenant six years is not a good plea of limitation (*Hartshorn* v. *Watson*, 4 Bing. N. C. 178). Where a purchaser covenanted to pay his purchase-money by promissory notes of even date, it was held that an action could be brought on the covenant after six years (*Dixon* v. *Holroyd*, 7 Ell. & Bl. 703). The section applies even where the bond on which action is brought was executed in India, where the period of limitation for specialties is three years (*Alliance Bank* v. *Carey*, 5 C. P. D. 429). Cases within this section.

An action for calls by a company under 8 & 9 Vict. c. 16, is an action on a specialty, and is therefore within this section, and not 21 Jac. 1, c. 16 (*Cork and Bandon R. Co.* v. *Goode*, 13 C. B. 827; see *Shepperd* v. *Hills*, 11 Exch. 55). In the winding up of a banking company which had been established by a deed of settlement, the liability of a shareholder was a liability by way of specialty within this section (*Re Portsmouth Banking Co.*, 2 Eq. 167). By the Companies Act, 1862, s. 75, the liability to contribute under a winding-up order creates a specialty debt, even though the company was not registered under that act (*Muggeridge* v. *Sharp*, 10 Eq. 443); and the specialty is one which binds the heirs of the contributory (*Buck* v. *Robson*, 10 Eq. 629). In the case of companies formed and registered under that act, the liability of a member in a winding-up is a specialty (Companies Act, 1862, sects. 75, 90, 134). So also is the liability of a member under the articles (sect. 16). A specialty debt was not created by a call made by a company established under the old Joint Stock Companies Winding-up Acts (*Robinson's Executors' case*, 6 D. M. & G. 572), or under a colonial statute (*Welland R. Co.* v. *Blake*, 30 L. J. Ex. 161).

As regards rent reserved, an action on a covenant under seal for payment of such rent may be brought within the twenty years limited by 3 & 4 Will. 4, c. 42, s. 3, and is not limited to six years by the 42nd section of 3 & 4 Will. 4, c. 27. In *Paget* v. *Foley* (2 Bing. N. C. 679), *Tindal*, C.J., said, "If the 42nd section of 3 & 4 Will. 4, c. 27, is a general enactment, the subsequent declaration that an action of covenant may be commenced during a longer period is virtually an exception out of the former: we are to reconcile the two enactments if it be possible, but if it be not, the affirmative and negative cannot co-exist, and the action of covenant must be taken as an exception; therefore, without affecting the clause in the first statute further than is necessary to give effect to the second, we decide that the plea of six years' limitation of the cause of action is bad" (See *Paddon* v. *Bartlett*, 3 Ad. & Ell. 895; *Wilson* v. *Jackson*, 2 Ir. L. R. 1; *Strachan* v. *Thomas*, 12 Ad. & Ell. 558). The act 37 & 38 Vict. c. 57, has made no difference in this respect (*Darley* v. *Tennant*, 53 L. T. 257). As regards a rentcharge, it was held under 3 & 4 Will. 4, c. 27, that such statute did not apply to an action on a collateral covenant for payment of such rent-charge; and that the covenantee might recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge out of the land was barred (*Manning* v. *Phelps*, 10 Exch. 59; see now 37 & 38 Vict. c. 57, s. 8, *ante*, p. 198). As regards mortgage debts, the personal remedy of a mortgagee to obtain payment from the mortgagor is now, by 37 & 38 Vict. c. 57, s. 8, barred after twelve years, whether the action be on a collateral bond (*Fearnside* v. *Flint*, 22 Ch. D. 579), or on the mortgagor's covenant in the mortgage deed (*Sutton* v. *Sutton*, 22 Ch. D. 511). As regards arrears of interest recoverable in an action on covenant, see *Mellersh* v. *Brown* (45 Ch. D. 228). Cases within this section and also within 3 & 4 Will. 4, c. 27.

Courts of equity adopted many of the provisions of this statute (*Hyde* v. *Price*, 8 Sim. 578). In administration suits, specialty debts were held barred under it (*Spickernell* v. *Hotham*, Kay, 669). But where a settlor Cases in equity.

3 & 4 Will. 4, c. 42, s. 3.

had constituted himself a trustee of a covenant, time was no bar (*Stone* v. *Stone*, 5 Ch. 74). See note as to courts of equity and the Statutes of Limitation, p. 232, *post*.

Penalties.

An action for penalties by an officer of the Company of Goldsmiths, mentioned in 7 & 8 Vict. c. 22, is not an action by a "party grieved" within this section, and may be brought more than two years after accruer of the cause of action (*Robinson* v. *Currey*, 7 Q. B. Div. 465).

When time begins to run under this section.

In the case of *post obit* bonds, time does not begin to run until the death (*Tuckey* v. *Hawkins*, 4 C. B. 655; see *Barber* v. *Shore*, 1 Jebb & S. 610). On a bond conditioned to pay an annuity, the non-payment of each instalment is a distinct breach, and the statute begins to run against each as it becomes due (*Amott* v. *Holden*, 18 Q. B. 593); where Lord *Campbell*, C. J., said (p. 603): "It is admitted that, since *Sanders* v. *Coward* (15 M. & W. 48), and *Blair* v. *Ormond* (17 Q. B. 423), where a bond is conditioned for the performance of a series of acts at stated times, though there may have been a forfeiture, by reason of the non-performance of the first act in that series, yet if default be made in the performance of subsequent acts, a new cause of action arises upon each default, and the statute runs from that. The obligee, therefore, is not prevented by the statute from suing in respect of breaches committed more than twenty years after the first breach, if he has chosen to waive the previous breaches" (See *Higgs* v. *Mortimer*, 1 Exch. 711). If a bond with a penalty were given to secure a duty which is to be performed during a period of twelve years, the bond would be forfeited by a delinquency in the first year, but the obligee might elect not to act on it until the delinquency in the twelfth year (*Per Bramwell*, B., 7 L. T. 792). Where the breach is a continuing breach, a fresh cause of action arises at every moment of the time during which the breach continues (*Maddock* v. *Mallet*, 12 Ir. Ch. R. 193). As to the time from which time runs in the case of a breach of covenants for title, see the conflicting judgments of *Bramwell*, B., and *Kelly*, C. B., in *Spoor* v. *Green* (L. R. 9 Ex. 110, 116).

A deed of settlement of a company exonerated the transferor of shares from all liabilities in respect of his shares subsequently to the transfer, with a proviso that nothing should extend to release the transferor from his proportion of losses up to transfer. In winding-up time was held to run from the date of the transfer, and not from the date of the winding-up order (*Re Portsmouth Banking Co.*, 2 Eq. 167).

Remedy for infants, *femes coverts*, &c.

4. That if any person or persons that is, or are, or shall be entitled to any such action or suit, or to such *scire facias*, is, are, or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discovert, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that if any person or persons against whom there shall be any such cause of action, is, or are, or shall be at the time such cause of

Absence of defendants beyond seas provided for.

action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas (*b*).

Disabilities.

(*b*) This provision as to disabilities has been altered by 19 & 20 Vict. c. 97, s. 10 (p. 228, *post*), which enacts that the absence beyond seas of the

person entitled to the action shall be no disability. As to the meaning of "beyond seas," see sect. 7 of this statute (p. 207, *post*). See further the cases quoted under 21 Jac. 1, c. 16, s. 7 (p. 216, *post*), the law as to disabilities under both these sections being now the same. In cases within M. W. P. Act, 1882, s. 1, sub-s. 2, coverture has ceased to be a disability (*Lowe* v. *Fox*, 15 Q. B. Div. 676; *Weldon* v. *Neal*, 51 L. T. 289).

3 & 4 Will. 4, c. 42, s. 4.

5. That if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent (*c*), or by part payment or part satisfaction on account of any principal or interest being then due thereon (*d*), it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid; or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action on any indenture, specialty or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute (See 16 & 17 Vict. c. 113, s. 23, as to Ireland).

Proviso in case of acknowledgment in writing, or by part payment.

(*c*) The acknowledgment under this section need not be made to the person entitled, or amount to a promise to pay; and, therefore, the admission of a bond debt, contained in an answer of the executors of the obligor in a suit to which the obligee was not a party, was held sufficient (*Moodie* v. *Bannister*, 4 Drew. 433; 28 L. J. Ch. 881). A conveyance on trust to sell and pay off mortgages was held not an acknowledgment within this section of a particular mortgage (*Howcutt* v. *Bonner*, 3 Exch. 491; see *Forsyth* v. *Bristowe*, 8 Exch. 716). As to pleading acknowledgments under this section, see *Kempe* v. *Gibbon* (9 Q. B. 609; 12 Q. B. 662). See further the cases as to acknowledgments by payment under this section.

Acknowledgment by writing.

The case of disability at the time of the acknowledgment existing on the part of the person entitled to the action, or on the part of the person making the acknowledgment, is provided for at the end of this section. See the joint effect of this provision and 19 & 20 Vict. c. 97, s. 11, explained Darb. & Bos. Stat. Lim. 111—113.

(*d*) The 5th section does not specify by whom the part payment is to be made; but Lord *Cranworth*, C., expressed an opinion that there can be no doubt but it must be made by a party interested, for the legislature could not mean to give any right against the debtors by the mere act of a stranger (*Roddam* v. *Morley*, 1 De G. & J. 18). The payment of interest to a mortgagee by the assignee of the equity of redemption, was held to be payment by the agent of the mortgagor within the meaning of this section (*Forsyth* v. *Bristowe*, 8 Exch. 716; compare *Newbould* v. *Smith*, 33 Ch. Div. 127, quoted *ante*, p. 183). Payments made by a receiver in a suit, but which were not authorized by the order appointing him, were held not to take the case out of this statute (*Whitley* v. *Lowe*, 25 Beav. 421; 2 De G. & J. 704). Where the same bond secured payment of different sums to different persons, payment of one sum was held no acknowledgment in respect of the other sum (*Ashlin* v. *Lee*, 23 W. R. 458).

Acknowledgment by payment.

3 & 4 Will. 4, c. 42, s. 5.

Where several liable.

Where a devisee for life paid interest on a specialty of his testator's, in which the heirs were bound, this was an acknowledgment within the 5th section, and sufficient to preserve the right of action not only against the party making the payment, but also against all parties interested in remainder (*Roddam* v. *Morley*, 1 De G. & J. 1). "If the payment is made by one only of several persons liable, as, for instance, by a person having only a life interest as devisee, who is affected by the payment? Does it operate against the party only by whom the payment is made, or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved not only against the party making the payment, but also against all other persons liable on the specialty" (*Per* Lord *Cranworth*, *Roddam* v. *Morley*, 1 De G. & J. 1, where the payment was in fact made by a devisee for life). See also, as to a tenant for life's payment, *Barclay* v. *Owen* (60 L. T. 222). Payment of interest on a simple contract debt by a devisee for life of the debtor's real estate stands on the same footing (*Hollingshead* v. *Webster*, 37 Ch. D. 660).

Where a person indebted on a specialty dies having left personal estate, and real estate devised for payment of debts, and also real estate devised beneficially, it was said by *Kindersley*, V.-C., "There are three parties, each of whom is liable to the claims of a specialty creditor—the executor in respect of the personalty, the trustees in respect of the real estate devised for payment of debts, and the beneficial devisee in respect of the real estate beneficially devised. . . . . If any one of these parties makes the payment or gives the acknowledgment, it is a payment or acknowledgment by the party liable by virtue of the specialty" (*Coope* v. *Cresswell*, 2 Eq. 117; in which case it was held, that payment of interest on a specialty debt of a testator by his personal representatives who were also trustees of real estate devised for payment of debts, took the debt out of the statute as against a beneficial devisee). This decision was reversed on appeal by Lord *Chelmsford* (2 Ch. 112), who said that he was unable to concur in the reasoning which led to the ultimate decision in *Roddam* v. *Morley* (*sup.*) *Roddam* v. *Morley* has since been approved by *Chitty*, J. (*Hollingshead* v. *Webster*, 37 Ch. D. 651), and by *Bacon*, V.-C. (*Pears* v. *Laing*, 12 Eq. 41). In the last case, A. mortgaged freeholds and leaseholds, and subsequently died, having devised and bequeathed his residuary estate upon trust for the payment of his debts, including mortgage debts, and afterwards upon trust for B. C., who was beneficial tenant for life under the will of A., in a moiety of the freeholds not comprised in the mortgage, and was also interested in the residue under the will of B., paid interest on the mortgage down to her death. Held, that such payment prevented the statute being a bar to the mortgagee's proceeding either against the property comprised in the mortgage, or on the covenant for repayment against the estate of A.

As regards acknowledgments by payment of principal or interest in the case of several parties being liable, it has now been provided by 19 & 20 Vict. c. 97, s. 14, that payments by one co-debtor shall not prevent time running under this statute in favour of another co-debtor (See *post*, p. 229).

What amounts to payment.

By a settlement, A. covenanted to transfer stock to trustees upon trust for himself for life, and then upon trusts for the wife and issue. The stock was not transferred: it was held, that this constituted a debt from him, and that, notwithstanding his life interest, time began to run against this debt from the execution of the settlement; for in this case the sum of stock which ought to have been brought into existence as a trust fund never had any existence, and it could not be assumed that a person had been paying himself the interest of a non-existing fund (*Spickernell* v. *Hotham*, Kay, 669; see also *Stone* v. *Stone*, 5 Ch. 74). But where part of the funds comprised in a settlement (under which the husband took the first life interest) consisted of a bond of the husband to secure a sum,

conditioned for repayment by him with interest in six months if he should be called upon to do so, it was held that time did not begin to run until the death of the husband, he being the person who was both bound to pay the interest on the bond, and entitled to receive the interest under the settlement (*Mills* v. *Borthwick*, 35 L. J. Ch. 31; 13 W. R. 707). Under the terms of a marriage settlement, the owner was entitled until bankruptcy or insolvency to receive the interest of a fund. This fund was lent to him and he executed a bond to secure repayment, and judgment was entered on the bond. Held, that, as regards the judgment, time did not begin to run until the insolvency (*Re Keay*, I. R. 3 Eq. 659). Where money settled to the separate use of a wife was lent to her husband, and she, with his consent, gave formal receipts for the income, but no money passed, this amounted to a payment or satisfaction of the interest within 3 & 4 Will. 4, c. 42, s. 5 (*Amos* v. *Smith*, 1 H. & Colt. 238; 10 W. R. 759). 3 & 4 Will. 4, c. 42, s. 5.

A payment made within twenty years upon one of several judgments obtained upon foot of one joint and several bond will prevent recovery upon another of such judgments from being barred by this statute (*Re Kingston*, I. R. 3 Eq. 485).

A bond conditioned for the replacing of stock in specie is not such an instrument as comes within the 5th section of 3 & 4 Will. 4, c. 42. The payment of sums of money in lieu of dividends which would have been payable if the stock had remained in the name of the obligee is not payment of interest, neither is any sum of money thereby acknowledged to be due. Lord *Campbell*, C. J., said, "The argument that, as the bond in question is plainly within the 3rd section, it must necessarily be within the 5th, is quite untenable, for it is obvious that a bond conditioned to perform the covenants of a lease in respect of repairs or any other matter sounding purely in damages, would be within the 3rd section, and yet it would be impossible by any ingenuity of construction to bring it within the 5th" (*Blair* v. *Ormond*, 17 Q. B. 436, 437).

As to the proof of payment by indorsements on a bond, see 1 Taylor, Ev. 605—611, 8th ed.

6. And nevertheless be it enacted, if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after (16 & 17 Vict. c. 113, s. 21, Ireland) (*e*). The limitation after judgment reversed.

(*e*) See *Tynte* v. *The Queen* (7 Q. B. 216). Outlawry has been abolished in civil cases by 42 & 43 Vict. c. 59, s. 3.

7. That no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of his majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the act passed in the 21st year of the reign of King James the First, No part of the United Kingdom, &c. to be deemed beyond the seas within the meaning of this act.

3 & 4 Will. 4, c. 42, s. 7.

intituled "An Act for Limitation of Actions, and for avoiding of Suits in Law" (*f*).

(*f*) The act 4 Anne, c. 16, s. 19, was omitted from this section, and the consequence was to make Ireland a place beyond the seas within the meaning of 4 Anne, c. 16, s. 19, notwithstanding the Act of Union (*Lane* v. *Bennett*, 1 M. & W. 70; *Battersby* v. *Kirk*, 2 Bing. N. C. 603). But see now 19 & 20 Vict. c. 97, s. 12.

Beyond the seas, within the Irish acts.

No part of the United Kingdom, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, are to be deemed to be beyond the seas within the meaning of the act 3 & 4 Vict. c. 105, or of the Irish Statute of Limitations, 10 Car. 1, st. 2, c. 6 (3 & 4 Vict. c. 105, s. 36, which is repealed by 16 & 17 Vict. c. 113, s. 3).

Old rule as to the presumption of payment of bonds.

Before 3 & 4 Will. 4, c. 42, it had been long held that satisfaction of money secured on bonds would be presumed after twenty years (3 P. Wms. 396; 2 Atk. 144; *Morley* v. *Morley*, 5 D. M. & G. 610). But such presumption of payment might have been encountered by evidence to repel it, as if the interest were proved to have been paid within the time conceived to furnish the presumption (8 Mod. 278; 2 Ld. Raym. 1370; 3 Br. P. C. 535; 2 Str. 827; 2 Cox, 118); or if the obligor had had no opportunity nor means of paying (*Fladong* v. *Winter*, 19 Ves. 196); or had been abroad ever since he acknowledged by letter the debt to be due (*Newman* v. *Newman*, 1 Stark. N. P. C. 101). See further as to the presumption of payment of bonds, and the grounds upon which the presumption could be rebutted, *Barrington* v. *Searle* (3 Br. P. C. 535); *Glyn* v. *Bank of England* (2 Ves. sen. 43); *Oswald* v. *Legh* (1 T. R. 271); *Colsell* v. *Budd* (1 Camp. 27); *Middleton* v. *Melton* (10 B. & C. 317); *Gleadow* v. *Atkin* (1 C. & M. 410); *Sanders* v. *Meredith* (3 M. & R. 116; 1 Phil. Ev. 7th ed. 255).

IV. Of the limitation of actions on simple contract debts, 21 Jac. 1, c. 16; 9 Geo. 4, c. 14.

21 Jac. 1, c. 16, s. 3.

Limitation of certain personal actions.

3. That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than for such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after, (that is to say) the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, im-

prisonment, or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken, and not after (*a*). 21 Jac. 1, c. 16, s. 3.

(*a*) An action of debt for a penalty incurred under a bye-law, made by virtue of a royal charter under the great seal, is not an action of debt grounded upon a contract without specialty within this section, and therefore the action must be commenced within six years after the penalty is incurred (*Tobacco-pipe Makers* v. *Loder*, 16 Q. B. 765). An action for calls by a company under the Companies Clauses Consolidation Act, 1845, is an action on a specialty not within this act (*Cork and Bandon R. Co.* v. *Goode*, 13 C. B. 827). The liability of an equitable assignee of leaseholds in respect of the covenants in the lease is that of simple contract, and the statute limits the liability to six years after the cause of suit (*Saunders* v. *Benson*, 4 Beav. 351; see *Moore* v. *Greg*, 2 Phil. 717). When by an instrument not under seal, A. agrees to repay an advance and execute a mortgage, this statute would at the end of six years bar an action to recover the advance or for breach of the contract to execute the mortgage (*Firth* v. *Slingsby*, 58 L. T. 483). **Cases within this section.**

The statute 21 Jac. 1, c. 16, s. 3, extends to defences of set-off, &c., as well as actions; therefore a debt barred by the statute cannot be set off, and if such debt be pleaded in bar to the action the plaintiff may reply the above statute (*Remington* v. *Stevens*, 2 Str. 1271; Bull. N. P. 180; and see 9 Geo. 4, c. 14, s. 4, p. 218, *post*). But before the Jud. Acts it was held that the statute must be replied specially, and could not be relied on under a replication taking issue (*Chapple* v. *Durston*, 1 C. & J. 1). The set-off must have been barred before the commencement of the suit in order to support a replication of the statute (*Walker* v. *Clement*, 15 Q. B. 1046; *Re Ballard*, *Lovell* v. *Forester*, 1890, W. N. 64). As to replying the statute to part of the claim of set-off, see *Mead* v. *Bashford* (5 Ex. 336). See also *Fairthorne* v. *Donald* (13 M. & W. 424). **Set-off.**

Money deposited with a banker by his customer in the ordinary way is *money lent* to the banker with a superadded obligation that it is to be paid when called for by cheque; and consequently, if it remain in the banker's hands for six years, without any payment by him of the principal or allowance of interest, the statute is a bar to its recovery (*Pott* v. *Clegg*, 16 M. & W. 324). The relation between a banker and his customer is that of debtor and creditor, and not trustee and *cestui que trust* (*Foley* v. *Hill*, 1 Phil. 399; 2 H. L. Ca. 28; and see *Moxon* v. *Bright*, 4 Ch. 294). But, where a fund was standing to the account of two trustees in the books of some bankers who had notice that it was a trust fund, and they by the direction of the tenant for life transferred it to the account of the tenant for life, and thereby obtained payment of a debt due from him to them; it was held, that the trustees had a right in equity to compel the bankers to replace the trust fund, and that the statute was inapplicable (*Bridgman* v. *Gill*, 24 Beav. 302; see *Foxton* v. *Manchester, &c. Banking Co.*, 44 L. T. 406). As to the parties to actions against bankers, and the practice of the common law courts in allowing amendments to avoid the effect of the statute, see *Crawford* v. *Cocks* (20 L. J. Ex. 169); *Corne* v. *Malins* (*Ib.* 434). **Banker and customer.**

In the absence of fraud, the statute bars an action to recover money received by a solicitor as his client's agent (*Re Hindmarsh*, 1 Dr. & Sm. 129; *Crawford* v. *Crawford*, 16 W. R. 411; *Watson* v. *Woodman*, 20 Eq. 721). But the statute did not apply where a solicitor received money of which he knew his client was an express trustee (*Re Bell*, *Lake* v. *Bell*, 34 Ch. D. 462); nor where a solicitor received his client's money under a special power of attorney, which was held to create a trust (*Burdick* v. *Garrick*, 5 Ch. 233; *Gray* v. *Bateman*, 21 W. R. 137). See now Trustee Act, **Solicitor and client.**

21 Jac. 1, c. 16, s. 3.

1888, s. 8. No trust, however, is created where a solicitor is employed to invest in a particular mortgage, or to find securities to be approved by the client and then invest, and the client does approve the security; and in such a case the statute will bar an action for negligence (*Dooby* v. *Watson*, 39 Ch. D. 178; see *Hughes* v. *Twisden*, 54 L. T. 570). See also *Smith* v. *Pococke*, 2 Drew. 197.

Master and steward. Where during his life a master had permitted his steward to retain his salary out of moneys in his hands, the steward, in accounting after the master's death, was allowed to credit himself with his salary for twenty years, the statute not applying (*Hawkins* v. *Hawkins*, 28 W. R. 240).

Principal and agent. An action by a principal for an account against his agent is, generally speaking, within the statute, time not commencing to run until the agency is terminated (*Re Sharpe, Masonic Co.* v. *Sharpe*, 1892, 1 Ch. 166; see *Burdick* v. *Garrick*, 5 Ch. 233).

Account. Before 9 Geo. 4, c. 14, it was held, that in the case of open accounts between persons other than merchants, the statute did not begin to run so long as the account was continued (See *Foster* v. *Hodgson*, 19 Ves. 185). The effect, however, of 9 Geo. 4, c. 14, in the case of actions of debt or assumpsit was, that although there might be a mutual open running account, the existence of items not barred was not sufficient to take items which were barred out of the statute (*Williams* v. *Griffiths*, 2 C. M. & R. 45; *Cottam* v. *Partridge*, 4 M. & G. 271; see *Jackson* v. *Ogg*, Johns. 397).

Merchants' accounts. Merchants' accounts were excepted from the statute 21 Jac. 1, c. 16 (See as to the exception, *Robinson* v. *Alexander*, 2 Cl. & Fin. 717); but this exception has been repealed by 19 & 20 Vict. c. 97, s. 9 (*post*, p. 227), and merchants' accounts now stand upon the same footing as other accounts.

Partnership accounts. In the case of partnership accounts it is settled that, after a partnership has ceased, any claim on simple contract by one partner against the others in respect thereof is *primâ facie* subject to be barred after six years (*Knox* v. *Gye*, L. R. 5 H. L. 656), in which case a suit for an account by the executors of a deceased partner instituted against the surviving partner more than six years from the death, was held barred, although the business had been carried on and assets got in by the defendant during the six years. In another case an action for an account brought more than six years after a dissolution was barred (*Noyes* v. *Crawley*, 10 Ch. D. 31, where *Miller* v. *Miller*, 8 Eq. 499, was treated as overruled). On the other hand, "while a partnership is continuing there is no authority for suggesting that a claim between the partners is affected by the statute, and the opinion of *Lindley*, L. J. (Partnership, 5th ed. p. 510), is to the contrary" (*Barton* v. *North Staffordshire R. Co.*, 38 Ch. D. 463).

Fraud. An action based on concealed fraud (*e.g.*, to recover a bribe secretly received by a director) is within the section, time running from the discovery of the fraud (*Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319; *Re Fitzroy Bessemer Co.*, 50 L. T. 144). Compare the case of a claim against directors for improperly paying dividends, which was a claim for a breach of trust, and was not then capable of being barred, *Flitcroft's case* (21 Ch. D. 519); and see the principle stated by *Cotton*, L. J. (5 Ex. D. 325). Where an auditor was guilty of a breach of duty to the company, the plea of the statute was admitted without argument (*Leeds Co.* v. *Shepherd*, 36 Ch. D. 809). In an action for damages arising from fraudulent misrepresentation, time ran from the discovery of the fraud (*Gibbs* v. *Guild*, 9 Q. B. Div. 59; compare *Moore* v. *Knight*, 1891, 1 Ch. 547, and the other cases cited *post*, p. 233). As to an action to rescind a contract on the ground of fraud, see *Redgrave* v. *Hurd* (20 Ch. D. 13). And as to an injunction in aid of an action of deceit, see *Fullwood* v. *Fullwood* (9 Ch. D. 176).

Where an action was brought to compel a company to replace in the name of the plaintiff stock which they had transferred on a forged transfer, time ran from the refusal by the company, after the forgeries were made known to them, to treat the plaintiff as owner (*Barton* v. *North Staffordshire Co.*, 38 Ch. D. 458).

Fraudulent trespass. Where a mine owner breaks bounds into his neighbour's colliery, and an action is brought for an account, the courts in some cases have treated

21 Jac. 1, c. 16, s. 3.

it as one of fraud, the statute running from the time when the fraud is discovered (*Eccles. Commissioners* v. *N. E. R. Co.*, 4 Ch. D. 845). But where the wrongful working of the defendant was with the knowledge of the plaintiff, it was treated as if commenced inadvertently, and an account was only directed for six years (*Trotter* v. *Maclean*, 13 Ch. D. 574; see the cases classified, *ib.* 586; and see *Dean* v. *Thwaite*, 21 Beav. 61). The fact that the defendants kept a map, in which they omitted to mark their workings into the plaintiff's mine, was not sufficient to establish concealed fraud (*Daws* v. *Bagnall*, 23 W. R. 690).

Devastavit.

A person injured by a devastavit is but a simple contract creditor of the executor (*Charlton* v. *Low*, 3 P. W. 331), and in general his claim is barred by this statute after six years (*Thorne* v. *Kerr*, 2 K. & J. 54; *Re Gale, Blake* v. *Gale*, 22 Ch. D. 820; *Re Hyatt, Bowles* v. *Hyatt*, 38 Ch. D. 618). See further as to enforcing debts against executors, p. 236, *post*.

Arrears of pauper lunatic's maintenance.

Where a pauper lunatic becomes entitled to property, the guardians of his parish can only recover six years' arrears in respect of sums paid for his maintenance (*Eggleton* v. *Newbegin*, 36 Ch. D. 477; see *Re Weaver*, 21 Ch. Div. 615).

India.

Prior to 1859 this statute extended to India (*Ruckmaboye* v. *Mottichund*, 8 Moore, P. C. 4; but see now *Re Peat*, 7 Eq. 302).

Foreign contracts.

In the construction of a contract, the question whether there has been a contract made at all is to be governed by the law where the contract was made, but the remedy is to be according to the law where the contract is sought to be enforced (*Ex p. Melbourn*, 6 Ch. 69). Therefore a debt contracted abroad can only be enforced in England within the time limited by the English statutes (*Huber* v. *Steiner*, 2 Bing. N. C. 202; see *Harris* v. *Quine*, L. R. 4 Q. B. 653; *Pardo* v. *Bingham*, 4 Ch. 738; *Finch* v. *Finch*, 35 L. T. 235; *Alliance Bank* v. *Carey*, 5 C. P. D. 429).

Statute does not extinguish debt, but merely bars remedy.

This statute does not extinguish the debt, but merely bars the remedy by action (*Curwen* v. *Milburn*, 42 Ch. Div. 434; *Re Hancock, Hancock* v. *Berrey*, 59 L. T. 199; see *Re Hepburn*, 14 Q. B. D. 400). On this principle it has been held that a creditor whose action is barred may avail himself of any other means of recovering his debt he may possess. Thus, a solicitor has been allowed to recover by means of his lien on his client's papers, costs which were barred (*Re Murray*, 1867, W. N. 190; *Re Carter*, 1885, W. N. 184; see *Curwen* v. *Milburn*, *sup.*) And see the cases as to an executor's right of retaining debts barred, quoted p. 236. Set-off, however, is within the Statutes of Limitation (*ante*, p. 209). For the purpose of proving in bankruptcy, the remedy by action can alone be looked at (*Re Hepburn*, 14 Q. B. D. 400).

Solicitor's lien.

WHEN TIME BEGINS TO RUN.

(1) In actions *ex delicto*.

Case.

In an action on the case for negligence (*e.g.*, against a solicitor), where the plaintiff alleges a breach of duty, and a special consequential damage, the cause of action is the breach of duty and not the consequential damage; and the statute runs from the time when the breach of duty is committed, and not from the time when the negligence was discovered, or when the consequential damage accrued (*Howell* v. *Young*, 5 B. & C. 259; *Smith* v. *Fox*, 6 Hare, 386; *Hughes* v. *Twisden*, 54 L. T. 570. Compare the rule in assumpsit, *Short* v. *M'Carthy*, 5 B. & Ald. 626, *post*, p. 212). Concealment of the negligence without fraud would make no difference (*Armstrong* v. *Milburn*, 54 L. T. 247, 723). But in actions on the case for injury to real property, where the ground of the action is the consequential damage, time runs from the actual damage, and not from the wrongful act (*Bonomi* v. *Backhouse*, 9 H. L. C. 503; an action for negligently working mines, where the working which caused the thrust was more than six years before action brought, but the actual damage did not commence till within six years). In the case of a further subsidence, time commences to run from such subsidence (*Darley Main Co.* v. *Mitchell*, 11 App. Cas. 127, overruling *Lamb* v. *Walker*, 3 Q. B. D. 389; see *Crumbie* v. *Wallsend Board*, 1891, 1 Q. B. 503).

Trover.

In trover, time runs from the conversion (*Denys* v. *Shuckburgh*, 4 Y. & C. 42). A.'s furniture having been seized under an execution, and then purchased by his friends, was left in A.'s possession for more than six

21 Jac. 1, c. 16, s. 3.

Detinue.

years. After A.'s death the furniture was claimed by his friends, and adversely by his administratrix: it was held that the rights of the former were not barred by the statute, which could only apply from six years from a conversion (*Edwards* v. *Clay*, 28 Beav. 145). Where once there has been a complete cause of action arising out of contract or tort, the statute begins to run, and subsequent circumstances, which would but for the prior wrongful act or default have constituted a cause of action, are disregarded (*Wilkinson* v. *Verity*, L. R. 6 C. P. 209). In the case of tort this principle only applies where the defendant is the sole wrongdoer (*Miller* v. *Dell*, 1891, 1 Q. B. 470). Goods having been bailed by the plaintiffs to the defendant for safe custody, the defendant wrongfully sold them, and the plaintiffs, more than six years after the sale, of which they were ignorant, demanded the goods, which the defendant refused. Held, in detinue, that time ran from the refusal, and not from the sale; inasmuch as the plaintiffs, although if they had discovered the sale they would have been entitled to sue immediately for conversion, were also entitled to elect to sue upon the breach of the bailee's duty by the refusal to deliver up on request. But where an action of detinue is founded upon a bare taking and withholding of the property of another, without any circumstances to show a trust for the owner, or to found an option to sue, either for the wrong or for the breach of the original terms of deposit, time will run from the period at which the property was first wrongfully dealt with (*Wilkinson* v. *Verity*, L. R. 6 C. P. 206). Where A.'s lease was, without his knowledge, deposited fraudulently with B. to secure a loan, and the mortgage debt and lease were afterwards transferred to C., both B. and C., being ignorant of the fraud, and C. having refused to return the lease, A. brought an action of detinue against him, the statute ran from the time when A. first had a complete cause of action against C. by reason of his refusal, irrespective of the existence of any previous cause of action against B. (*Miller* v. *Dell*, 1891, 1 Q. B. 468; *Spackman* v. *Foster*, 11 Q. B. D. 99). It was doubted whether the statute would prevent a person rightfully in possession of land from recovering title deeds more than six years after their conversion (1891, 1 Q. B. 472). In an action for detention of title deeds, it was laid down that time does not begin to run so long as the deeds are in the possession of the person enjoying the land, although such enjoyment be wrongful (*Plant* v. *Cotterell*, 5 H. & N. 430).

Fraud.

As to the running of time in the cases of concealed fraud, see the cases on p. 210.

False imprisonment.

As to when time runs in the case of an action for false imprisonment, see *Violett* v. *Simpson* (8 El. & Bl. 344; 6 W. R. 12).

(2) In actions *ex contractu*.

The time limited by the statute does not begin to run until there be a full and complete cause of action. On a sale of goods on credit, the statute begins to run from the time when credit has expired (*Helps* v. *Winterbottom*, 2 B. & Ad. 431). In general, the day on which the cause of action accrued is to be included (Hob. 109; 4 Moore, 465). In

Assumpsit.

assumpsit the statute begins to run from the breach of the promise, and not from the consequential damage. In an action against an attorney for an omission to make a search, which took place upwards of six years before, the statute was a bar, though the omission was not discovered till within the six years (*Short* v. *M'Carthy*, 3 B. & Ald. 626; *Brown* v. *Howard*, 2 Brod. & B. 73; *Battley* v. *Faulkner*, 3 B. & Ald. 288). Compare the rule in an action on the case (*Howell* v. *Young*, 5 B. & C. 259, *ante*, p. 211).

Ante-nuptial debts.

As regards the liability of a husband for his wife's ante-nuptial debts under sects. 14, 15 of M. W. P. Act, 1882, time runs in favour of the husband from the date of the cause of action against the wife, not from marriage (*Beck* v. *Pierce*, 23 Q. B. Div. 323).

The statute runs from the earliest time at which an action can be brought (*Reeves* v. *Butcher*, 1891, 2 Q. B. 511). The defendant gave a warrant of attorney to secure a debt payable by instalments, the plaintiff to be at liberty, in case of any default, to have judgment and execution for the whole. It was held that the fact that the first default was made more than six years before action was a complete

21 Jac. 1, c. 16, s. 3.

defence, not only as to instalments due more than six years ago, but also as to those due within that period (*Hemp* v. *Garland*, 4 Q. B. 519). If any one of the securities for an annuity are set aside, the grantee may recover back the purchase-money in an action for money had and received for failure of consideration. In such a case the statute runs from the time when the security is set aside, it not appearing that the consideration has failed before that time; and the statute does not apply if the security was set aside within six years, though six years have elapsed since the annuity was last paid (*Huggins* v. *Coutes*, 5 Q. B. 432; *Cowper* v. *Godmond*, 9 Bing. 748). Where the cause of action does not arise until after request made, the statute will only run from the time of such request (*Gould* v. *Johnson*, 2 Salk. 422; 2 Saund. 63 b, n.) If goods be consigned to a factor for sale, an action does not lie against him for not accounting for them, until after a demand made of an account; and the statute therefore, in such case runs only from the time of such demand (*Topham* v. *Braddick*, 1 Taunt. 572). If the contract be to pay money at a future period, or upon the happening of a certain event, the statute does not begin to run until that specified period or that event (*Fenton* v. *Imbers*, 1 W. Bl. 354; 3 Burr. 1278).

Action for purchase-money of annuity.

Where money was advanced to a firm to be repaid on demand, with compound interest: the statute ran from the date of the advance (*Jackson* v. *Ogg*, Johns. 397); in which case it was also held that entries made in the books of the firm, crediting the person who advanced the money with interest from time to time, on the footing of periodical rests, did not affect the operation of the statute. Compare the cases as to a mortgagee's accounts, *ante*, p. 161. Where the plaintiff, in 1851, advanced 5,000*l.* to the defendant, to assist an undertaking, which was brought to an end in 1856, and it was agreed that the defendant was not to be personally liable, but the plaintiff was to be paid out of the profits, it was held that the advance was not to be considered with reference to the statute as a debt payable on demand, and that the statute did not commence to run until after the plaintiff's first demand. A distinction was drawn between debts payable on demand, and debts recoverable on demand (*Knox* v. *Gye*, 15 W. R. 628). The defendant, being drawer of two bills of exchange of which the plaintiff was holder, gave him a written promise that, in consideration of the plaintiff having agreed not to proceed against him, the defendant debarred himself of all future plea of the statute, and promised to pay the bills, "whenever my circumstances may enable me to do so, and I may be called upon for that purpose." In an action on this agreement, held, that the statute ran from the time of the defendant becoming able to pay, though the plaintiff had made no demand, and had not been informed by the defendant, or otherwise had knowledge of such ability (*Waters* v. *Thanet*, 2 Q. B. 757; see *Hammond* v. *Smith*, 33 Beav. 452; *Bethell* v. *Bethell*, 34 Ch. D. 561). A promissory note being given to a banker by A. and a surety, and a contemporaneous agreement being executed showing the note to be given as a security for the banking account to be kept by A. with the bank: it was held, that the statute did not run from the time when A. became indebted to the bank, but from the time when the balance was struck (*Hartland* v. *Jukes*, 32 L. J. Exch. 162).

Debt payable on demand.

In the case of a note, payable on demand, the statute runs from the date of the note (*Christie* v. *Fonsick*, 1 Selw. N. P. 301, 13th ed.) So in the case of a cheque given for a pre-existing debt (*Bethell* v. *Bethell*, 34 Ch. D. 566). It makes no difference that the note is payable with interest (*Norton* v. *Ellam*, 2 M. & W. 461). Where, upon a loan, the borrower, before the advance was made, gave to the lender a promissory note payable on demand, it was said that time ran from the giving of the note, not from the date of the advance (*Buccleugh* v. *Eden*, 61 L. T. 360). Where in form a note is payable twenty-four months after demand, the cause of action on the note does not accrue, and the statute does not begin to run until twenty-four months after demand made (*Thorpe* v. *Boothe*, 1 Ry. & Moo. 388). Payment of interest upon a promissory note payable on demand, although there be no independent evidence that any demand of payment of the note has been made, is of itself evidence of a demand (*Bamfield* v. *Tupper*, 7 Exch.

Bills and notes.

21 Jac. 1, c. 16, s. 3.

27; *Re Rutherford, Brown* v. *Rutherford*, 14 Ch. Div. 687). Where a note is payable after sight, the statute runs only from the time of presentment (*Holmes* v. *Kerrison*, 2 Taunt. 323; and see *Savage* v. *Aldred*, 2 Stark. 232). As to when bills and notes are to be deemed payable on demand, see 45 & 46 Vict. c. 61, ss. 10, 11, 88.

Where the statutory period for suing on a note expired on a Sunday, and a writ was issued on Monday, the action was held barred, R. S. C. Ord. 64, r. 3, not applying (*Morris* v. *Richards*, 45 L. T. 210). Where a debtor draws a bill to be applied in part payment of the debt, and the bill is paid when due by the drawee to the creditor, it operates as a part payment to defeat the statute only from the time of the delivery of the bill by the debtor, not from the time of its payment (*Irving* v. *Veitch*, 3 M. & W. 90). The defendant gave S. his acceptance in blank on a 5*s.* stamp. S. (not within a reasonable time), filled in his own name as drawer for 200*l.* at five months. The defendant being sued on the bill, and having pleaded the statute, the statute ran from the time the bill became due as filled up, and not from the time it would have become due if completed when it was accepted in blank (*Montague* v. *Perkins*, 22 L. J. C. P. 187). In the case of a bill of exchange drawn on a bank, time did not commence to run against the holder's right to sue the drawer until presentation to the bank for payment (*Re Boyse, Crofton* v. *Crofton*, 33 Ch. D. 612). "In the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete, and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment" (*Per Willes*, J., *Wilkinson* v. *Verity*, L. R. 6 C. P. 209; see *Whitehead* v. *Walker*, 9 M. & W. 506). K. being indebted to the plaintiffs and to the defendant, and also to a banking company, it was agreed between all the parties that to secure K.'s debt to the company the defendant should draw upon K. three bills of exchange, payable to the plaintiffs, and that the plaintiffs should indorse them to the company. The bills became due in 1843, and were dishonoured. In 1847 the company sued the plaintiffs on the bills, and the plaintiffs, in 1851, paid the amount: it was held, in 1852, that the plaintiffs were barred by the statute from suing the defendant as drawer of the bills (*Webster* v. *Kirk*, 17 Q. B. 944).

Where a bill is drawn payable at a future period for a sum lent by payee to drawer at the time of drawing the bill, the payee may recover in an action for money lent at any time within six years from the time when the bill became due (*Wintersheim* v. *Carlisle*, 1 H. Bl. 631). Where an advance was made by the lender giving to the borrower a cheque which was subsequently paid, time ran against the lender, in an action for money lent, from the payment not the giving of the cheque (*Garden* v. *Bruce*, L. R. 3 C. P. 300).

Concealment of right.

Before the Jud. Acts it was held that it was no answer at law to a plea of the statute, that the plaintiff was prevented by the defendant's fraud from knowing of the cause of action until after the time of limitation had expired (*Imperial Gas Co.* v. *London Gas Co.*, 10 Exch. 39; *Hunter* v. *Gibbons*, 1 H. & N. 459). The rule was different in equity where time ran from the discovery of the fraud (*Blair* v. *Bromley*, 2 Phil. 354; *Eccl. Commissioners* v. *N. E. R. Co.*, 4 Ch. D. 845). The rule in equity now prevails (*Gibbs* v. *Guild*, 9 Q. B. Div. 59; *Re Crosley, Munns* v. *Burn*, 35 Ch. Div. 266), and in cases falling within the Trustee Act, 1888, s. 8, is not affected by that section (*Moore* v. *Knight*, 1891, 1 Ch. 547). But concealment of a cause of action without fraud makes no difference (*Armstrong* v. *Milburn*, 54 L. T. 723).

Where costs were incurred in obtaining an act for a railway subsequently abandoned, time did not commence to run against the creditor claiming the costs until the company had assets (*Re Kensington Station Act*, 20 Eq. 197).

Actions for costs.

In the case of bills of costs items dated more than six years before action will be barred, where the work was miscellaneous (*Beck* v. *Pierce*, 23 Q. B. Div. 323), or the employment not continuous (*Phillips* v. *Broadley*, 9 Q. B. 744). Where, however, the employment was continuous and lasted till within the six years, such items will not be barred (*Harris* v.

21 Jac. 1, c. 16, s. 3.

Quine, L. R. 4 Q. B. 653). As where a solicitor is retained to conduct an action; in which case he cannot, as a rule, sue for his costs until the termination of the action or of his retainer (*Harris* v. *Osbourn*, 2 C. & M. 629; *Nicholls* v. *Wilson*, 11 M. & W. 106). So costs incurred in conducting a suit in which no final decree had been made were held not to be barred, though no steps had been taken in the suit for ten years prior to action brought (*Whitehead* v. *Lord*, 7 Exch. 691; see *Stokes* v. *Trumper*, 2 K. & J. 232; *Baile* v. *Baile*, 13 Eq. 497). The statute will, as a rule, run from the date of the judgment in the action for which the retainer was given (*Rothery* v. *Munnings*, 1 B. & Ad. 15); but when an appeal is brought, the employment will be considered continuous as from the commencement of the action (*Harris* v. *Quine*, L. R. 4 Q. B. 657). During the course of the action the solicitor may give reasonable notice to the client to supply him with funds, and on refusal sue for costs. The retainer will also be determined by the death of the client (*Whitehead* v. *Lord*, 7 Exch. 691). As to part payment in the case of bills of costs, see *Morley* v. *Finney* (1870, W. N. 82). And as to taxation where some of the items of a bill are barred, see *Curwen* v. *Milburn*, 42 Ch. D. 424.

Costs in lunacy.

Costs incurred by solicitors in prosecuting a commission in lunacy, and subsequently acting on behalf of the committee, were held (at the lunatic's death) not barred by the lapse of six years during his life; for the Court of Chancery will take judicial notice, that any action for the recovery of the claim would have been restrained (*Stedman* v. *Hart*, Kay, 607). See the cases as to a lunatic's maintenance, *post*, p. 238.

Costs incurred by a company which is afterwards wound up.

Where solicitors delivered to the official manager of a company in liquidation books and papers, on which they had a lien for their costs, upon his undertaking in writing to pay them out of the first funds which might come into his hands; it was held that the statute had no application (*Re Gloucester, &c. R. Co.*, 2 Giff. 47). As to the right of an official liquidator to have bills of costs taxed, see *Ex p. Evans* (11 Eq. 151); *Re Liverpool, &c. Association* (1889, W. N. 48). A solicitor's right to have a call made for his payment may be lost by laches (*Ex p. A'Beckett*, 2 Jur. N. S. 684; see *Re Gloucester R. Co.*, *sup.*)

Effect on the running of time —of winding-up order; —of administration judgment.

It was decided, under the Winding-up Acts of 1848-49, that an order to wind up a company did not stop time from running against a creditor whose right of action had accrued previously to the winding-up order (*Ex p. Forest*, 2 Giff. 42). But the carrying in a claim under the winding up did stop the running of time (*Wryghte's Case*, 5 De G. & Sm. 244). Under the Companies Act, 1862, a winding-up order stops the running of time (*Re General Rolling Stock Co.*, 7 Ch. 646). Compare the similar effect of judgment in an administration action, *post*, p. 237.

Continuous running of time.

It was formerly laid down that when once time had begun to run, no subsequent disability or inability to sue would stop it (*Rhodes* v. *Smethurst*, 4 M. & W. 42). But it has since been held, that where a debtor takes out administration to his creditor, the running of time will be suspended during the administration (*Seagram* v. *Knight*, 2 Ch. 628). Where an action was brought in time and the defendant died, the plaintiff had a right to bring a new action against the executor or administrator within a reasonable time (*Sturgis* v. *Darell*, 6 H. & N. 120; see sect. 4, *post*). This rule was applied where the second action was commenced within a year from the proof of the will by the executor (*Swindell* v. *Bulkeley*, 18 Q. B. Div. 250). A mere letter of licence by a creditor to his debtor does not suspend the operation of the statute (*Fuller* v. *Redman*, 26 Beav. 614). But a covenant not to sue for a certain period will prevent time running until the expiration of that period (*Iven* v. *Elwes*, 3 Drew. 25; see *O'Brien* v. *Osborne*, 10 Hare, 92). Time was held to run against a trustee in bankruptcy in the same way against the bankrupt [illegible].

Where a cause of action accrues to a person in his lifetime, his executor cannot bring an action after the time limited by the statute has expired (*Penny* v. *Brice*, 18 C. B. N. S. 393; 13 W. R. 342). But if the statute has not begun to run during the lifetime of an intestate, it does not run against the administrator until administration has been taken out (*Burdick* v. *Garrick*, 5 Ch. 241). Where a creditor dies intestate on the day on which the debt becomes due, in the absence of evidence time does not

21 Jac. 1, c. 16, s. 3.

run against the administrator until administration is taken out (*Atkinson* v. *Bradford Society*, 25 Q. B. Div. 377). If time has once begun to run against a debt in the debtor's life, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted (*Freake* v. *Cranefeldt*, 3 M. & C. 499; *Boatwright* v. *Boatwright*, 17 Eq. 71; see *Martin* v. *Beauchamp*, 1888, W. N. 247).

In an action by an administrator against the acceptor upon a bill of exchange, payable to the testator, *but accepted* after his death, it was held, that the statute began to run from the time of granting the letters of administration, and not from the time the bill became due, there being no cause of action until there was a party capable of suing (*Murray* v. *The East India Co.*, 5 B. & Ald. 204; and see *Pratt* v. *Swaine*, 8 B. & C. 285; *Perry* v. *Jenkins*, 1 M. & C. 118; *Hyde* v. *Price*, 1 C. P. Coop. 196; *Freake* v. *Cranefeldt*, 3 M. & C. 499; *Howlitt* v. *Lambert*, 1 Ir. Eq. R. 263; *Fergusson* v. *Fyffe*, 8 Cl. & Fin. 121). The statute is not a good plea where an executor has not proved; because no laches can be imputed to a plaintiff for not suing whilst there was no executor against whom he could bring his action (Coop. Eq. Pl. 233; 2 Vern. 694; 1 Eq. Cas. Abr. 305). But where the defendant might have been sued as executor *de son tort*, his plea of the statute was allowed, although he had not taken out probate until some years after the testator's death (*Webster* v. *Webster*, 10 Ves. 93).

Limitation after judgment or outlawry reversed.

By 21 Jac. 1, c. 16, s. 4, if judgment is given for the plaintiff and reversed by error or arrested, or if the defendant is outlawed and the outlawry reversed, a new action may from time to time be commenced within a year afterwards by the plaintiff, his heirs, executors or administrators.

Within the equity of this section the courts permitted an executor or administrator, within a year, or within a reasonable time after the death of the testator or intestate, to renew a suit commenced by the testator or intestate, and *vice versâ* (*Curlewis* v. *Mornington*, 7 E. & B. 283; see 15 & 16 Vict. c. 76, ss. 135 *et seq.*; *Swindell* v. *Bulkeley*, 18 Q. B. Div. 250).

Infants, femes coverts, &c. excepted.

7. Provided nevertheless, and be it further enacted, that if any person or persons that is, or shall be, entitled to any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debt, actions of trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be, at the time of any such cause of action, given or accrued, fallen or come, within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done (*b*).

Disabilities. Coverture.

(*b*) From the time when the Married Women's Property Act, 1882, enabled a married woman to sue, she became discovert within the above section; so held in the case of an action for slander (*Weldon* v. *Neal*, 51 L. T. 289; 32 W. R. 828), and for assault (*Lowe* v. *Fox*, 15 Q. B. Div. 676). Neither the imprisonment of the plaintiff nor his absence beyond the seas now constitute a disability (19 & 20 Vict. c. 97, s. 10, *post*). The absence of a defendant beyond the seas is made a disability by 4 Anne, c. 16, s. 19 (See *Forbes* v. *Smith*, 11 Ex. 161). As to the meaning of "beyond seas" in these acts, see 3 & 4 Will. 4, c. 42, s. 7 (p. 207, *ante*); and 19 & 20 Vict.

Beyond the seas.

c. 97, s. 12 (*post*, p. 228); and see as to the effect of the proviso relating to plaintiffs beyond the seas, *Perry* v. *Jackson* (4 T. R. 516); *Lafond* v. *Ruddock* (13 C. B. 813; 2 Atk. 610—614); *Strithorst* v. *Græme*, (3 Wils. 145); *Le Veux* v. *Berkeley*, (5 Q. B. 836); *Townsend* v. *Deacon* (3 Exch. R. 706); *Smith* v. *Hill* (1 Wils. 134; 4 T. R. 311); *Denys* v. *Shuckburgh* (4 Y. & Coll. 47). 21 Jac. 1, c. 16, s. 7.

Under the statute 4 Anne, c. 16, s. 19, if a right of action accrued against several persons, one of whom was beyond seas, the statute did not run until his return, though the others had never been absent from the kingdom (*Fannin* v. *Anderson*, 7 Q. B. 811; *Towns* v. *Mead*, 16 C. B. 123; see 19 & 20 Vict. c. 97, ss. 10, 11, *post*, p. 228). One of several under disability.

Where a person died abroad, to whom a right of action had accrued during his residence there, and he never returned to this country, his executors could sue for it, although more than six years had elapsed since it accrued. It was unnecessary to consider the question whether the executor could maintain the action after the expiration of six years; *Parke*, B., inclining to the opinion that the executor was under no restraint; but *Rolfe*, B., thinking it would be more reasonable to consider the right of action as accruing to the executor at the death of the testator, and to limit the right of action to six years (*Townsend* v. *Deacon*, 3 Exch. R. 706). A person gave his creditor a bill, and, before the bill arrived at maturity, went to India, whence he never returned. As soon as circumstances would permit after his death in India, his will was proved in England. A creditor's bill filed within six years after his death was held not barred (*Story* v. *Fry*, 1 Y. & Coll. C. C. 603; see *Williams* v. *Jones*, 13 East, 439; and *Flood* v. *Patterson*, 29 Beav. 295). Representatives of persons dying under disability.

EXPRESS ACKNOWLEDGMENTS.

9 Geo. 4, c. 14.—*An Act for rendering a Written Memorandum necessary to the Validity of certain Promises and Engagements.* [19th May, 1828.]

The stat. 9 Geo. 4, c. 14, recites the stat. 21 Jac. 1, c. 16, s. 3, and the Irish stat. 10 Car. 1, sess. 2, c. 6, and that various questions had arisen in actions founded on simple contracts, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking cases out of the operation of the said enactments; and that it was expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof; and enacts (sect. 1), That in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that, where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: 9 Geo. 4, c. 14.

In actions of debt or upon the case no acknowledgment shall be deemed sufficient, unless it be in writing or by part payment.

9 Geo. 4, c. 14, s. 1.

provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

Proviso for case of joint contractors.

Indorsements of payments.

3. That no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes (*a*).

(*a*) As to this section, see *post*, p. 225.

Simple contract debts alleged by way of set-off.

4. That the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

See as to Ireland, 16 & 17 Vict. c. 113, ss. 24, 25, and 26.

Old law.

From an early period, although the time limited by the stat. 21 Jac. 1, c. 16, had elapsed, the plaintiff was permitted to prove an acknowledgment of, or promise to pay, the debt within six years, which was sufficient to entitle him to recover (3 Y. & Jerv. 522). To provide a remedy against the vague and loose verbal promises which had been allowed to take cases out of the statute, 9 Geo. 4, c. 14 (Lord Tenterden's Act) was passed (6 Bing. 264).

Construction of Lord Tenterden's Act.

The intention of the stat. 9 Geo. 4, c. 14, was not to make any alteration in the legal construction to be put upon acknowledgments or promises made by debtors, but merely to require a different mode of proof, substituting the certain evidence of writing, signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses. The inquiry, therefore, in a given case, whether the written document amounts to an acknowledgment or a promise, is no other than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar effect (*Haydon* v. *Williams*, 7 Bing. 163; see *Courtenay* v. *Williams*, 3 Ha. 549; and *Moodie* v. *Bannister*, 4 Drew. 440). Since the statute a verbal order by the trustees of a turnpike act to pay a debt was held insufficient (*Emery* v. *Day*, 1 C. M. & R. 245).

Acknowledgments by agent.

Previously to the act 19 & 20 Vict. c. 97, it was held, under 9 Geo. 4, c. 14, that an acknowledgment signed by an agent of the debtor would not revive a debt barred by 21 Jac. 1, c. 16, but that it must have been signed by the debtor himself (*Hyde* v. *Johnson*, 2 Bing. N. C. 776; *Clark* v. *Alexander*, 8 Scott, N. R. 165; see *Swift* v. *Winterbotham*, L. R. 8 Q. B. 249; and *Williams* v. *Mason*, 21 W. R. 386). An acknowledgment signed by an agent is now sufficient (See 19 & 20 Vict. c. 97, s. 13, *post*, p. 229). Thus an acknowledgment by a solicitor bound his client (*Curwen*

v. *Milburn*, 42 Ch. D. 432). And an acknowledgment by one partner would probably be regarded as an acknowledgment by the firm (Lindley, Partnership, 263, 5th ed.) Compare the case of payments by one partner (*Watson* v. *Woodman*, 20 Eq. 730). Where a debt due from a company to L. was barred, and the board of directors, of whom L. was one, passed a resolution in reference to the debt, it was said by *Wood*, V.-C., that even if the resolution had been a sufficient acknowledgment, it would not have bound the company (*Lowndes* v. *The Garnett, &c. Co.*, 33 L. J. Ch. 418; 12 W. R. 573).

By one of several executors.

It was ruled by Lord *Tenterden*, in *Tulloch* v. *Dunn* (1 Ry. & M. 416), that one executor cannot be bound by the express promise of another, even if he binds himself in his character as executor. "It seems to have been the opinion of the court, in the case of *Atkins* v. *Tredgold* (2 B. & C. 23), that if an express promise is made by an executor in his representative character, it binds the remaining executors in their representative characters. So also in *M'Culloch* v. *Dawes* (9 D. & R. 40), the court appear to have thought that if one promised in his executive character, it would bind the others. The point, however, is not decided in those cases, but it has been decided in *Tulloch* v. *Dunn*. It appears to me that that case is founded in justice and good sense, and ought to be followed" (*Scholey* v. *Walton*, 12 M. & W. 514, *per Parke*, B.)

By infants.

A written acknowledgment of a debt is an answer to a plea of the statute, though made by an infant, if the debt was for necessaries supplied to him (*Willins* v. *Smith*, 4 Ell. & Bl. 180). With regard to acknowledgments of debts and contracts of infants generally, it is provided by 37 & 38 Vict. c. 62, s. 2, that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

Confirmation of promises made by infants.

37 & 38 Vict. c. 62.

Acknowledgment to a third party.

An acknowledgment made to a third party will not take the case out of the statute (*Moodie* v. *Bannister*, 4 Drew. 439; *Fuller* v. *Redman*, 26 Beav. 619; *Grenfell* v. *Girdlestone*, 2 Y. & Coll. Exch. 676; *Tanner* v. *Smart*, 6 B. & C. 603; *Stamford Banking Co.* v. *Smith*, 1892, 1 Q. B. 765).

To an agent.

But an acknowledgment to the agent of the creditor will be sufficient (*Edmonds* v. *Goater*, 15 Beav. 415).

When acknowledgment must be made.

An acknowledgment made within six years before action brought is sufficient, although it be made more than six years after the original cause of action (*Spickernell* v. *Hotham*, Kay, 669; see *Re Lane*, 23 Q. B. D. 74). An acknowledgment made after action brought cannot be used to take a case out of the statute (*Bateman* v. *Pinder*, 3 Q. B. 574).

Effect of an acknowledgment.

In *Philips* v. *Philips* (3 Hare, 281, 299), *Wigram*, V.-C., laid down the following principle (which has since been adopted, *Buckmaster* v. *Russell*, 10 C. B. N. S. 749; *Chasemore* v. *Turner*, L. R. 10 Q. B. 505):—"The legal effect of an acknowledgment of a debt, barred by the Statute of Limitations, is that of a promise to pay the old debt, and for this purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." On this principle a mere acknowledgment of a debt, accompanied with a proposal to pay part, which has not been acceded to, is not sufficient to take the case out of this statute (*Francis* v. *Hawkesley*, 1 Ell. & Ell. 1052; 28 L. J. Q. B. 370).

Construction of an acknowledgment.

The construction of an acknowledgment is a question for the court, not the jury, except where the document is connected with other evidence affecting the construction (*Morrell* v. *Frith*, 3 M. & W. 402; *Bird* v. *Gammon*, 3 Bing. N. C. 883; *Power* v. *Barham*, 4 Ad. & Ell. 473). The later cases have decided that the effect of a document set up as an acknow-

9 Geo. 4, c. 14.

ledgment is entirely a question for the court, unless extrinsic evidence is necessary to qualify or explain it (*Smith* v. *Thorne*, 18 Q. B. 140).

Acknowledgment of pending account.

To prevent the right to have an account from being barred by the statute, it is not necessary to have an acknowledgment that a debt is actually due, but it is sufficient that there should be an acknowledgment that the account is pending, and a promise to pay the balance if it should be found to be against the accounting party (*Prance* v. *Sympson*, Kay, 678).

Amount need not be stated.

If, since the stat. 9 Geo. 4, c. 14, a defendant, by letter, admits a *balance to be due*, without stating the amount, this will take the case out of the statute, but the damages will be nominal unless the amount be proved at the trial (*Dickenson* v. *Hatfield*, 5 C. & P. 46; *Bird* v. *Gammon*, 3 Bing. N. C. 833; *Archer* v. *Leonard*, 15 Ir. Ch. Rep. 67, a promise to pay a solicitor an amount to be ascertained by taxation; *Cheslyn* v. *Dalby*, 4 Y. & C. 238, where the recitals of a deed amounted to a promise to pay an amount to be ascertained as mentioned in the deed; *Dodson* v. *Mackey*, 8 Ad. & El. 225, n.; *Dabbs* v. *Humphries*, 10 Bing. 446; *Lechmere* v. *Fletcher*, 1 C. & M. 623; *Waller* v. *Lacy*, 1 Scott, N. R. 186).

Bankrupt's balance sheet.

An admission by a bankrupt in his balance sheet will not, as between the creditor and the bankrupt's assignees, take a debt out of the statute (*Pott* v. *Cliff*, 16 M. & W. 321); where it was also held that an admission in an unsigned letter, written and sent by direction of the assignees of a bankrupt, by an accountant employed by them to wind up the affairs of the bankrupt estate, would not take a debt of the bankrupt out of the statute (See *Everett* v. *Robertson*, 1 Ell. & Ell. 16, and *Ex p. Topping*, 34 L. J. Bk. 44). An advertisement under 22 & 23 Vict. c. 35, s. 29, to creditors to bring in their claims will not take a debt out of the statute (*Re Stephens*, *Warburton* v. *Stephens*, 43 Ch. D. 43). So in the case of advertisements before that act (*Scott* v. *Jones*, 4 Cl. & Fin. 382). An admission in cross-examination, and appearing in a signed deposition, may amount to an acknowledgment (*Re Beynon*, 1873, W. N. 186).

Advertisement.

Parol evidence.

Where a written promise to pay a debt barred by the statute has been lost, parol evidence of the contents of the writing is admissible (*Haydon* v. *Williams*, 7 Bing. 163). But it is doubtful whether the date of the written acknowledgment can be supplied by oral evidence (*Edmunds* v. *Downes*, 2 C. & M. 459).

Acknowledgment exempted from stamp duty.

9 Geo. 4, c. 14, s. 8.

No memorandum or other writing made necessary by 9 Geo. 4, c. 14, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps (9 Geo. 4, c. 14, s. 8; 16 & 17 Vict. c. 113, s. 27, Ir.) Under this section the following memorandum:—"I acknowledge to owe to M. 36*l*., which I agree to pay him as soon as circumstances will permit," is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the statute, the debt itself being proved by other evidence (*Morris* v. *Dixon*, 4 Ad. & Ell. 845). When the parties mean to make an instrument solely to prevent the operation of 9 Geo. 4, c. 14, they must take care not to import into it terms which will make it liable to stamp duty as a promissory note. A promissory note, improperly stamped, is not admissible as a memorandum to take a case out of the statute under the 9 Geo. 4, c. 14, s. 8; that section applies only to instruments which might be stamped with an agreement stamp (*Jones* v. *Ryder*, 4 M. & W. 32; see also *Parmiter* v. *Parmiter*, 3 D. F. & J. 461).

What a sufficient acknowledgment.

There must be—(1) acknowledgment, or (2) unconditional promise, or (3) conditional

A mere acknowledgment is not sufficient to take a case out of the statute, unless there be a promise to pay; upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, an implication will not arise (*Tanner* v. *Smart*, 6 B. & C. 602). A statement of inability to pay does not *per se* exclude the implication of a promise (*Firth* v. *Slingsby*, 58 L. T. 485). In *Smith* v. *Thorne* (18 Q. B. 134, 139), *Parke*, B., said, "the acknowledgment must be consistent with an intention to pay, either on request, or else (which practically comes to the same thing) at the end of a particular period which has elapsed, or on

some condition which has been fulfilled" (cited by *Hill*, J., *Everett* v. *Robertson*, 1 Ell. & Ell. 20). "There must be, in order to take the case out of the statute, one of the three following things: either there must be an acknowledgment of the debt from which a promise to pay it must be implied: or secondly, there must be an unconditional promise to pay the debt: or thirdly, there must be a conditional promise to pay the debt in writing, and evidence that that condition has been performed" (*Mitchell's Claim*, 6 Ch. 828).

promise and evidence of condition performed.

The following letters written by debtors have been held to be sufficient acknowledgments of debts from which a promise to pay must be implied:— "In regard to your statement of account received, I am ashamed the account has stood so long, I must beg to trespass on your kindness a short time longer" (*Cornforth* v. *Smithard*, 1 H. & N. 13). "I have received your bill, it does not, I think, specify sufficiently to which cottages the work is done. I shall feel obliged if you will more particularly explain, and take your agreements to Mrs. H. (the defendant's agent). It is my wish to settle your account immediately, but being at a distance I wish everything very explicit and correct. I have asked Mrs. H. to mark the agreements, and send them to me, and I will return them by first post, with instructions to pay, if correct" (*Sidwell* v. *Mason*, 2 H. & N. 306). "When the policy is paid on the 29th October, I hope that you will have whole of your account ready for me as I hope to be with you on that day": followed by a second letter, "Oct. 25, Mr. V., when here on Saturday, stated that the amount due against me was about 280*l.*; of course this includes the 100*l.* and interest that I had some years since, and the 40*l.* promissory note that I jointly signed with the late Mr. B." (*Godwin* v. *Culley*, 4 H. & N. 373). "I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week" (*Lee* v. *Wilmot*, L. R. 1 Ex. 364). "I shall be obliged to you to send in your account made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders till this be done": followed by another letter, "I again beg of you to send in your account" (*Quincey* v. *Sharpe*, 1 Ex. D. 72). A request for the delivery of "any unsettled bill" (*Curwen* v. *Milburn*, 42 Ch. D. 424). An indorsement by the maker of a promissory note, with his name, together with the date, upon the note (*Bourdin* v. *Greenwood*, 13 Eq. 281). So where a first mortgagee who had sold the property, wrote to the second mortgagee enclosing account showing balance after payment of first mortgage, and offered explanation (*Banner* v. *Berridge*, 18 Ch. D. 254, see 274).

Instances of sufficient acknowledgments.

S. borrowed of J. 200*l.* upon promissory notes, and a year afterwards remitted to J. 10*l.* on account of the interest due, and sent him a bill of 17*l.* for goods. J., by note, acknowledged the 10*l.* and the bill and stated that he placed both sums to the credit of S., and requested S. to receipt the bill and return. In an action for the 17*l.*, it was held, that the above letter took the case out of the statute (*Evans* v. *Simon*, 9 Exch. 282).

The following were held to be unconditional promises to pay:—"I hope to be in H. very soon, when I trust everything will be arranged with Mrs. W. agreeable to her wishes" (*Edmonds* v. *Goater*, 15 Beav. 415; see *Fuller* v. *Redman*, 26 Beav. 620). "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are a short time and all will be right" (*Collis* v. *Stack*, 1 H. & N. 605, in which case it was said that the question in these cases is, whether the statement as to the time of payment is merely an excuse, or the condition on which payment is to be made). "Show this letter to Mrs. W., and tell her the claim has not been forgotten by me, and shall be liquidated at the earliest opportunity" (*Wilby* v. *Elgee*, L. R. 10 C. P. 497). "The old account between us, which has been standing over so long, has not escaped our memory, and as soon as we can get our affairs arranged, we will see you are paid" (*Chasemore* v. *Turner*, L. R. 10 Q. B. 500). "If you send me the particulars of your account with vouchers, I shall have it examined, and cheque sent you for the amount due, but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim" (*Skeet* v. *Lindsay*, 2 Ex. D. 314).

Unconditional promises.

9 Geo. 4, c. 14.

In 1834, A. gave B. a promissory note payable on demand. Demand having been made, but neither principal nor interest having been paid, in 1848 A. wrote to B. a letter referring to a promissory note for a debt which he acknowledged and promised thereby to pay. It was held, that in the absence of proof of the existence of any other promissory note to which it could relate, the letter of 1848 must be taken to refer to the promissory note, and thus to take it out of the statute (*Spickernell* v. *Hotham*, Kay, 699).

Conditional promises.

Condition performed.

The following is an instance of a conditional promise to pay, the condition having been performed. A debtor wrote to his creditor, "I will pay you as soon as I get it in my power: before I cannot." Held, that time commenced to run when the debtor became of ability to pay, and not before (*Hammond* v. *Smith*, 33 Beav. 452; see *Waters* v. *Thanet*, 2 Q. B. 757, *ante*, p. 213; *Buccleugh* v. *Eden*, 61 L. T. 360).

See also *Archer* v. *Leonard* (15 Ir. Ch. R. 267); *Leland* v. *Murphy* (16 Ir. Ch. R. 500); *Burrows* v. *Baker* (I. R. 3 Eq. 596); *Fiske* v. *Mitchell* (19 W. R. 798).

Instances of insufficient acknowledgments.

An acknowledgment, accompanied with what is a contradiction of any promise to pay, is not sufficient (*Linsell* v. *Bonsor*, 2 Bing. N. C. 241). A mere acknowledgment, though it may, under circumstances, amount to a new promise, yet if it does not it is not a sufficient answer to the statute (*Fearn* v. *Lewis*, 6 Bing. 349; *Scales* v. *Jacob*, 3 Bing. 638; *Ayton* v. *Bolt*, 4 Bing. 105). And therefore a letter acknowledging that the plaintiff made a demand, but not acknowledging the propriety of the demand, and denying all liability on the defendant's part to make the payment, was held not to raise an implication of a promise to pay (*Brigstock* v. *Smith*, 1 C. & M. 483). The following letters written by debtors have been held not to be sufficient acknowledgments of debts from which a promise to pay could be implied:—"I am happy to say that by that time both the principal and interest will have been paid in full" (*Green* v. *Humphreys*, 26 Ch. Div. 474). "A paper has been received purporting to be a memorandum of account between you and this company, which is altogether incorrect, omitting all deductions and credits, which would leave a balance considerably in their favour. The company are still willing to have all accounts decided by arbitration" (*Mitchell's Claim*, 6 Ch. 822). "I am in hopes that I shall be able to transfer the mortgage to enable me to clear off the whole that may be standing against me" (*Smith* v. *Thorne*, 18 Q. B. 134). "I give the above accounts to you, so you must collect them and pay yourself, and I will then be clear" (*Routledge* v. *Ramsey*, 8 Ad. & Ell. 221). "I have been in almost daily expectation of being enabled to give a satisfactory reply to your application. I will call upon you (the plaintiff's solicitor) to-morrow on the matter" (*Morrell* v. *Frith*, 8 C. & P. 246). "I am not conscious of ever having had this bill put before me till now, nor did I know it was owing. I am much annoyed that it should have been so long unsettled" (*Collinson* v. *Margetson*, 27 L. J. Ex. 305). "I must candidly tell you once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the pantechnicon by paying the expenses incurred thereon, as before agreed when Mr. F. (one of the plaintiffs) was in town" (*Cawley* v. *Furnell*, 12 C. B. 291). "I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. In time an augmentation of salary may enable me to propose some satisfactory arrangement" (*Rackham* v. *Marriott*, 2 H. & N. 196). "It is agreed that Mr. H. in his general account shall give credit to Dr. H. for 174*l.*, being for bricks delivered to the trustees of Y. P. chapel in 1834" (*Hughes* v. *Paramore*, 7 D. M. & G. 229). "I have no wish to have anything to do with the lawyers, much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army. But as you declare it was not settled, I am willing to pay you 10*l.* per annum until it is liquidated" (*Buckmaster* v. *Russell*, 10 C. B. N. S. 745). "I will not fail to meet the plaintiff on fair terms, and have now a hope, before perhaps a week from this date, I

9 Geo. 4, c. 14.

Instances of insufficient acknowledgments.

shall have it in my power to pay him at all events a portion of the debts, when we shall settle about the liquidation of the balance" (*Hart* v. *Prendergast*, 14 M. & W. 745; see *Gardner* v. *M'Mahon*, 3 Q. B. 561; *Fuller* v. *Redman*, 26 Beav. 620). A letter in which the defendant stated "that family arrangements have been making to enable him to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; and that the defendant has handed the plaintiff's account to A.; and that some time must elapse before payment, but that the defendant is authorized by A. to refer the plaintiff to him for any further information" (*Whippy* v. *Hillary*, 3 B. & Ad. 399).

The renewal of mere former promissory notes by a debtor cannot be considered as a promise rendering a party liable to pay original debts, all that can be inferred is that the party intended to give a fresh security limited to the liability on the new notes (*Foster* v. *Dawber*, 6 Exch. 839). A deed of composition by which, after reciting that the defendant was indebted to the plaintiff and others, the former assigned his property to the plaintiff, in trust to sell and to pay all such creditors as should sign the schedule of debts annexed, but which was neither signed by the plaintiff nor specified the amount of his debt, and had become void under a proviso, was held not to be evidence of a promise, nor an acknowledgment in writing within the stat. 9 Geo. 4, c. 14, for the acknowledgment was only of some debt, but what, remained to be made out by parol evidence (*Kennett* v. *Milbank*, 8 Bing. 38).

Commissioners under a town improvement act appointed a committee, who made a report with a schedule of liabilities, including arrears of salary due to a clerk more than six years. The commissioners made an entry in their minute book that they accepted the report. Held, no sufficient acknowledgment of the debt (*Bush* v. *Martin*, 2 H. & C. 311; 11 W. R. 1078; see also *Emery* v. *Day*, 1 C. M. & R. 245; *Lowndes* v. *The Garnett, &c. Co.*, 33 L. J. Ch. 418; 12 W. R. 573; *ante*, p. 219). In *Williams* v. *Griffith* (3 Exch. 335), letters were not sufficient to take the plaintiff's claim, nor an account and affidavit sufficient to take the defendant's set-off, out of the statute. P., being indebted to the executors of C. in 1,100*l.*, to which A. was beneficially entitled, sent a letter to A., as follows:—"I have sent you a note for the money due to you, which your mother left for you." Inclosed in this letter was a promissory note on receipt stamp for 1,100*l.*, and 4*l.* per cent. interest. At the time of this letter and note being sent the debt was barred by the statute: it was held, that there was no sufficient acknowledgment by P. without referring to the note to see what was the promise made, and that this could not be done for want of a proper stamp (*Parmiter* v. *Parmiter*, 3 D. F. & J. 461). An admission of a debt made to a person, who at the same time signed a paper purporting to be a discharge of the debt, is not a sufficient acknowledgment though the discharge was inoperative in itself, and was given upon a consideration which the debtor failed to observe (*Goate* v. *Goate*, 1 H. & N. 29). A debtor presented a petition for arrangement with his creditors under 7 & 8 Vict. c. 70, and inserted the debt in the account of his debts, and his proposal was, that "for the future payment or compromise of such debts and engagements," he proposed to assign all his estate and effects to trustees: held, not to be sufficient acknowledgment (*Everett* v. *Robertson*, 1 Ell. & Ell. 16). An account stated between the defendant, a part owner and ship's husband, and his co-owners, in which the items of the plaintiff's account for work done and money advanced are included is not a sufficient acknowledgment (*Nash* v. *Hill*, 1 F. & F. 198). The drawer of a bill wrote to the holder, "If in funds I would immediately pay the money and take the bill out of your hands." Held an insufficient acknowledgment (*Richardson* v. *Barry*, 29 Beav. 22). In 1853, H. as principal and the defendant as surety gave to the plaintiff their joint and several note for payment of 200*l.* on demand. In 1861, H. assigned all his property for the benefit of his creditors, and the defendant signed and gave to the plaintiff the following letter: "I hereby consent to your receiving the dividend under H.'s assignment, and agree that your so doing shall

9 Geo. 4, c. 14.

not prejudice your claim upon me for the same debt." The plaintiff received the dividend, and in 1862 sued the defendant for the balance of the note. Held not a sufficient acknowledgment (*Cockrill* v. *Sparke*, 1 H. & C. 699; 11 W. R. 428). In *Cassidy* v. *Firman* (I. R. 1 C. L. 8), and *Crawford* v. *Crawford* (I. R. 2 Eq. 166) acknowledgments were held to be insufficient. See further Darb. & Bos. Stat. Lim. 46—53.

Conditional promises.

Condition not performed.

The following have been held to be conditional promises, the conditions of which were not shown to have been performed:—"I will send it as soon as possible, send your account next week" (*Bethell* v. *Bethell*, 34 Ch. D. 561); "I shall be glad as soon as my position becomes somewhat better to begin again my instalments" (*Meyerhoff* v. *Froehlick*, 4 C. P. Div. 63); "I cannot pay the debt at present, but I will pay it as soon as I can" (*Tanner* v. *Smart*, 6 B. & C. 602); "I shall be happy to pay you both principal and interest as soon as convenient, I shall pay no more interest till we have a fair settling" (*Edmunds* v. *Downes*, 2 C. & M. 459).

ACKNOWLEDGMENT BY PAYMENT.

In addition to written acknowledgments a creditor may, for the purpose of taking a case out of the statute, rely on the act of part payment. No other act will suffice (*Emery* v. *Day*, 1 C. M. & R. 249). The payment is sufficient even though at the time the debt is barred (*Re Lane*, 23 Q. B. D. 74); and even if the payment could be recovered back as *pro tanto* a fraudulent preference (*Ib.*)

Part payment of principal.

In order to take a case out of the statute by a part payment it must appear, in the first place, that the payment was made on account of a debt; secondly, that the payment was made on account of the debt for which the action is brought; and thirdly, that the payment was made of part of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at time of the payment (*Tippets* v. *Heane*, 1 C. M. & R. 252; see *Wainman* v. *Kynman*, 1 Exch. R. 118; *Waugh* v. *Cope*, 6 M. & W. 829). Part payment to come within the statute must be a payment from which a promise may be inferred to pay the remainder (*Stamford Banking Co.* v. *Smith*, 1892, 1 Q. B. 769; *Foster* v. *Dawber*, 6 Exch. 839). See *Sims* v. *Brutton* (5 Exch. 802), where it was said that to take a case out of the statute there must be a payment *quà* interest, or a part payment of principal, thereby acknowledging more to be due. The reason why the effect of such a payment is not lessened by the act 9 Geo. 4, c. 14, is, that it is not a mere acknowledgment *by words*, but it is coupled with a fact (*Waters* v. *Tompkins*, 2 C. M. & R. 726; see *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493).

Payment of interest.

Payment of interest upon a promissory note payable on demand will take the principal sum secured by the note out of the statute, although there be no independent evidence of any demand having been made (*Bamfield* v. *Tupper*, 7 Exch. 27; *Beally* v. *Greenslade*, 2 C. & J. 61; *Wyatt* v. *Hodson*, 8 Bing. 309). As to whether a part payment of principal will take a claim for interest out of the statute, see *Collyer* v. *Willcock*, 4 Bing. 313; Darb. & Bos. Stat. Lim. 70.

Payment into court will not keep a debt alive (*Long* v. *Greville*, 3 B. & C. 10). Nor will payment of interest under compulsion of law (*Morgan* v. *Rowlands*, L. R. 7 Q. B. 493). Nor will the payment of a dividend under an insolvency (*Davies* v. *Edwards*, 7 Exch. 22), or under an inspectorship deed (*Ex p. Topping*, 34 L. J. (Bank. 44). The effect of a payment may be qualified by words used at the time, but the jury must judge the truth of statements accompanying the admission of a previous payment (*Baildon* v. *Walton*, 1 Exch. 617; see *Trentham* v. *Deverill*, 3 Bing. N. C. 397). Where payment was relied upon as taking a debt out of the statute, it was for the jury to judge whether such payments were made in respect of interest or in respect of an annuity (*Baildon* v. *Walton*, *sup.*) As to the effect of payments by guardians of one union to those of another, see *Wycombe Union* v. *Eton Union* (1 H. & N. 687).

Appropriation.

Where, several debts being due of which some are barred and some not barred, the debtor pays a sum without appropriating it to any particular debt, such payment will not, in the absence of evidence, be appropriated so as to revive the debts barred (*Mills* v. *Fowkes*, 5 Bing. N. C. 455); and

semble, the creditor cannot himself, without the consent of the debtor, appropriate the payment to the barred debt, so as to entitle himself to sue for the balance of that debt (*Nash* v. *Hodgson*, 6 D. M. & G. 490; see, however, the judgment of *Knight-Bruce*, L. J., *S. C.*) It may, of course, be shown that the debtor has himself appropriated the payment to any particular debt (*Gwynn* v. *Gwynn*, 41 L. T. 610). For the case where a payment is made on balance of account, see *Walker* v. *Butler* (6 E. & B. 506). 9 Geo. 4, c. 14, s. 4.

Part payment of principal or payment of interest on account of a debt is not affected by the 9 Geo. 4, c. 14, and therefore a *parol acknowledgment* of payment within six years before the action brought will take the case out of the statute (*Cleave* v. *Jones*, 6 Exch. 573; 20 L. J. Exch. 238; *Edwards* v. *Janes*, 1 K. & J. 534; *Bevan* v. *Gething*, 3 Q. B. 740). A witness, who said he settled all kinds of accounts for the defendant, admitted that an account containing a memorandum of a payment was in his own handwriting, but could not recollect the fact of payment: held, sufficient evidence to go to the jury, as to the fact of payment (*Trentham* v. *Deverill*, 3 Bing. N. C. 397; see further, as to parol evidence of part payment, *Morley* v. *Finney*, 1870, W. N. 82). A letter not in itself sufficient as a written acknowledgment to bar the statute, may be left, with other evidence, to the jury upon the question whether there have been payments or deliveries of goods in part satisfaction of the debt within the six years. It will be a question for the jury whether the payments or deliveries of goods were made and received on account of the particular debt sued for (*Collinson* v. *Margesson*, 27 L. J. Ex. 305). Proof of payment —by parol evidence;

It was enacted by 9 Geo. 4, c. 14, s. 3, that no indorsement or memorandum of any payment written or made after the 1st Jan. 1829, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the statute. As to the law before this act, see *Briggs* v. *Wilson* (5 D. M. & G. 12). The section only applies to the case when there is nothing more than an indorsement or memorandum on the note or bill or other writing which constitutes the contract, and does prevent payment being proved by an entry in an independent account book (*Bradley* v. *James*, 13 C. B. 822). See as to admitting in evidence entries in a deceased's books, on the ground that they were against interest, *Newbould* v. *Smith* (14 App. Cas. 423). —by indorsements on bills and notes. 9 Geo. 4, c. 14, s. 3.

To constitute a payment sufficient to take a debt out of the statute it is not essential that money should pass between the parties. Thus there was a sufficient payment where the creditor gave a receipt (*Maber* v. *Maber*, L. R. 2 Ex. 153); and where a debtor supported a creditor's child (*Bodger* v. *Arch*, 10 Exch. 333). The dictum in *Brocklehurst* v. *Jessop* (7 Sim. 438), as to an equitable mortgagee's receipt of rents being a payment within the proviso in 9 Geo. 4, c. 14, s. 1, has been overruled (*Cockburn* v. *Edwards*, 18 Ch. Div. 449). Anything received upon an agreement, in reduction of a debt, is a payment within 9 Geo. 4, c. 14, s. 1, sufficient to take the debt out of the statute (*Hooper* v. *Stephens*, 4 Ad. & Ell. 71). If the parties to a bill of exchange agree that goods shall be supplied in part payment, and they are supplied and taken accordingly, that is sufficient part payment (*Hart* v. *Nash*, 2 C. M. & R. 337); but in order to make a delivery of goods operative, there must be some evidence of an agreement that such delivery shall be deemed equivalent to payment (*Cottam* v. *Partridge*, 4 Scott, N. R. 819). The stat. 9 Geo. 4, c. 14, does not apply to the fact of an account stated, where there are items on both sides; but the going through an account with items on both sides and striking a balance converts the *set-off* into *payments* (*Ashby* v. *James*, 11 M. & W. 342; *Worthington* v. *Grimsditch*, 7 Q. B. 484; *Clark* v. *Alexander*, 8 Scott, N. R. 165; *Amos* v. *Smith*, 1 H. & Colt. 238). See *Williams* v. *Griffiths* (2 C. M. & R. 45), *Hughes* v. *Paramore* (7 D. M. & G. 229), and also *Scholey* v. *Walton* (12 M. & W. 510), where the setting-off a sum of money in an account Modes in which payment can be made. Payment —by delivery of goods; —by settlement of accounts.

9 Geo. 4, c. 14, s. 4.

stated and settled was held to be a payment within the statute (See *Stewart* v. *Connick*, I. R. 5 C. L. 562). The going through an account where there are items on one side only does not alter the situation of the parties at all or constitute a new consideration (*Smith* v. *Forty*, 4 C. & P. 126; *Jones* v. *Ryder*, 4 M. & W. 32; *Mills* v. *Fowkes*, 5 Bing. N. C. 455).

Payment —by giving note or bill.

Where a bill is given in payment on account of a debt in such a manner as to raise an implication of a promise to pay the balance, this is sufficient part payment (*Turney* v. *Dodwell*, 3 Ell. & Bl. 136; 23 L. J. Q. B. 137; see *Irving* v. *Veitch*, 3 M. & W. 90). A testator died in 1829, part of his assets consisted of a promissory note for 100*l.* of five persons. All interest on it was paid down to 1837, but by whom did not appear. In 1837, the executor took the note of one of the five for the 100*l.*, and interest was paid until 1842. Subsequently nothing was done, and the debt became barred by the statute: it was held, that the second note must be treated as a new security given for payment of the old debt, and the executor was charged with the 100*l.* (*Sparkes* v. *Restall*, 22 Beav. 587).

Payment to an agent;

Payment may be made to an agent of the creditor (*Evans* v. *Davies*, 4 Ad. & El. 840). The payment of interest to a *cestui que trust* was held to keep alive the right of the trustee to maintain an action on a promissory note (*Megginson* v. *Harper*, 2 C. & M. 322). Payment to a husband of interest on a promissory note given to his wife before marriage, was held sufficient payment (*Hart* v. *Stephens*, 6 Q. B. 937).

—to a stranger.

Payment to a stranger is not sufficient (*Stamford Banking Co.* v. *Smith*, 1892, 1 Q. B. 765). Unless possibly where the payment is made to a person filling a representative capacity, or who was believed to fill that capacity, when the payment might enure for the benefit of the persons for whom it was believed to be made (*Ib.* 769; *Clark* v. *Hooper*, 10 Bing. 480).

Payment by a wife;

Before M. W. P. Act, 1882, it was held that an acknowledgment or part payment by a woman before marriage kept her debt alive, both as against herself and her after-taken husband. But similar acts by her after marriage were of no avail either against herself or as against her husband (*Pittam* v. *Foster*, 1 B. & C. 248; *Neve* v. *Hollands*, 18 Q. B. 262). The M. W. P. Act, 1882, enables a wife to keep alive her liabilities in respect of her separate estate by an acknowledgment or part payment, or by suffering judgment to be obtained against her. But such acts do not affect her husband (*Beck* v. *Pierce*, 23 Q. B. Div. 322).

—by an agent;

The words of the act, that "nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever," can never mean a payment made by a stranger, and without authority, but payment made by the principal debtor or some one acting by his authority (*Linsell* v. *Bonsor*, 2 Bing. N. C. 245; *Homan* v. *Andrews*, 1 Ir. Ch. R. 106). In *Jones* v. *Hughes* (5 Exch. 104), where money was advanced on a promissory note signed by the defendant thus: "I. H., churchwarden, J. E., overseer, or *others for the time being*," and interest had been regularly paid by the overseer for the time being, it was a question for the jury, whether by the form of the note the defendant had not constituted the parish officers for the time being his agents for the payment of interest (See *Rew* v. *Pettet*, 1 Ad. & E. 196). As to whether payments by a company affect a director who has guaranteed the company's debt, see *Re Woolmershausen* (62 L. T. 541).

—by one of a number of joint contractors, &c.;

As to payments by one of a number of joint contractors, executors, or partners, see 19 & 20 Vict. c. 97, s. 14, *post*, p. 229. The case of payments by one of a number of persons bound by several promises is dealt with in *Re Woolmershausen* (62 L. T. 541).

—of interest on simple contract debt by devisee for life of debtor's real estate;

Payment of interest on a simple contract debt by a devisee for life of the debtor's real estate will keep the creditor's right of action alive against all parties interested in such real estate in remainder (*Hollingshead* v. *Webster*, 37 Ch. D. 651). It was said in one case that such a payment would operate to prevent time running as regards the testator's real estate only (*Boatwright* v. *Boatwright*, 17 Eq. 74).

—by executor, effect as against beneficial devisee.

It was held under 47 Geo. 3, c. 74, that a payment by the executrix of a trader would not take a debt out of the statute, so as to enable the creditor to claim payment out of the real estate in the hands of a devisee

(*Putnam* v. *Bates*, 3 Russ. 188; *conf. Wilson* v. *Leonard*, 3 Beav. 373, where a devisee was held not bound by the amount of a claim substantiated against the executor in an action at law to which he was not a party). And it has since been held under 3 & 4 Will. 4, c. 104, that the payment of interest on a debt of the testator by his executors, they being also trustees of his real estate not subjected by the will to debts, did not necessarily keep the debt alive as against such real estate; for although the executors and trustees were the same persons, they filled different characters, and where the payments were made by them in the character of executors only, the real estate was not affected by it (*Fordham* v. *Wallis*, 10 Hare, 217). The demand of a simple contract creditor as against the real estate of the testator, which would otherwise be barred by the statute, is not kept alive by the effect of any right to have the assets marshalled (*Fordham* v. *Wallis*, *sup.*; see, however, Darb. & Bos. Stat. Lim. 87—90).

9 Geo. 4, c. 14, s. 4.

Payment of interest on a testator's simple contract debt made by a party filling the two characters of beneficial devisee and executor, will be attributed to both characters, and not to one only, for the moral obligation does not attach more to one character than to the other. But it is otherwise where the characters held by the party are entirely distinct, as where he is personally liable as debtor, and is answerable also in the character of trustee of another; for he then represents two persons, and the question in such a case is by whom the promise is made and not what is its extent or effect (*Fordham* v. *Wallis*, 10 Hare, 217; compare *Brown* v. *Gordon*, 16 Beav. 302).

Where executor is beneficial devisee.

Where executor is trustee.

Payments having been made to some residuary legatees by the executors, it was held that such payments whilst the debts of the testator remained unpaid were a breach of trust, and that the debts having been kept alive against the executors, the statute was no bar to the claim of the creditor as against the residuary legatees to the extent of their interest in the residue, and they must therefore refund the moneys they had received on account of the estate (*Fordham* v. *Wallis*, 10 Hare, 217). A claim by a creditor to make legatees refund was held barred by lapse of time and acquiescence (*Blake* v. *Gale*, 32 Ch. Div. 571). See further as to the acknowledgment of a simple contract debt by payment, *Whitcomb* v. *Whiting* (1 Smith, L. C. 644, 7th ed.); and see the cases quoted under 3 & 4 Will. 4, c. 27, s. 40 (*ante*, p. 182), and 3 & 4 Will. 4, c. 42, s. 5 (*ante*, p. 205).

Effect in keeping alive right to make legatees refund.

---

19 & 20 Victoria, cap. 97.—*An Act to amend the Laws of England and Ireland affecting Commerce.* [29th July, 1856.]

Limitation of Actions and Suits.

9. All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandize between merchant and merchant (*a*), their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen then within six years after the passing of this act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

19 & 20 Vict. c. 97, s. 9.

Limitation of actions for "merchants' accounts."

(*a*) *Ante*, pp. 208, 210.

19 & 20 Vict. c. 97, s. 10.

Absence beyond seas or imprisonment of a creditor not to be a disability.

10. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the act of the twenty-first year of the reign of King James the First, chapter sixteen, section three (*b*), or by the act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the act of the fifty-third year of the reign of King George the Third, chapter one hundred and twenty-seven, section five (*c*), or by the acts of the third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one and forty-two (*d*), and chapter forty-two, section three (*e*), or by the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty (*f*), shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons, being imprisoned at the time of such cause of action or suit accrued.

(*b*) *Ante*, p. 208.
(*c*) *Ante*, p. 186.
(*d*) *Ante*, pp. 176, 185.
(*e*) *Ante*, p. 202.
(*f*) *Ante*, p. 203.

This section was retrospective, and included causes of action accrued before the statute was passed (*Pardo* v. *Bingham*, 4 Ch. 755; see *Cornill* v. *Hudson*, 8 El. & Bl. 429).

Period of limitation to run as to joint debtors in the kingdom, though some are beyond seas.

11. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas; and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid (*g*).

Judgment recovered against joint debtors in the kingdom to be no bar to proceeding against others beyond seas after their return.

(*g*) *Ante*, p. 216.

Definition of "beyond seas," within 4 & 5 Anne, c. 16, and this act.

12. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part

of the dominions of her Majesty, shall be deemed to be beyond seas within the meaning of the act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen, or of this act (*h*). 19 & 20 Vict. c. 97, s. 13.

(*h*) See 3 & 4 Will. 4, c. 27, s. 19, *ante*, p. 145; 3 & 4 Will. 4, c. 42, s. 7, *ante*, p. 207. This section of the act is not retrospective (*Flood* v. *Patterson*, 29 Beav. 295). A testator resided in Jersey, and died, having appointed his widow, who also lived there, the executrix of his will. She proved his will in Jersey, but not in England, and, though she had been three weeks in England shortly after the testator's death, she did not act as executrix in England: it was held, that she was not a person whom a creditor of the testator could sue in this country, and that the Statute of Limitations did not therefore run in favour of her testator's estate (*Ib.*)

Provisions of 9 Geo. 4, c. 14, ss. 1 and 8, and 16 & 17 Vict. c. 113, ss. 24 and 27, extended to acknowledgments by agents.

13. In reference to the provisions of the acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight (*i*), and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven (*k*), an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

(*i*) *Ante*, pp. 217, 220.
(*k*) *Ante*, pp. 218, 220.

Part payment by one contractor, &c. not to prevent bar by certain Statutes of Limitations in favour of another contractor, &c.

14. In reference to the provisions of the acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three (*l*), and of the act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three (*m*), and of the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty (*n*), when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors, or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

(*l*) *Ante*, p. 208.
(*m*) *Ante*, p. 202.
(*n*) *Ante*, p. 203.

Old law as to payments by one of several joint contractors.

Before this act, it was held that payment of interest by one of the makers of a joint and several promissory note was sufficient to take the case out of the Statute of Limitations as against the other maker (*Whitcomb* v. *Whiting*, 2 Doug. 652), although such payment was made after the statute had run (*Channell* v. *Ditchburn*, 5 M. & W. 494; *Goddard* v. *Ingram*, 3 Q. B. 839; see *Atkins* v. *Tredgold*, 2 B. & C. 23; *Slater* v. *Lawson*, 1 B. & Ad. 396; *Burleigh* v. *Stott*, 8 B. & C. 36; *Mundersion* v.

19 & 20 Vict. c. 97, s. 14.

Robertson, 4 M. & R. 140; see also cases cited 5 M. & W. 498, n.) Where a debtor, A., gave as security a note of himself and another, B., a payment on behalf of B., after the statute has begun to run, was held to revive the debt as against A. (*Ex p. Woodman*, 3 Mont. & A. 613).

The doctrine of *Whitcomb* v. *Whiting* was applied to the case of one of the co-contractors being a principal and the other a surety (*Perham* v. *Raynall*, 2 Bing. 306; *Wyatt* v. *Hodson*, 8 Bing. 309); but it was limited to cases where a joint liability existed, and was never applied where the liability arose from promises which were several only (*Re Woolmershausen*, 62 L. T. 544), even where one of the promisors was a principal mortgaging real estate and another a surety for him (*Ib.*)

Payments after death of one of several joint contractors.

So where a joint contract is severed by the death of one of the contractors, nothing can be done by his personal representatives to take the debt out of the statute as against the survivor (*Slater* v. *Lawson*, 1 B. & Ad. 396), nor by the survivor so as to affect the deceased (*Atkins* v. *Tredgold*, 2 B. & C. 23).

Partners: Payments after death of one of several.

So also payments of interest on a partnership debt by surviving partners have not the effect of taking the debt out of the statute as against the real or personal estate of a deceased partner (*Way* v. *Bassett*, 5 Hare, 55; *Brown* v. *Gordon*, 16 Beav. 302). See the doubts previously expressed as to this, *Winter* v. *Innes* (4 M. & Cr. 111); *Braithwaite* v. *Britain* (1 Keen, 221). Even where payments are made by a surviving partner, who is also executor of the deceased partner, the presumption seems to be that the payments are made in the character of surviving partner, and not as executor (*Thompson* v. *Waithman*, 3 Drew. 628).

Where all the partners survive, it has been decided, since 19 & 20 Vict. c. 97, that the above section does not apply to a payment made during the continuance of a partnership, by one partner on account of a debt due by the firm, such a payment being considered as a payment of the firm itself (*Goodwin* v. *Parton*, 42 L. T. 91; see *Watson* v. *Woodman*, 20 Eq. 730). But after a dissolution, part payment by a continuing partner cannot be set up against a retiring partner as an answer to the statute (*Watson* v. *Woodman*, 20 Eq. 721).

Executors.

For the effect before 19 & 20 Vict. c. 97, of a payment by one of several executors as regards his co-executors, see *Atkins* v. *Tredgold* (2 B. & C. 23); *Scholey* v. *Walton* (12 M. & W. 512). The effect since the act of one of several executors paying interest on a simple contract debt of his testator is discussed, *Hollinshed* v. *Webster* (37 Ch. D. 658).

Under the above section (which was held not retrospective as regards the date of the payment, *Jackson* v. *Woolley*, 8 E. & B. 784), part payment by one of two makers of a joint and several promissory note did not take the case out of the statute as against the other (*Cockrill* v. *Sparkes*, 1 H. & C. 699). The section does not apply in the case of payments under 37 & 38 Vict. c. 57, s. 8, *ante*, p. 198 (*Re Frisby*, *Allison* v. *Frisby*, 43 Ch. Div. 106). As to the effect of a mortgagor's payment of interest where by a separate instrument a surety had guaranteed the mortgage debt, see *Re Powers*, *Lindsell* v. *Phillips* (30 Ch. Div. 291, a separate bond); *Re Woolmershausen* (62 L. T. 541, a separate promissory note).

Short title.

16. In citing this act it shall be sufficient to use the expression "The Mercantile Law Amendment Act, 1856."

Extent of act.

17. Nothing in this act shall extend to Scotland.

51 & 52 Vict. c. 59, s. 1.

V. Limitation of time in actions against trustees.

51 & 52 Victoria, cap. 59.—*An Act to amend the Law relating to the Duties, Powers, and Liability of Trustees.*

[24th December, 1888.]

Short title, extent, and definition.

1.—(1.) This act may be cited as the Trustee Act, 1888.

(2.) This act shall not extend to Scotland.

(3.) For the purposes of this act, the expression "trustee" shall be deemed to include an executor or administrator, and a trustee whose trust arises by construction or implication of law, as well as an express trustee, but not the official trustee of charitable funds.

(4.) The provisions of this act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

Statute of Limitations may be pleaded by trustees.

8.—(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

(a.) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

(b.) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession (*a*).

(2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(3.) This section shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or

51 & 52 Vict. c. 59, s. 8.

administrator of any right or defence to which he is entitled under any existing statute of limitations.

(*a*) Sub-sect. (1) (b) was held to bar an action by a new trustee to compel an old trustee to make good loss from improper investment (*Re Bowden*, *Andrew* v. *Cooper*, 45 Ch. D. 444); and also an action by a residuary legatee to recover from a trustee loss which had arisen from the non-realization of the residue (*Re Swain*, *Swain* v. *Bringeman*, 1891, 3 Ch. 233). Time would seem to run from the date of the breach of trust rather than the date of the loss (See *Re Bowden*, 45 Ch. D. 450; *Smith* v. *Fox*, 6 Hare, 386; see, however, *Re Swain*, 1891, 3 Ch. 241).

As to the exceptions in sub-sect. (1), see *Moore* v. *Knight* (1891, 1 Ch. 553). In the last-mentioned case it was also laid down that the principle of the decision in *Blair* v. *Bromley* (2 Phil. 354, *post*, p. 233) is unaffected by the above section. Where the action was commenced before 1st July 1890 but the decree was made after that date, the action did not apply as against persons served with the decree (Re Farrington, Allen v. Lord 1894 W.N. 148)

Application of act.

12.—(1.) This act shall apply as well to trusts created by instrument executed before as to trusts created after the passing of this act.

(2.) Provided always, that save as in this Act expressly provided, nothing therein contained shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust.

VI.—Courts of Equity and the Statutes of Limitation.

Land, money charged on land, &c.

In the case of suits in courts of equity (before the Judicature Acts) relating to land, rent-charges, church property, advowsons, money charged on land or rent-charges, legacies, and the estates of intestates, provisions in terms affecting such suits occurred in 3 & 4 Will. 4, c. 27 (sects. 24—34, 40—43); 1 Vict. c. 28; 23 & 24 Vict. c. 38 (sect. 13). See these sections, *ante*. Sects. 2—5, 7—9, 14—22 of 3 & 4 Will. 4, c. 27, applied in terms only to actions at law. All the provisions, however, of 37 & 38 Vict. c. 57 (*ante*, p. 194), were so framed as to apply in terms to courts of equity as well as courts of law. In the case of trusts, proceedings in all courts are also affected by Jud. Act, 1873, sect. 25 (2); Trustee Act, 1888, sect. 8.

Specialty and simple contract debts.

In the case of specialty and simple contract debts the statutes which prescribed the periods of limitation for the recovery of such debts did not apply in terms to courts of equity. But it was said before the Judicature Acts that in the case of legal demands those courts acted in obedience to the statutes (*Foley* v. *Hill*, 1 Ph. 399). Since the Judicature Acts, it has been said that 21 Jac. 1, c. 16, s. 3, is binding upon the High Court, and applies to every action properly described by it (*Re Greaves*, *Bray* v. *Tofield*, 18 Ch. D. 554; see *Gibbs* v. *Guild*, 9 Q. B. Div. 67; *Re Sharpe*, *Masonic Co.* v. *Sharpe*, 1892, 1 Ch. 154). Again, it has been laid down that in the case of a legal right a court of equity will not refuse relief on the ground of delay unless sufficient to create a statutory bar (*Re Maddever*, *Three Towns' Co.* v. *Maddever*, 27 Ch. Div. 532; *Moore* v. *Marriott*, 7 Ch. D. 546). Thus a less delay did not deprive a plaintiff of his right to an injunction in aid of an action of deceit (*Fullwood* v. *Fullwood*, 9 Ch. D. 176). So also a deed was set aside under 13 Eliz. c. 5, ten years after the death of the grantor (*Three Towns' Co.* v. *Maddever*, *sup.*) And a specialty creditor recovered his debt more than eighteen years after the

Courts of Equity and the Statutes of Limitation.

debtor's death (*Re Baker, Collins* v. *Rhodes*, 20 Ch. Div. 230). Mere laches does not deprive the creditor of his right to sue an executor for devastavit (*Re Birch, Roe* v. *Birch*, 27 Ch. D. 622).

Acting by analogy.

Where a remedy in equity corresponds to a remedy at law which is within the statute, the court of equity acts by analogy to the statute (*Knox* v. *Gye*, L. R. 5 H. L. 674). Thus an action against directors for misrepresentation in a prospectus was treated as analogous to an action for deceit, and it was said that no delay short of the statutory period would be a bar (*Peek* v. *Gurney*, L. R. 6 H. L. 377). So an action to set aside a gift on the ground of undue influence (*Allcard* v. *Skinner*, 36 Ch. Div. 186). The analogy of the statute of 21 Jac. 1 was held applicable to an action to set aside a forfeiture of shares (*Rule* v. *Jewell*, 18 Ch. D. 667), and to an action to recover a debt out of a married woman's separate estate (*Re Hastings, Hallett* v. *Hastings*, 35 Ch. Div. 105; *Beck* v. *Pierce*, 23 Q. B. Div. 322). Where an action for damages for breach of a contract to execute a mortgage would have been barred by 21 Jac. 1, c. 16, it was said that specific performance would not be decreed (*Firth* v. *Slingsby*, 58 L. T. 483).

Laches and acquiescence.

Independently of the statute time in equity may bar stale equitable demands on the ground of laches (*Harcourt* v. *White*, 28 Beav. 303). See *Re Sharpe, Masonic Co.* v. *Sharpe*, 1892, 1 Ch. 154; and cases quoted *Ib.* p. 168). In the case of legal demands, however, relief will not be refused on the ground of delay unless sufficient to create a statutory bar (See p. 232). Acquiescence will also, independently of the statute, prevent the enforcement of demands in equity (*Blake* v. *Gale*, 32 Ch. Div. 571; *Evans* v. *Smallcombe*, L. R. 3 H. L. 249; *Allcard* v. *Skinner*, 36 Ch. D. 163). See *Archbold* v. *Scully*, 9 H. L. C. 383, where laches and acquiescence are distinguished; and see the cases quoted under 3 & 4 Will. 4, c. 27, s. 27, *ante*, p. 156. Laches and acquiescence will prevent the enforcement of a claim even in the case of an express trust (*Re Cross, Harston* v. *Tenison*, 20 Ch. Div. 121; *Bright* v. *Legerton*, 2 D. F. & J. 606; *M'Donnell* v. *White*, 11 H. L. C. 570).

Fraud.

In actions based on concealed fraud, time in courts of equity always ran from the discovery of the fraud (*Booth* v. *Warrington*, 4 Bro. P. C. 163; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 607; *Rolfe* v. *Gregory*, 4 D. J. & S. 579; see *Gibbs* v. *Guild*, 9 Q. B. Div. 70; *Re Crossley, Munns* v. *Burn*, 35 Ch. D. 266). This rule was applied where fraud, as regards a client's money, was committed by solicitors in partnership and was concealed by misrepresentation (*Blair* v. *Bromley*, 2 Phil. 354; *Moore* v. *Knight*, 1891, 1 Ch. 547). In the last-mentioned cases, the defendant had not been personally concerned in the fraud, and had ceased to be a partner for more than six years before action; but he was nevertheless held liable for the fraud of his co-partner, which had been committed in the ordinary course of the partnership business. The result was different when the fraud was not in the ordinary course of the partnership business (*Hughes* v. *Twisden*, 54 L. T. 570). In actions to open accounts, where an item complained of is fraudulent, the accounts will be opened altogether; but where the item is not fraudulent, and the accounts are of some years' standing, the plaintiff will only have liberty to surcharge and falsify (*Gething* v. *Keighley*, 9 Ch. D. 550; see *Allfrey* v. *Allfrey*, 1 Mac. & G. 87; *Williamson* v. *Barbour*, 9 Ch. D. 529). Delay deprives a man of his right to rescind a contract on the ground of fraud, and the delay counts from the time when by due diligence the fraud might have been discovered (*Redgrave* v. *Hurd*, 20 Ch. Div. 13).

Mistake.

In the case of mistake the same rule applies, and a trust fund paid by mistake to a stranger can be recovered within six years from discovery of the mistake (*Brookesbank* v. *Smith*, 2 Y. & C. Ex. 58). Where, however, trustees had by mistake overpaid one *cestui que trust*, the statute was no defence to a suit by another *cestui que trust*, brought more than six years later, to make the overpaid *cestui que trust* refund (*Harris* v. *Harris*, 29 Beav. 110). A release to trustees has been set aside after the lapse of more than twenty years, it having been executed under a mistake (*Re*

Courts of Equity and the Statutes of Limitation.

Garnett, *Gaudy* v. *Macaulay*, 31 Ch. Div. 1). When property has been long enjoyed by a family in certain shares under a mistake, the court will presume a family arrangement (*Re Peat*, 7 Eq. 302).

Mortgagee of reversionary interests in personalty.

A mortgagee of an equitable reversionary interest in personal estate can, on the interest falling into possession, recover the fund from the trustee and pay himself in full, although the debt, to secure which the mortgage was made, is barred (*Re Hancock*, *Hancock* v. *Berrey*, 59 L. T. 197; *Re Lake*, 63 L. T. 416; see *Jordan* v. *Young*, 1878, W. N. 229). As to the arrears of interest recoverable in such case, see *Smith* v. *Hill* (9 Ch. D. 143); *Clarkson* v. *Henderson* (14 Ch. D. 348); *Mellersh* v. *Brown* (45 Ch. D. 225).

Waste.

In the case of legal waste by a tenant for life, time runs against the remainderman from the cutting (*Seagram* v. *Knight*, 2 Ch. 628; *Higginbottom* v. *Hawkins*, 7 Ch. 676; see *Simpson* v. *Simpson*, 3 L. R. Ir. 314); and the period of limitation is six years (*Birch-Wolfe* v. *Birch*, 9 Eq. 692). For the case where a tenant for life has rendered accounts for a longer period, see *Hony* v. *Hony* (1 S. & S. 628). As to equitable waste, see *Leeds* v. *Amherst* (2 Phil. 117); *Morris* v. *Morris* (6 W. R. 427), quoted *ante*, p. 149.

Trusts.

Trustee Act, 1888, s. 8.

In the case of proceedings against trustees commenced after 1st January, 1890, regard must be had to sects. 1, 8, and 12 of the Trustee Act, 1888 (*ante*, p. 231).

The following note as to how far the existence of a trust may prevent any Statute of Limitation being set up, relates to the law apart from the last-mentioned act.

Express trusts.

Express trusts affecting land or rent were dealt with by 3 & 4 Will. 4, c. 27, s. 25 (*ante*, p. 150), and express trusts affecting money charged upon land by 37 & 38 Vict. c. 57, s. 10 (*ante*, p. 200). As to express trusts in the case of legacies payable out of personalty, see *ante*, p. 181.

Jud. Act, 1873, s. 25 (2).

As regards real and personal property generally, it was enacted by the Jud. Act, 1873, s. 25 (2), that no claim of a *c. q. t.* against his trustee for any property held on an express trust or in respect of any breach of such trust, should be barred by any Statute of Limitations; "a statutory declaration of a law which has always been recognized and administered in courts of equity" (*Re Cross*, *Harston* v. *Tenison*, 20 Ch. Div. 121). See as to this law, *Beckford* v. *Wade* (17 Ves. 97); *Townshend* v. *Townshend* (1 Bro. C. C. 550); *Wedderburn* v. *Wedderburn* (4 M. & C. 41); *Stone* v. *Stone* (5 Ch. 74). So far as regards money charged on land, the last section appears to be subject to 37 & 38 Vict. c. 57, s. 10 (*ante*, p. 200).

In a case affecting personal estate decided since the Jud. Act, 1873, it was said there might be an express trust without any actual expression in words (*Banner* v. *Berridge*, 18 Ch. D. 265; but see *Sands* v. *Thompson*, 22 Ch. D. 617). The first mortgagee of a ship having sold, it was held that there was no express trust of the proceeds; that in the case of an ascertained surplus, the first mortgagee might be constructively trustee of the surplus; but that after six years, evidence could not be adduced to prove a surplus (*Banner* v. *Berridge*, *sup.*) See also the cases as to express trust within 3 & 4 Will. 4, c. 27, s. 25, *ante*, p. 150.

Where an express trust for the payment of a debt was for the benefit of the debtor only, it did not prevent time running against the creditor (*Henriques* v. *Bensusan*, 20 W. R. 350).

Where a breach of an express trust relating to personal estate had been committed, it was said that a *c. q. t.* might by his conduct raise a presumption of abandonment of his right of action which would bar subsequent proceedings (*Re Cross*, *Harston* v. *Tenison*, 20 Ch. Div. 122). So if there had been a direct and independent dealing between the trustee and *c. q. t.* after the relation had terminated (*Wedderburn* v. *Wedderburn*, 2 Keen, 749).

Enforcing breach of trust against estate of deceased trustee.

A claim arising from a breach of trust is, generally speaking, considered as a simple contract debt (*Holland* v. *Holland*, 4 Ch. 449). But it was held that the analogy of the statute 21 Jac. 1, c. 16, could not, in answer to a claim founded on a breach of trust, be set up, either by the executor

(*Brittlebank* v. *Goodwin*, 5 Eq. 545; *Cresswell* v. *Dewell*, 4 Giff. 460; *Woodhouse* v. *Woodhouse*, 8 Eq. 514; *Smith* v. *Cork, &c. R. Co.*, I. R. 5 Eq. 65; *Carroll* v. *Hargrave*, *Ib.* 548), or by his heir (*Gillard* v. *Lawrenson*, 57 L. T. 364).

Constructive trusts.

The relation of lapse of time to constructive trusts has also been considered by courts of equity, where it has been held that no lapse of time will bar the right to an account of moneys received by a person standing in a fiduciary position (*Teed* v. *Beere*, 7 W. R. 394; *James* v. *Holmes*, 10 W. R. 643; *Burdick* v. *Garrick*, 5 Ch. 233). Managers of an annuity fund were held trustees for the members so as to prevent time running (*Edwards* v. *Warden*, 1 App. Cas. 281). And the defence of the statute has been unsuccessfully raised by the following persons who were held to be trustees: a receiver appointed by the court (*Seagram* v. *Tuck*, 18 Ch. D. 296); a director who had paid dividends out of capital (*Flitcroft's case*, 21 Ch. Div. 519; *Re Oxford Society*, 35 Ch. D. 509; *Re Sharpe*, *Masonic Co.* v. *Sharpe*, 1892, 1 Ch. 154; compare the case of an action to recover a bribe received by a director, *Metrop. Bank* v. *Heiron*, 5 Ex. Div. 319); a person who borrowed trust money with notice of the trust (*Ernest* v. *Croysdill*, 2 D. F. & J. 198; see *Butler* v. *Carter*, 5 Eq. 276; *Coxwell* v. *Franklinski*, 12 W. R. 1072); a solicitor receiving money under the circumstances of the case (*Re Bell*, *Lake* v. *Bell*, 34 Ch. D. 462; see *Dooby* v. *Watson*, 39 Ch. D. 178). Accounting parties were held not to be trustees of money received by them (*Phillips* v. *Homfray*, 44 Ch. D. 694; see *Lister* v. *Stubbs*, 45 Ch. 1).

Where there was no trust, except such as was created by the decree of the court on setting aside the transaction, time ran from the discovery of circumstances which constituted the right to relief (*Clanricarde* v. *Henning*, 30 Beav. 175, a purchase by a solicitor from his client). The rules of equity as to such a purchase, and the operation of lapse of time upon the right to relief in such a case, were considered in *Gresley* v. *Mousley* (4 De G. & J. 78). In one case the purchase of trust property by trustees for their own benefit was set aside, after a considerable lapse of time and several assignments (*A. G.* v. *Dudley*, Coop. C. C. 146). But in another case, a bill to set aside a purchase by a trustee for himself and his children was dismissed, merely on the ground of the lapse of eighteen years (*Gregory* v. *Gregory*, Coop. C. C. 201; see *Champion* v. *Rigby*, 1 R. & M. 539; *Postlethwaite* v. *Rickman*, 60 L. T. 514).

See further the decisions as to the effect of lapse of time in the case of constructive trusts of land, *ante*, p. 150. Constructive trusts are within the Trustee Act, 1888, s. 8 (See sect. 1 of that act).

Devise in trust to pay debts.

A devise of real estate in trust for payment of debts will not revive a debt barred at the time of the testator's death (*Burke* v. *Jones*, 2 Ves. & B. 275); but as to debts not then barred, it seems that since 37 & 38 Vict. c. 57, such a devise, or a charge of debts on real estate, will keep them alive for twelve years, but no longer (*Re Stephens*, *Warburton* v. *Stephens*, 43 Ch. D. 39; *Fearnside* v. *Flint*, 22 Ch. D. 582; see *Piggott* v. *Jefferson*, 12 Sim. 26). And as to the law before the last-mentioned act, see *Hughes* v. *Wynne* (T. & R. 307); *Hargreaves* v. *Michell* (6 Mad. 326). See the note to 3 & 4 Will. 4, c. 27, s. 40, *ante*, pp. 180—182.

Where, however, a testator devised real estate on trust for payment of his debts, and had in fact no real estate at his death, the devise had no effect on the running of time (*Ex p. Hepburn*, 14 Q. B. D. 394); and the case was the same where debts were charged on property which was described in the will as real estate, but was in fact personalty (*Scott* v. *Jones*, 4 Cl. & F. 382). A trust for payment of a testator's debts out of his personal estate does not stop the running of time (*Ex p. Hepburn*, *sup.*; *Scott* v. *Jones*, *sup.*; *Freake* v. *Cranefeldt*, 3 M. & C. 499; see *Cadbury* v. *Smith*, 9 Eq. 42). For the case where real and personal estate are blended in one gift to executors, see *Re Stephens*, *Warburton* v. *Stephens* (43 Ch. D. 45). A testator may, however, by express directions in his will, revive debts which have been barred (*Williamson* v. *Nayler*, 3 Y. & C. Ex. 208; *Philips* v. *Philips*, 3 Ha. 281). When a man makes a provision for his

Courts of Equity and the Statutes of Limitation.

debts, he makes a provision for those which are not barred, that is to say, for those which in law are deemed debts. But if a man chooses voluntarily to make a provision for his father's debts to which he was not liable, the statute has no operation with respect to such debts (*O'Connor* v. *Haslam*, 5 H. L. C. 181).

Liability of executor and legatee to creditors.

Where a debt is not barred as between a creditor and his deceased debtor's estate, the executor may, in a creditor's administration action, be made personally liable to the extent of personal assets which he has lost or parted with, even though he did so more than six years before action brought (*Re Baker*, *Collins* v. *Rodes*, 20 Ch. Div. 230; *Re Marsden*, *Bowden* v. *Layland*, 26 Ch. D. 783; see as regards real assets claimed from a devisee, *Re Hyatt*, *Bowles* v. *Hyatt*, 38 Ch. D. 609). And where the executor has parted with assets to a legatee, the legatee may be made to refund (*Fordham* v. *Wallis*, 10 Hare, 217). But the conduct or acquiescence of the creditor may bar his right against the legatee (*Blake* v. *Gale*, 32 Ch. Div. 571); and it would seem also against the executors (*Re Birch*, *Roe* v. *Birch*, 27 Ch. D. 627; see *Re Marsden*, *sup.*) The above liability of the executor seems to have been sometimes placed on the ground of trust (*Re Marsden*, 26 Ch. D. 789; *Fordham* v. *Wallis*, 10 Hare, 226; see, however, *Re Hyatt*, 38 Ch. D. 617). As to pleading the statute in an action on a devastavit, see *ante*, p. 211.

Administration actions.

In administration suits legal demands are decided by courts of equity entirely on legal grounds (*Fuller* v. *Redman*, 26 Beav. 619). An acknowledgment by an executor after an administration decree will not revive a debt already barred (*Philips* v. *Beale*, 32 Beav. 26).

Who may set up statute.

If a decree has been obtained, the statute may be set up in the proceedings under the decree, by one creditor against another (*Fuller* v. *Redman*, 26 Beav. 614), and by a residuary legatee or other party interested in the estate against a creditor (*Moodie* v. *Bannister*, 4 Drew. 432; *Shewen* v. *Vanderhorst*, 1 Russ. & M. 347; *Beeching* v. *Morphew*, 8 Hare, 129). A residuary legatee was entitled to insist on this right where there was no administration judgment, but the executors had issued a summons under R. S. C., Ord. 55, to determine whether a defendant was a creditor of the estate (*Re Wenham*, *Hunt* v. *Wenham*, ~~1892, W. N. 101~~). The statute, however, cannot be set up against the plaintiff whose debt is the foundation of the decree (*Adams* v. *Waller*, 14 W. R. 789; *Fuller* v. *Redman*, *sup.*; see *Re Baker*, *Nicholls* v. *Baker*, 44 Ch. Div. 262). As to this question in the administration of real estate, see *Briggs* v. *Wilson* (5 D. M. & G. 21). A residuary legatee has been held to be precluded by his own acts from setting up the statute as against a pecuniary legatee (*Prowse* v. *Spurgin*, 5 Eq. 99). The court is not bound to set up the statute on behalf of absent parties (*Alston* v. *Trollope*, 2 Eq. 205). As to proof in an English action by a creditor who had attached French assets as security for two debts, one of which was barred in England but not in France, see *Re Bowes*, *Strathmore* v. *Vane* (1889, W. N. 53).

Executor may pay and retain debts barred.

Executors in administration actions are not bound to plead the statute (*Ex p. Dewdney*, 15 Ves. 498; *Norton* v. *Frecker*, 1 Atk. 526; *Castleton* v. *Fanshaw*, Prec. Ch. 100; *Re Baker*, *Nicholls* v. *Baker*, 44 Ch. Div. 272. See *Re Wenham*, *sup.*) Where judgment has been recovered against executors for a debt due from their testator, which they paid, the executors are entitled to be allowed such payment, although the statute might have been set up (*Hunter* v. *Baxter*, 3 Giff. 214). An executor may pay debts due from the testator to a stranger, although barred in testator's lifetime (*Stahlschmidt* v. *Lett*, 1 Sm. & Giff. 415), and may retain his own debt under the same circumstances (*Hill* v. *Walker*, 4 K. & J. 166; *Beswick* v. *Orpen*, 16 Ch. D. 207; see *Coombs* v. *Coombs*, L. R. 1 P. & M. 288; *Morley* v. *Saunders*, 8 Eq. 599). The case of the Statute of Limitations, however, is an exception to the general rule as to an executor's duty which will not be extended; and an executor cannot either pay or retain a debt which cannot be enforced by reason of the Statute of Frauds (*Field* v. *White*, 29 Ch. Div. 358). To satisfy a debt due from legatee to testator, but statute barred at his death, an executor may retain a pecuniary legacy (*Courte-*

nay v. *Williams*, 3 Hare, 539; *Coates* v. *Coates*, 33 Beav. 249), or a share of residue (*Akerman* v. *Akerman*, 1891, 3 Ch. 212); but not a specific legacy (*Ib.*) An administrator may similarly retain the share of a next of kin (*White* v. *Cordwell*, 20 Eq. 644). Directions in wills that debts due from beneficiaries are to be deducted from shares bequeathed to them, have been held to include debts barred by the statute (*Rose* v. *Gould*, 15 Beav. 189; *Poole* v. *Poole*, 7 Ch. 17). Where one of several executors owed the testator 300*l.*, and the other executors proved at once, but the debtor did not prove for more than six years, he could not then set up the statute, the act of proving having relation to the testator's death (*Ingle* v. *Richards*, 28 Beav. 366).

Lapse of time will not of itself bar an executor of an executor of his right to have an account of the original testator's estate taken, with a view to ascertain such executor's liabilities as an accounting party (*Smith* v. *O'Grady*, L. R. 3 P. C. 311).

Judgment in administration action.

With regard to the effect of judgment in administration actions, it has been held that judgment in such an action commenced by a legatee, and which contained the usual direction for payment of debts, operated in favour of such creditors of the testator as could then substantiate their claims, so as to prevent time running (*Finch* v. *Finch*, 35 L. T. 235, where the judgment was within the statutory period from the incurring of the debt; *Re Crossley*, *Munns* v. *Burn*, 35 Ch. Div. 266). Compare the effect of a winding up order (*Re General Rolling Stock Co.*, 7 Ch. 646). An administration judgment also operates in favour of the estate in regard to a set-off against a creditor's demand (*Re Ballard*, *Lovell* v. *Forester*, 1890, W. N. 64).

Pendency of administration action.

Berrington v. *Evans.*

The existence of a creditor's administration suit was held not to prevent the barring of a debt in respect of which no claim was made under the decree (*Tatam* v. *Williams*, 3 Hare, 347). And where a judgment creditor had allowed twenty years to elapse without taking steps to recover his debt, and then ascertained that during the twenty years a suit had been instituted for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part payment of their debts, and that there was money in court available for payment of the remainder, he was not allowed to prove his debt (*Berrington* v. *Evans*, 1 Y. & Coll. 484; see also *O'Kelly* v. *Bodkin*, 3 Ir. Eq. R. 390; *Hutchins* v. *O'Sullivan*, 11 Ir. Eq. R. 443).

Sterndale v. *Hankinson.*

Before 3 & 4 Will. 4, c. 27, it was held that although a creditor's demand was in strictness barred by the rule of equity and by analogy to the old statute, yet that rule would not be applied against him if he had delayed his suit, relying on the prosecution of an existing suit by another creditor on behalf of himself and other creditors (*Sterndale* v. *Hankinson*, 1 Sim. 393; followed in *Brown* v. *Lynch*, 4 Ir. Eq. R. 316; *Carroll* v. *Darcy*, 10 Ir. Eq. R. 321; and approved by Lord *St. Leonards* in *Bermingham* v. *Burke*, 2 J. & Lat. 714; R. P. Stat. 126; and see *Foster* v. *Mackenzie*, 17 Beav. 414; *Finch* v. *Finch*, 35 L. T. 235). Since the Judicature Acts, however, the reasons on which *Sterndale* v. *Hankinson* was founded no longer apply (*Re Greaves*, *Bray* v. *Tofield*, 18 Ch. D. 551; where the action was commenced within the statutory period from the incurring of the debt, but the judgment was made after the expiration of that period).

Pendency of actions.

The institution of a suit to execute the trusts of a will did not preserve the rights of the heir who claimed adversely to the will (*Simmons* v. *Rudall*, 1 Sim. N. S. 115). The right of a vendor to enforce his lien was not preserved by the existence of a suit by the creditors of the devisor of the estate, under whose will the sale took place, to administer his estate; nor by suits by the residuary devisees and legatees of the purchaser, for the administration of his estate (*Toft* v. *Stephenson*, 7 Hare, 1). A mortgagee's suit for foreclosure and sale instituted during the debtor's life, did not prevent time running against a judgment creditor of that debtor (*Bennett* v. *Bernard*, 12 Ir. Eq. R. 229). Where an equitable incumbrancer files a bill to assert his claim, he may be assisted by the fact that there is

Courts of Equity and the Statutes of Limitation.

a fund in court the rights in which have not been ascertained (*Lancaster* v. *Evors*, 10 Beav. 154). For the case where a creditor or incumbrancer is made a defendant to the suit, see *Watson* v. *Birch* (15 Sim. 523), and *Humble* v. *Humble* (24 Beav. 535).

Orders to carry on proceedings.

As to the application of the Statutes of Limitation to an order to carry on proceedings made before judgment, see *Perry* v. *Jenkins* (1 M. & Cr. 118, 121); *Bland* v. *Davison* (21 Beav. 312); and after judgment, see *Alsop* v. *Bell* (24 Beav. 451); *Parkinson* v. *Lucas* (28 Beav. 627, 630); see also *Bampton* v. *Birchall* (11 Beav. 38; 1 Phil. 568; 5 Beav. 67). Where a defendant was out of the jurisdiction and a bill prayed process against him when he should come within it, the operation of the statute was suspended though he had neither been served nor appeared (*Hele* v. *Bexley*, 20 Beav. 127).

As to the effect of the appointment of a receiver, see the cases quoted *ante*, pp. 148, 149.

Claim under advertisement.

The sending in a claim in answer to an executor's advertisement is not such a proceeding as will prevent time running against a debt (*Re Stephens*, *Warburton* v. *Stephens*, 43 Ch. D. 44).

Lunacy.

Where a creditor cannot recover by reason of the lunacy of the debtor, time will not run (*Stedman* v. *Hart*, Kay, 607). But where an executor was found lunatic after time has commenced to run against a legatee, time ran during the lunacy (*Boldero* v. *Halpin*, 19 W. R. 320). Proceedings in lunacy were held not to exclude the operation of the statute on a promissory note (*Roch* v. *Cooke*, 1 De G. & Sm. 675). A petition in lunacy, after the death of the lunatic, by his committee, and a reference, followed by a report that a sum of money had been expended by the committee in the maintenance of the lunatic, will not take the claim of the committee out of the statute, as against the heir-at-law, who was not a party (*Wilkinson* v. *Wilkinson*, 9 Hare, 204). Where funds in the hands of a lunatic executrix were under an order transferred to the credit of the lunacy to an account in the names of herself and other persons interested, and the income was paid to her, the order preserved the right of the parties interested, but arrears of income could only be recovered for six years (*Re Walker*, 7 Ch. 120). An order for repayment to executors of advances made by their testator for maintenance of a lady found lunatic after his death was limited to six years before the death (*Re Weaver*, 21 Ch. Div. 615). Guardians could only recover six years' arrears in respect of the maintenance of a pauper lunatic (*Re Newbegin*, *Eggleton* v. *Newbegin*, 36 Ch. D. 477).

Where time has run pending injunction or action.

See as to the relief granted by courts of equity where time had run pending an injunction, *Brown* v. *Newall* (2 M. & Cr. 572); *Anon.* (2 Cas. Ch. 217); *Fyson* v. *Pole* (3 Y. & C. 273); *Morgan* v. *Morgan* (2 Dick. 643); *Grant* v. *Grant* (3 Sim. 364; 3 Russ. 607); *Duval* v. *Terry* (Show. P. C. 15); *O'Donel* v. *Browne* (1 Ball & B. 262): or pending improper litigation, *Pultney* v. *Warren* (6 Ves. 73); *East India Co.* v. *Campion* (11 Bligh. 158, 186, 187); *Furnival* v. *Boyle* (4 Russ. 142); *Sirdefield* v. *Price* (2 Y. & C. 73).

GENERAL LIMITATION OF ACTIONS UNDER LOCAL AND PERSONAL ACTS.

The stat. 5 & 6 Vict. c. 97, after reciting that divers acts, commonly called public, local and personal, or local and personal acts, and divers other acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for any thing done in pursuance of the said acts respectively, and that the periods of such limitations vary very much, and it is expedient that there should be one period of limitation only, enacts, "That from and after the 10th August, 1842, the period within which any action may be brought for any thing done under the authority or

General Limitation of Actions.

in pursuance of any such act or acts shall be two years; or in case of continuing damage, then within one year after such damage shall have ceased; and that so much of any clause, provision or enactment by which any other time or period of limitation is appointed or enacted, shall be, and the same is hereby repealed." But this act does not extend to actions brought before the passing of it (See *Moore* v. *Shepherd*, 10 Exch. 424, as to the Ramsgate Harbour Act). On the 8th May, 1801, there was a resolution of the House of Commons, agreed to by the House of Lords, that the general statutes, and the "public, local and personal," in each session should be classed in separate volumes (*Richards* v. *Easto*, 15 M. & W. 251). The Metropolitan Police Acts, 10 Geo. 4, c. 44, 2 & 3 Vict. c. 47, and 3 & 4 Vict. c. 84, are not local and personal within the meaning of the stat. 5 & 6 Vict. c. 97; and therefore the times limited by the former statutes respectively for the bringing of actions against justices of a metropolitan district are not altered by the last act (*Barnett* v. *Cox*, 9 Q. B. 617). See further Darb. & Bos. Stat. Lim. 464—470.

ABOLITION OF FINES AND RECOVERIES.

3 & 4 WILLIAM IV. CAP. 74.

*An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.**

[28th August, 1833.]

I. *Interpretation clause*, s. 1.
II. *Fines and recoveries abolished*, ss. 2, 3.
III. *The tenure of ancient demesne*, ss. 4—6.
IV. *The amendment of fines and recoveries, and the rendering them valid in certain cases*, ss. 7—12.
V. *The custody of the records of fines and recoveries*, s. 13.
VI. *Estates tail not barrable by warranty*, s. 14.
VII. *Disposition of lands entailed*, ss. 15—21.
VIII. *Definition of the protector*, ss. 22—33.
IX. *Powers of the protector*, ss. 34—37.
X. *Confirmation of voidable estates created by tenant in tail*, s. 38.
XI. *Enlargement of base fees*, s. 39.
XII. *Modes in which dispositions of land under this act by tenants in tail are to be effected*, ss. 40—49.
XIII. *Estates tail in copyholds*, ss. 50—54.
XIV. *Bankrupts' estates tail*, ss. 55—69.
XV. *Money to be laid out in lands to be entailed*, ss. 70—72.
XVI. *The inrolment of deeds, &c.*, ss. 73—76.
XVII. *Alienation by married women*, ss. 77—91.
XVIII. *Ireland*, s. 92.

I. INTERPRETATION CLAUSE.

3 & 4 Will. 4, c. 74, s. 1.

Meaning of certain words and expressions.

"Lands."

"Estate."

1. Be it enacted, that in the construction of this act the word "lands" shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents and hereditaments of any tenure (except copy of court roll), and whether corporeal or incorporeal, and any undivided share thereof, but when accompanied by some expression including or denoting the tenure by copy of court roll, shall extend to manors, messuages, lands, tenements and hereditaments of that tenure, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien or incumbrance in, upon, or affecting lands, either

* This act does not extend to Ireland, but on the 15th August, 1834, the statute 4 & 5 Will. 4, c. 92, was passed, which corresponds in most particulars with the English statute, and came into operation on the 31st October, 1834, instead of 31st December, 1833.

at law or in equity, and shall also extend to any interest, charge, lien or incumbrance in, upon or affecting money subject to be invested in the purchase of lands (*b*); and the expression "base fee" shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred (*c*); and the expression "estate tail," in addition to its usual meaning (*a*), shall mean a base fee into which an estate tail shall have been converted; and the expression "actual tenant in tail" shall mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right (*d*); and the expression "tenant in tail" shall mean not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred; and the expression "tenant in tail entitled to a base fee" shall mean a person entitled to a base fee, or to the ultimate beneficial interest in a base fee, and who, if the base fee had not been created, would have been actual tenant in tail; and the expression "money subject to be invested in the purchase of lands" shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands, and the lands to be purchased with such money or produce shall extend to lands held by copy of court roll, and also to lands of any tenure, in Ireland or elsewhere out of England, where such lands or any of them are within the scope or meaning of the trust or power directing or authorizing the purchase; and the word "person" shall extend to a body politic, corporate or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and every assurance already made or hereafter to be made, whether by deed, will, private act of parliament or otherwise, by which lands are or shall be entailed, or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out of the power contained in any settlement, shall be considered as part of such settlement, and the estate created by such appointment shall be considered as having been created by such settlement (*e*); and where any such settlement is or shall be made by will, the time of the death of the testator shall be considered the time when such

3 & 4 Will. 4, c. 74, s. 1.

"Base fee."

"Estate tail."

"Actual tenant in tail."

"Tenant in tail."

"Tenant in tail entitled to a base fee."

"Money."

"Person."

Number and gender.

Settlement.

3 & 4 Will. 4, c. 74, s. 1.

settlement was made: provided always, that those words and expressions occurring in this clause, to which more than one meaning is to be attached, shall not have the different meanings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction.

The principal objects of this act.

The principal objects of this statute were to abolish fines and recoveries, to enable a tenant in tail to make an effectual alienation by enrolled deed, and to enable married women to dispose of land by deed acknowledged.

The origin of estates tail.

(*a*) By the common law, before the stat. Westm. 2, commonly called the statute *De Donis* (13 Edw. 1, c. 1), there were two kinds of estates of inheritance: the one a fee simple absolute, where lands were limited to a man and to his heirs generally; and the other a fee simple *conditional*, where lands were given to a man and to the heirs of his body (See *Willion* v. *Berkeley*, Plowd. 222—252; 2 Prest. on Est. 323—354).

In the case of the latter, until issue born, the grantee had not the absolute property in the estate; but the moment issue was born, the condition being performed, the estate became absolutely his property for some purposes (2 Bl. Comm. 111), and he could dispose of it in the same manner as if he had held it in fee simple. The statute *De Donis* declared that the will of the donor or grantor should be observed, and that an estate so granted to a man and the heirs of his body should descend to the issue, and that he should not have power to alienate the estate (3 Madd. 531, 532), thus creating the modern estate tail.

What may not be entailed.

Two things are essential to an entail within the statute, viz., that the subject be of a real nature, and that the estate in it be an inheritance (Harg. Co. Litt. 20 a, note (5)). Where a dignity is limited to the heirs of the body, even though no place be named in the creation of the title, the dignity is within the statute *De Donis* and descendible as an estate tail (*Re Rivett-Carnac*, 30 Ch. D. 136). Lands in ancient demesne are not within the statute *De Donis* (*Cresswell* v. *Hawkins*, 3 Jur. N. S. 407). As to copyholds, see note to sect. 50, *post*, p. 277.

If a purely personal annuity be granted to a man and the heirs of his body, the grantee takes a fee simple conditional, which becomes absolute on the birth of issue, the case not being within the statute *De Donis* (*Re Rivett-Carnac*, 30 Ch. D. 141; see *Stafford* v. *Buckley*, 2 Ves. sen. 170; *Turner* v. *Turner*, 1 Br. C. C. 325). In the case, however, of bequests of personalty to A. and the heirs of his body, the ordinary rule is that A. takes an absolute interest (*Leventhorpe* v. *Ashbie*, Tud. L. C. Conv. 763).

Neither estates *pur autre vie* in lands, nor terms of years, are entailable any more than personal chattels. They may, however, be so settled as to answer the purposes of an entailed estate and be rendered inalienable almost for as long a time as if they were entailable (Harg. Co. Litt. 20 a, note (5); see Fearne, 495—501, 7th ed.) As to chattels settled by reference to limitations of real estate in strict settlement, see *Glenorchy* v. *Bosville* (1 White & Tud. L. C. Eq. 1).

***Quasi* entails of estates *pur autre vie*.**

A *quasi* tenant in tail in possession of an estate *pur autre vie* may by act *inter vivos* deal with the estate as if there had never been any settlement (*Allen* v. *Allen*, 2 Dru. & War. 307; see *Pickersgill* v. *Grey*, 31 L. J. Ch. 394). The *quasi* entail in such an estate may be barred by deed, surrender, or even by articles (*Guy* v. *Mannock*, 2 Eden, 339; see 16 Ves. 313; Coop. C. C. 178; 1 Mer. 665; see *Lynch* v. *Nelson*, I. R. 5 Eq. 192); but not by *will* (*Hopkins* v. *Ramadge*, Batty, 365; *Campbell* v. *Sandys*, 1 Sch. & L. 281; *Cresswell* v. *Hawkins*, 3 Jur. N. S. 408; see *Doe* v. *Luxton*, 6 T. R. 292). A lease for lives may be barred by surrender and renewed by the first *quasi* tenant in tail of it (*Blake* v. *Blake*, 1 Cox, 266; 3 P. Wms. 10, note 1, by Cox; see Coop. C. C. 184, 185); and a renewable freehold by a grant for one hundred years by the *quasi* tenant in tail (*Walsh* v. *Studdert*, I. R. 5 C. L. 478), or a fee farm grant to the *quasi* tenant in

tail (*Morris* v. *Morris*, I. R. 6 C. L. 73). But a *quasi* tenant in tail in remainder of an estate *pur autre vie*, after an estate for life to some other person, could not by his own act, by fine or otherwise, in the lifetime of the tenant for life and without his concurrence, bar the remainders over (*Slade* v. *Pattison*, 5 L. J. Ch. 51; *Allen* v. *Allen*, *sup.*; see *Wastneys* v. *Chappell*, 3 Br. P. C. 50; *Edwards* v. *Champion*, 3 D. M. & G. 202). So where an estate *pur autre vie* is limited to one for life with remainder over in tail, there the first taker cannot bar the remainder, unless the remainderman in tail joins (*Low* v. *Barron*, 3 P. Wms. 262; *Osbrey* v. *Bury*, 1 Ball & B. 53). 3 & 4 Will. 4, c. 74, s. 1.

Before this act estates tail were barred by means of fines or recoveries (See the note to sect. 2, *post*).

(*b*) In the Irish act the word "estate" is made to extend to "any interest, charge, *right*, *title*, lien, or incumbrance, in, upon, or affecting lands, either at law or in equity, *whether present or vested, or future or contingent.*" As to the definition of estate in the present act, see *Briggs* v. *Chamberlain* (11 Hare, 74); *Williams* v. *Cooke* (4 Giff. 343); *Re Newton* (23 Ch. D. 187). Estate.

(*c*) The species of base fee here defined is thus described by Lord *Coke*:— Where tenant in tail bargains and sells the estate to another and his heirs, and afterwards levies a fine to him and his heirs with proclamations, he has an estate in fee simple as long as the tenant in tail has heirs of his body, derived out of the estate tail; this being an inferior and subordinate estate, a remainder or reversion may be expectant upon it (*Seymour's Case*, 10 Rep. 97 b, 98 a; see 2 Ld. Raym. 1148; Plowd. 557; Co. Litt. 18; Shep. T. 46, 103, 402; 3 Leon. 117; 1 Prest. on Estates, 431, 432). It was clearly settled that a release or bargain and sale by a tenant in tail gave a *base fee*, voidable by the issue in tail (*Machel* v. *Clark*, 2 Ld. Raym. 779; *S. C.*; Salk. 619; Com. 120; 7 Mod. 18; 11 Mod. 19; *Goodright* v. *Mead*, 3 Burr. 1703; *Seymour's Case*, 10 Rep. 95; *Doe* v. *Rivers*, 7 Term Rep. 276). A conveyance by a tenant in tail without a disentailing assurance will in general pass a fee determinable by the entry of the issue in tail (*Sturgis* v. *Morse*, 2 D. F. & J. 231, 232). Base fee.

(*d*) The word *divest* signifies nothing more than a mere deprivation of the possession (Cow. Dict.) But the words *turned to a right* have a more extensive signification; for when an estate is turned to a right, the owner has only the *jus proprietatis*, or mere right of property, which could not be regained by a possessory, but only by a real action (See 1 Burr. 107; 1 Taunt. 578, 583; 1 T. R. 738; Butl. Co. Litt. 239 a, n. (1)). Divest.

(*e*) It has been established ever since the time of Lord *Coke* (*Sir Edward Clere's Case*, 6 Rep. 18), that where a power of appointment over real estate is executed, that the appointee takes under him who created the power, and not under him who executes it (*Marlborough* v. *Godolphin*, 2 Ves. sen. 78); the appointee, however, does not take from the time of the creation of the power, but from the time of its complete execution, *e. g.*, where the execution is by will from the testator's death (*Ib.*) The estates limited in default of and until the execution of the power are vested until an appointment is made (*Doe* v. *Martin*, 4 T. R. 39; compare *Re Ware*, *Cumberlege* v. *Cumberlege-Ware*, 45 Ch. D. 269), but are defeated by an appointment. Thus, in the case of a power of leasing, the lessee stands in the same relation to all the persons named in the settlement as if that settlement had contained a limitation to his use antecedent to the life estate and the subsequent limitations (*Maundrell* v. *Maundrell*, 10 Ves. 255, 256; see Co. Litt. 216 a, 241 a, notes by Butl.) So a right of dower, which had attached before the execution of a power, was defeated by an appointment (*Ray* v. *Pung*, 5 B. & Ald. 561; 5 Madd. 310). Relation of appointment to deed creating a power.

But the donee of a power cannot by an appointment defeat a lease or other interest granted by him by virtue of his estate (*Snape* v. *Turton*, Sir W. Jones, 392; *Yelland* v. *Ficlis*, Moore, 788; *Goodright* v. *Cator*, Dougl. 477; see Gilb. on Uses, 142; *Edwards* v. *Slater*, Hardr. 415; *Reg.* v. *Ellis*, 4 Exch. 652; see also the note *post*, p. 296).

With reference to the rules against perpetuities and remoteness, where an appointment is made in exercise of a special power, the appointment

3 & 4 Will. 4, c. 74, s. 1.

must be read into the instrument creating the power, and its validity tested in that way (*Whitby* v. *Mitchell*, 42 Ch. D. 500; 44 Ch. Div. 85; *Re Brown and Sibley*, 3 Ch. D. 159). But where the appointment is made under a general power, time runs from the execution of the power, not from its creation (*Rous* v. *Jackson*, 29 Ch. D. 521, 526).

II. Fines and Recoveries abolished.

Abolition Clause.

No fine or recovery to be levied or suffered after the 31st of December, 1833.

2. After the thirty-first day of December, one thousand eight hundred and thirty-three, no fine shall be levied or common recovery suffered of lands of any tenure, except where parties intending to levy a fine or suffer a common recovery shall, on or before the thirty-first day of December, one thousand eight hundred and thirty-three, have sued out a writ of dedimus, or any other writ, in the regular proceedings of such fine or recovery; and any fine or common recovery, which shall be levied or suffered contrary to this provision, shall be absolutely void (*f*).

(*f*) The act 51 & 52 Vict. c. 57, has repealed the words, "and be it further enacted," wherever they occurred in 3 & 4 Will. 4, c. 74, and has also repealed immaterial words in the following sections, viz., 36, 47, 79, 80, 83, 84, and 89. The repealed words have accordingly been omitted.

Report of Real Property Commissioners.

The following account of the nature and operation of fines and recoveries is abridged from the First Report of the Real Property Commissioners, 1829, pp. 20—25.

Definition of a fine and its origin.

A fine in its origin was an amicable composition, by leave of the king or his justices, of any actual suit, whereby the lands were acknowledged to be the right of one of the parties, and at common law all persons were barred by it who did not claim within a year and a day. The safe title acquired by this process led, it is supposed, to the practice of transferring lands by means of a fictitious suit of the same nature as the real suit above alluded to. This is the origin of fines, which, before this statute, subject to certain modifications made from time to time by statutes, had been in use for centuries (See 34 Edw. 3, c. 16; 1 Rich. 3, c. 7; 4 Hen. 7, c. 24; 32 Hen. 8, c. 36).

Different sorts of fines.

There were four sorts of fines, viz., 1st, a fine "*Sur conuzance de droit come ceo, &c.*"; 2ndly, a fine "*Sur conuzance de droit tantum*"; 3rdly, a fine "*Sur concessit*"; and 4thly, a fine "*Sur done grant et render.*" The first and third were those in general use; the second was sometimes used, but the same purposes could not be attained either by the first or third; the fourth had become obsolete.

Operation of fines.

The three principal uses to which fines were applied were, to bar estates tail, and enable a tenant in tail to acquire or pass a base fee (See 32 Hen. 8, c. 36), to gain a title by non-claim (See *ante*, p. 115; *Davies* v. *Lowndes*, 7 Scott, N. R. 141), and to pass the estates and bar the rights of married women (See *Life Association* v. *Siddal*, 3 D. F. & J. 74; Co. Litt. 121 a, n.; *Dickens* v. *Unthank*, 1 Jur. N. S. 916; 24 L. J. Ch. 501). For other effects of a fine, see notes to the following sections of this act, viz., sects. 20, 34, 38, 39, and the note to sect. 39 of 3 & 4 Will. 4, c. 27 (*ante*, p. 172); *Doe* v. *Dilnot* (2 Bos. & P. N. R. 401); *Brassington* v. *Llewellyn* (1 F. & F. 27).

Definition of a common recovery and its origin.

A common recovery was a judgment in a fictitious suit brought by the demandant against the tenant of the freehold, who vouched some person to warrant the lands, and judgment was given for the demandant to recover them against the tenant, in consequence of the person vouched

making default in defending the title to the lands, which title he was supposed to have warranted. In a recovery, the regular process of a real action was pursued throughout (See *Broome* v. *Swan*, 1 Bl. Rep. 496, 526), and no compromise took place as in a fine. Common recoveries were invented by ecclesiastics in order to elude the statutes of mortmain (Willes Rep. 448, 551; 5 J. B. Moore, 607; 5 T. R. 109, n.; Shelford's Mortmain, 12, 13), and were in constant use for that purpose until checked by the statute of Westminster 2, 13 Edw. 1, c. 32. In consequence of the principles laid down in the 12 Edw. 4, in *Taltarum's Case* (Hardr. 209; Willes Rep. 452; Tudor, L. C. Conv. 605, 2nd ed.), a common recovery was afterwards applied to the purpose of evading the statute of Westminster 2, 13 Edw. 1, c. 1, commonly called the statute *De Donis Conditionalibus* (*ante*, p. 242). 3 & 4 Will. 4, c. 74, s. 2.

The principal use of a recovery was to enable a tenant in tail to bar not only his estate tail, but also all remainders, reversions, conditions, collateral limitations and charges, not prior to the estate tail, and to acquire or pass a fee simple or an estate commensurate with the estate of the settlor; it was not unfrequently made use of at the same time to convey, release, bar, or extinguish the estates, rights, powers, and interests of married women and others. As to other effects of a recovery, see notes to sects. 18 and 38 of this act, and *Doe* v. *Llandaff* (2 Bos. & P. N. R. 491). Operation of a recovery.

The writ, in the case of a recovery, must have been brought by the demandant against the person who had the immediate freehold, who was called the tenant to the *præcipe;* consequently there were frequently great difficulties in barring entails, for if the tenant to the *præcipe* did not join in the conveyance, the recovery was void, and it often happened that he could not be traced or would refuse to concur (See further First Report of the Commissioners of Real Property, ordered to be printed 20th May, 1829; 5 Cru. Dig.; Prest. on Conv.; Coventry on Recoveries; Shep. Touch.; *Doe* v. *Scarborough*, 3 Ad. & Ell. 1). Necessary parties to a recovery for barring estates tail and remainders.

Provision as to Covenants to levy Fines, &c.

3. In case any person shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable to levy a fine or suffer a common recovery of lands of any tenure, or to procure some other person to levy a fine or suffer a common recovery of lands of any tenure, under a covenant or agreement already entered into or hereafter to be entered into, before the first day of January, one thousand eight hundred and thirty-four, then and in such case, if all the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, the person liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable, under such covenant or agreement, to make, or to procure to be made, such a disposition under this act as will effect all the purposes intended to be effected by such fine or recovery; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand

Persons liable after 31st December, 1833, to levy fines or suffer recoveries under covenants to effect the purposes intended by means of this act; but in any case where the purpose of a fine or recovery cannot be so effected, the persons liable to levy fines or suffer recoveries shall execute a deed which shall have the same operation as the fine or recovery.

3 & 4 Will. 4, c. 74, s. 3.

eight hundred and thirty-three, be subject and liable under such covenant or agreement to make or procure to be made such a disposition under this act as will effect such of the purposes intended to be effected by such fine or recovery as can be effected by a disposition under this act; and in those cases where the purposes intended to be effected by such fine or recovery, or any of them, cannot be effected by any disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable under such covenant or agreement to execute, or to procure to be executed, some deed whereby the person intended to levy such fine or suffer such recovery shall declare his desire that such deed shall have the same operation and effect as such fine or recovery would have had if the same had been actually levied or suffered; and the deed by which such declaration shall be made shall, if none of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the deed by which such declaration shall be made shall, so far as the purposes intended to be effected by such fine or recovery cannot be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered.

III. The Tenure of Ancient Demesne.

Reversal of Fines, &c.

Fines and recoveries of lands in ancient demesne, when levied or suffered in a superior court, may be reversed as to the lord by writs of deceit, the proceedings in which are now pending, or by writs of deceit hereafter to be brought,

4. No fine already levied in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no fine hereafter to be levied of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such fine to be vacated only as to the lord of the said manor; and every such fine which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid shall still remain as good and valid against, and as binding upon, the conusors thereof and all persons claiming under them, as such fine would have been if the same had not been reversed by such writ of deceit as aforesaid; and

no common recovery already suffered in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no common recovery hereafter to be suffered of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such recovery to be vacated only as to the lord of the said manor; and every such recovery which may be reversed as to the lord of the said manor, upon such writ of deceit as aforesaid, shall still remain as good and valid against, and as binding upon, the vouchees therein, and all persons claiming under them, as such recovery would have been if the same had not been reversed by such writ of deceit as aforesaid (*g*).

3 & 4 Will. 4, c. 74, s. 4.

but shall be as valid against the parties thereto, and persons claiming under them, as if not reversed as to the lord.

(*g*) All those estates which are called in Doomsday Book *terræ regis* were manors belonging to the crown, being part of its ancient demesne; a great portion of the lands comprised within those manors was in the hands of tenants who held the same of the crown by a peculiar species of socage tenure which has long been known by the appellation of *ancient demesne* (4 Inst. 269, 270), which can only subsist in manors of that sort. Whether ancient demesne or not can only be determined by a reference to Doomsday Book (Dyer, 250; *Doe* v. *Roe*, 2 Burr. 1046; see Scriven on Cop. 33—37, 386—388, 6th ed.; Com. Dig. Ancient Demesne; and Third Real Property Report, 12, 13). The tenants in ancient demesne were subject to certain restraints, and entitled to certain immunities. They could not bring or defend any real action touching their tenements, except in the lord's court. Hence the title to lands of that tenure are frequently involved in considerable difficulties, in consequence of fines or recoveries having by mistake been levied or suffered in the Court of Common Pleas (See the *First Report of the Real Property Commissioners*, pp. 28, 29).

Tenure by ancient demesne.

Defect of Jurisdiction.

5. If at any time before or after the passing of this act a fine or common recovery shall have been levied or suffered, or shall be levied or suffered in a superior court, of lands of the tenure of ancient demesne, and subsequently to the levying or suffering thereof a fine or common recovery shall have been or shall be levied or suffered of the same lands in the court of the lord of the manor of which the lands had been previously parcel, and the fine or common recovery levied or suffered in such superior court shall not have been reversed previously to the levying of the fine or the suffering of the common recovery in the lord's court, then and in every such case the fine or common recovery levied or suffered in the lord's court shall, notwithstanding the alteration or change of the tenure by the fine or common recovery previously levied or suffered in the superior court, be as good, valid and binding as the same would have been if

Fines and recoveries of lands in ancient demesne levied or suffered in the manor court, after other fines and recoveries in a superior court, shall be as valid as if the tenure had not been changed.

3 & 4 Will. 4, c. 74, s. 5.

Fines and recoveries shall not be invalid in other cases, though levied or suffered in courts whose jurisdictions may not extend to the lands therein comprised.

the tenure had not been altered or changed; and that in every other case where any fine or common recovery shall at any time before the passing of this act have been levied or suffered in a court whose jurisdiction does not extend to the lands of which such fine or recovery shall have been levied or suffered, such fine or recovery shall not be invalid in consequence of its having been levied or suffered in such court, and such court shall be deemed a court of sufficient jurisdiction for all the purposes of such fine or recovery; and in every other case where persons shall have assumed to hold courts in which fines or common recoveries have been levied or suffered, and such courts shall be unlawful or held without due authority, the fines or common recoveries which at any time before the passing of this act may have been levied or suffered in such unlawful or unauthorized courts shall not be invalid in consequence of their having been levied or suffered therein, and such courts shall be deemed courts of sufficient jurisdiction for all the purposes of such fines or recoveries.

Tenure of Ancient Demesne restored.

Tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior court, restored in cases in which the rights of the lord of the manor shall have been recognized within twenty years.

6. In every case in which at any time, either before or after the passing of this act, the tenure or * ancient demesne has been or shall be suspended or destroyed by the levying of a fine, or the suffering of a common recovery of lands of that tenure in a superior court, and the lord of the manor of which the lands at the time of levying such fine or suffering such recovery were parcel, shall not reverse the same before the first day of January, one thousand eight hundred and thirty-four, and shall not by any law in force on the first day of this session of parliament be barred of his right to reverse the same, such lands, provided within the last twenty years immediately preceding the first day of January, one thousand eight hundred and thirty-four, the rights of the lord of the manor of which they shall have been parcel shall in any manner have been acknowledged or recognized as to the same lands, shall, from the said first day of January, one thousand eight hundred and thirty-four, again become parcel of the said manor, and be subject to the same heriots, rents and services, as they would have been subject to if such fine or recovery had not been levied or suffered; and no writ of deceit for the reversal of any fine or common recovery shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-three.

* *Lege* of.

3 & 4 Will. 4, c. 74, s. 7.

IV. The Amendment of Fines and Recoveries, and the rendering them Valid in certain Cases.

Errors in Fines.

Fines made valid without amendment.

7. If it shall be apparent, from the deed declaring the uses of any fine already levied or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record or proceedings in which such error, misdescription or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription or omission (*h*).

Amendment of fines.

(*h*) Amendment was refused where the error in the fine was cured by this section (*Life Association* v. *Siddal*, 3 D. F. & J. 58; *Lockington* v. *Shipley*, 1 Bing. N. C. 355). Fines were amended in the following cases: *Totton* v. *Vincent* (5 Bing. N. C. 626); *Lloyd* v. *Nicholas* (4 Bing. N. C. 633); *Price* v. *Watkins* (6 Jur. 170); *Evans* v. *Davis* (5 Bing. N. C. 229).

Errors in Recoveries.

Recoveries made valid without amendment.

8. If it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record or proceedings in which such error, misdescription or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription or omission (*i*).

Amendment of recoveries.

(*i*) A recovery was amended under this section by inserting a latent fact (*Re Twisden*, 4 Bing. N. C. 253); but amendment was refused when the defect was remedied by this section (*Wickens* v. *Windus*, 9 C. B. 711; *Re Watkins*, 9 Dowl. P. C. 58; *Re Evans*, 2 Scott's N. R. 83).

A warrant of attorney cannot be amended (*Lamont*, 3 Scott, 666).

See further, as to the amendment of fines and recoveries, Cruise, Dig. tit. 35, c. 5; tit. 36, c. 6; 2 Wms. Saund. 94.

3 & 4 Will. 4, c. 74, s. 9.

Jurisdiction to amend saved.

Saving jurisdiction in cases not provided for.

9. Provided always, that nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, in cases not provided for by this act.

Defect of Tenant to the Præcipe, Non-inrolment of Bargain and Sale.

Recoveries made valid in certain cases where bargain and sale is not duly inrolled.

10. No common recovery already suffered or hereafter to be suffered shall be invalid in consequence of the neglect to inrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly enrolled.

Defect of Legal Tenant to Præcipe.

Recoveries invalid in consequence of there not being proper tenants to the writs of entry made valid in certain cases.

11. No common recovery already suffered or hereafter to be suffered shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery, provided the person who was the owner of or had power to dispose of an estate in possession, not being less than an estate for life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits, after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ (*k*); and an estate shall be deemed to be an estate in possession notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved.

Equitable fines and recoveries.

(*k*) Fines and recoveries were levied or suffered of equitable estates, and had, with a few exceptions, the same operation as they would have had if the estates had been legal; but neither a fine nor a recovery of an equitable estate produced a forfeiture of a particular estate, or destroyed contingent interests, except in the instance of a recovery suffered by an equitable tenant in tail, which would bar the entail, and all interests to take effect on the determination or in derogation thereof. Fines and recoveries of equitable estates must have been levied and suffered in the same courts, and with the same formalities, as those of legal estates; but there was some difference between legal and equitable recoveries, so far as regarded the tenant to the *præcipe* (See *First Real Property Report*, 1829, p. 29).

Requisities to make good tenant to the *præcipe*.

In order to make a good tenant to the *præcipe* there should have been a legal estate for life, with a legal remainder in tail, or an equitable estate for life, with an equitable remainder in tail (*Shapland* v. *Smith*, 1 Br. C. C.

75; *Salvin* v. *Thornton*, *Id.* 73, n.; see *Iveson* v. *Pearman*, 3 B. & C. 811; 4 B. & Ad. 55; 1 Collect. Jurid. 214; *Doe* v. *Ewart*, 7 Ad. & Ell. 670). A recovery suffered by an equitable tenant for life with a legal remainder in tail was void (3 B. & Cr. 799). But an equitable remainder in tail might have been barred although the person making the tenant to the *præcipe* had the legal estate (3 Ves. 125). Where a legal tenant in tail conveyed his estate to a trustee or mortgagee, the concurrence of his alienee in making a tenant to the *præcipe* was necessary. But this rule was held not applicable by analogy to trust estates (*Nouaille* v. *Greenwood*, Turn. & Russ. 26; see *Casborne* v. *Scarfe*, 1 Atk. 603). In equitable recoveries the person who made the tenant to the *præcipe* was the person who had the real equitable ownership (*Re Dudson*, 8 Ch. Div. 632; see also *Penny* v. *Allen*, 7 D. M. & G. 409; *Adams* v. *Adams*, 6 Q. B. 860).

3 & 4 Will. 4, c. 74, s. 11.

As to the necessity of possession by the tenant to the *præcipe*, see *Grenville* v. *Blyth* (16 Ves. 224); *Pigott* v. *Waller* (7 Ves. 122); *Taylor* v. *Horde* (1 Burr. 60; Cowp. 689; 6 Br. P. C. 633, Toml. ed.; see Butl. Co. Litt. 330 b, n.); *Doe* v. *Lyons* (3 B. & C. 388).

A dowress who had not entered was not a necessary party to a recovery (4 Br. C. C. 525; see Gilb. Ten. 26; 5 Cru. Dig. p. 246, pl. 18); nor a person holding a freehold lease (14 Geo. 2, c. 20). A recovery might be void in part for want of a good tenant to the *præcipe* as to that part (*Row* v. *Power*, 2 Bos. & Pull. 1; *Moody* v. *Moody*, Ambl. 649; see Co. Litt. 187; 2 Br. C. C. 180; *Winchester's Case*, 3 Rep. 1; *Collyer* v. *Mason*, 2 Brod. & Bing. 685).

Remedial Clauses qualified.

Certain cases in which fines and recoveries shall not be made valid by this act.

12. Provided always, that where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and where any fine or common recovery shall before the passing of this act have been reversed as to some only of the parties thereto, or as to some only of the lands therein comprised, such fine or recovery shall not be rendered valid by this act so far as the same shall have been reversed; and where any person who would have been barred by any fine or common recovery, if valid, shall before the passing of this act have had any dealings with the lands comprised in such fine or recovery, on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this act; and this act shall not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this act be in possession in respect of any estate which the fine or common recovery, if valid, would have barred, nor any fine or common recovery which, before the passing of this act, any court of competent jurisdiction shall have refused to amend; nor shall this act prejudice or affect any proceedings at law or in equity, pending at the time of the passing of this act, in which the validity of such fine or recovery shall be in question between the party claiming under such fine or recovery, and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this act; and if such proceedings shall abate

3 & 4 Will. 4, c. 74, s. 12.

or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this act would have a right of action or suit by reason of the invalidity of such fine or recovery shall retain such right, so that he commence proceedings within six calendar months after the death of such party (*l*).

(*l*) See as to this section *Davies* v. *D'Arcy* (3 Ir. C. L. Rep. N. S. 617; 4 Ir. Ch. Rep. N. S. 87; Sugd. R. P. Stat. 2nd ed. 187).

V. Custody of the Records of Fines and Recoveries.

[*Sect.* 13 *provided for the custody of the records of fines and recoveries which are now kept at the Central Office of the Supreme Court* (*See* 5 & 6 *Will.* 4, *c.* 82; 42 & 43 *Vict. c.* 78, *s.* 5). *As to fines and recoveries in the Courts of Great Session in Wales, see* 5 *Vict. c.* 32; Doe *v.* Price, 16 *M.* & *W.* 603.]

VI. Estates Tail not Barrable by Warranty.

Estates tail, and estates expectant thereon, no longer barrable by warranty.

14. All warranties of lands which after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be made or entered into by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail (*m*).

(*m*) See 3 & 4 Will. 4, c. 27, s. 39, *ante*, p. 172.

VII. Disposition of Lands Entailed.

General enabling Clause.

Power after the 31st of December, 1833, to dispose of lands entailed in fee simple, or for a less estate, saving the rights of certain persons.

15. After the thirty-first day of December, one thousand eight hundred and thirty-three, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons,* including the King's most excellent Majesty, his heirs and

successors, whose estates are to take effect after the determination or in defeasance of any such estate tail: saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made (*n*). 3 & 4 Will. 4, c. 74, s. 15.

* The remainder of the corresponding clause in the Irish Act (4 & 5 Will. 4, c. 92, s. 12), runs thus: "whose estates are to take effect after the determination or in defeazance of any such estate tail, including the King's most Excellent Majesty, his heirs and successors, as regards the title to his Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, or where the title to the crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this act authorized to be made." Corresponding clause of Irish Act.

(*n*) The words "actual tenant in tail" are defined by sect. 1, *ante*, p. 241. As to equitable tenants in tail, and the form of assurance made necessary in that case by this act, see 1 Hayes, Conv. 155, 5th ed. As to fines and recoveries of equitable estates, see note to sect. 11, *ante*, p. 250. The owner of a contingent estate tail was deemed incompetent to suffer a common recovery with effect (1 Prest. Conv. 142); but tenants in tail in contingency are expressly within the words of this section (See Sugd. R. P. Stat. 192; 1 Hayes, Conv. 194, 5th ed. As to the alienation of contingent interests, see note to sect. 20, *post*). Where land was devised to trustees on trust for sale for certain purposes, and subject thereto to certain persons in tail, it was held not necessary to bar the entail on a sale by the trustees (*Re Skerrett*, 2 Dru. & War. 585). Actual tenant in tail. Equitable tenants in tail. Tenant in tail in contingency.

A disentailing deed executed by a tenant for life has no operation under this section (*Slater* v. *Dangerfield*, 15 M. & W. 263; as to the effect of a recovery suffered by a tenant for life, see *Smith* v. *Clifford*, 1 T. R. 738; *Meredith* v. *Leslie*, 6 Br. P. C. 388; *Doe* v. *Scarborough*, 3 Ad. & Ell. 43). But a proper disentailing deed will bar the entail, though the tenant in tail who executes it is recited in it to be tenant for life (*Evans* v. *Jones*, Kay, 29). Disposition —by tenant for life.

An alien might suffer a common recovery (Leon. 404; Shep. Touch. 404), and may execute a disentailing deed (1 Jarm. Wills, 41, 4th ed.) Where the tenant in tail is a lunatic, the Court of Lunacy can bar the entail, but the power will not be exercised so as to affect the remaindermen (*Re Pares, Lillingston* v. *Pares*, 12 Ch. Div. 333; see Lunacy Act, 1890, s. 123). An infant has been ordered under 1 Will. 4, c. 47, s. 11, to execute a disentailing deed (*Radcliffe* v. *Eccles*, 1 Keen, 130). A married woman is not prevented by a restraint on anticipation from barring an entail (*Cooper* v. *Macdonald*, 7 Ch. Div. 288). Where a settlor gives an estate tail, he cannot restrict the power of the tenant in tail to bar it (*Dawkins* v. *Penrhyn*, 4 App. Cas. 64). —by an alien, lunatic, &c.

A disentailing deed executed by a tenant in tail does not destroy the interest he possesses in the estate, but enables him, by the exercise of the power which that interest gives him, to render it perpetual (*Lilford* v. *A. G.*, L. R. 2 H. L. 63). As to the destruction of powers by a disposition under the statute, see Sugden, Powers, 91, 8th ed.; *Hill* v. *Pritchard* (Kay, 394); *Re Wright and Marshall* (28 Ch. D. 93). Operation of disentailing deeds under this section.

A common law grant by deed of land to a person who does not execute the deed and afterwards disclaims, is not effectual to bar an entail under this section (*Peacock* v. *Eastland*, 10 Eq. 17). But the fact that, in the case of a conveyance under the Statute of Uses, the grantee to uses does

3 & 4 Will. 4, c. 74, s. 15.

not execute the deed and afterwards disclaims, will not render the deed ineffectual to bar the entail (*Re Dudson*, 8 Ch. Div. 631).

Leases by tenant in tail.

The power of leasing conferred by this section on tenants in tail (See sect. 41, *post*) has become less material since the Settled Land Act, 1882, which last act (sect. 58, sub-sect. 1, *post*) has enabled a tenant in tail to exercise the powers under that act of a tenant for life.

Where a tenant in tail is a lunatic, the judge in lunacy may authorize the committee to grant leases binding on all reversioners (Lunacy Act, 1890, ss. 120, 122; see S. L. Act, 1882, s. 62).

Entail of rent.

"Lands" in this act includes rents (sect. 1, *ante*). As to the effect of a recovery on entailed rents, see *Smyth* v. *Farnaby*, Carter, 52; Sid. 285; 2 Keb. 29, 55, 84; *Weeks* v. *Peach*, Lutw. 1218, 1224; *S. C.*, Salk. 577; *Chaplin* v. *Chaplin*, 3 P. Wms. 229; Butl. Co. Litt. 298 a, n. 2; 1 Prest. on Conv. 3.

Form of disposition.

A declaration of trust is not such a disposition as is referred to in this section (*Green* v. *Paterson*, 32 Ch. Div. 108). See further, as to the mode in which the disposition can be made, sect. 40, *post*, p. 271.

Ex provisione Viri, &c. Restraining Clause.

Power of disposition not to be exercised by women tenants in tail ex provisione viri, under 11 Hen. 7, c. 20, except with assent.

16. Provided always, that where under any settlement made before the passing of this act, any woman shall be tenant in tail of lands within the provisions of an act passed in the eleventh year of the reign of his Majesty King Henry the Seventh, intituled "Certain Alienations made by the Wife of the Lands of her deceased Husband shall be void," the power of disposition hereinbefore contained as to such lands shall not be exercised by her except with such assent as, if this act had not been passed, would, under the provisions of the said act of King Henry the Seventh, have rendered valid a fine or common recovery levied or suffered by her of such lands (*o*).

The stat. 11 Hen. 7, c. 20, and construction of it.

(*o*) By stat. 11 Hen. 7, c. 20, a woman who had any estate in *dower* or for *life*, or *in tail jointly* with her husband, or *only to herself*, or to *her use*, in any lands or hereditaments of the *inheritance or purchase of her husband* (Co. Litt. 326 b), or given to the husband and wife in tail or for life, by any of the *ancestors of the husband*, or by any other person seised to the use of the husband, or of his ancestors, could not, being *sole*, or with any *after-taken husband*, except with the consent of the persons next entitled to the inheritance, or for the term of her *life only*, alien such estate (See *Foster* v. *Pitfal*, Cro. Eliz. 2, 524; *Symson* v. *Turner*, 1 Eq. Cas. Abr. 220; *Gretton* v. *Haward*, 6 Taunt. 94; *Villars* v. *Beaumont*, Dyer, 145 a; *Watkins* v. *Lewis*, 1 Russ. & M. 390; Cro. Eliz. 2; 1 Leon. 261; *Curtis* v. *Price*, 12 Ves. 97; *Rochfort* v. *Fitzmaurice*, 2 Dru. & War. 19; 1 Roper on Hus. & W. by Bright, pp. 497, 515; Cruise's Dig. tit. 36, c. 10; Prest. Conv. 19—21, 146—149).

[*Sect.* 17, *repealing* 11 *Hen.* 7, *c.* 20, *was repealed by* 37 & 38 *Vict. c.* 35, *without reviving the former act.*]

Reversion in Crown, &c. not to be barred.

The power of disposition not to extend

18. Provided always, that the power of disposition hereinbefore contained shall not extend to tenants of estates tail, who,

by an act passed in the thirty-fourth and thirty-fifth years of the reign of his Majesty King Henry the Eighth, intituled, "An Act to embar feigned Recovery of Lands wherein the King is in Reversion," or by any other act, are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct (*p*).

3 & 4 Will. 4, c. 74, s. 18. to certain tenants in tail.

(*p*) By statute 34 & 35 Hen. 8, c. 20, no feigned recovery by assent of parties against any tenant in tail of any lands *given by the crown*, whereof the reversion shall be in the king, shall bind the heirs in tail (See *Perkins* v. *Sewell*, 1 Bl. Rep. 654; Co. Litt. 372 b, 373 a; Cruise's Dig. tit. 36, c. 10, ss. 42—51; 1 Prest. Conv. 18, 19, 144—146, 221; *Chesterfield's case*, Hardr. 409; 1 Anne, sess. 1, c. 7; 34 Geo. 3, c. 75; 39 & 40 Geo. 3, cc. 86, 88; 47 Geo. 3, c. 24; S. E. Act, 1877, sect. 55, *post*). As to the law before 34 & 35 Hen. 8, c. 20, see 2 Roll. Abr. 293, 294; Hob. R. 339; Bro. Tail. 41; Cro. Car. 430; Plowd. 555; Dyer, 32 a; *Neal* v. *Wilding*, 1 Wils. 275; *Blosse* v. *Clanmorris*, 3 Bligh, 62.

Tenants in tail of the gift of the crown. 34 & 35 Hen. 8, c. 20.

Notwithstanding 34 & 35 Hen. 8, c. 20, the entail of lands granted by letters patent to the first Duke of Grafton was held effectually barred by a bargain and sale, under sect. 15, *ante* (*Grafton* v. *London & Birmingham R. Co.*, 6 Scott, 719; see Com. Dig. Estates, B. 21; Bac. Abr. Fines and Recoveries, 2nd Div. C.)

Where tenant in tail of the gift of the crown was disseised, and the disseisor levied a fine with proclamations, and five years elapsed; it was held that the issue in tail was not barred (*Stratfield* v. *Dover*, Cro. Eliz. 595; but see 1 Sid. 166; 1 Roll. R. 171; and *Abergavenny* v. *Brace*, L. R. 7 Exch. 176).

Tenant in tail of the gift of the crown disseised; fine by disseisor.

In several acts of parliament conferring estates on eminent individuals, tenants in tail are restrained from aliening such estates, except for their own lives, as in the case of the Duke of Marlborough, by 5 Anne, cc. 3, 4 (See *Davis* v. *Marlborough*, 1 Swanst. 74; *Osborn* v. *Marlborough*, 14 W. R. 886), the Duke of Wellington (See statutes 41 Geo. 3, c. 59, s. 6; 42 Geo. 3, c. 113, s. 6; 54 Geo. 3, c. 161, s. 28), and the Earl of Abergavenny (2 & 3 Ph. & M. c. 23; see *Abergavenny* v. *Brace*, L. R. 7 Exch. 145). An attempt to bring under the parliamentary settlement estates larger than those originally settled was held void (*Howard* v. *Shrewsbury*, 2 Ch. 760).

Inalienable estates tail.

By statute 14 Eliz. c. 8 (repealed by 26 & 27 Vict. c. 125), recoveries against tenant by the curtesy, tenant in tail after possibility of issue extinct, or otherwise, for term of life, or estate determinable upon life, were void against the reversioner, unless by the assent of the reversioner. See, however, *Doe* v. *Gatacre* (5 Bing. N. C. 609). A tenant in tail after possibility of issue extinct had no power of barring the estate tail or the remainders expectant thereon, but for all purposes of alienation was considered merely as tenant for life (Co. Litt. 28 a; 11 Rep. 80), although not impeachable for waste.

Tenants in tail after possibility of issue extinct.

Where lands were settled to the use of the wife for life for her *jointure* and in bar of dower, remainder to the sons and daughters successively of the marriage in tail, *remainder to the heirs of the body of the husband and wife*, and there was no issue of the marriage, the widow was held tenant in tail after possibility of issue extinct (*Williams* v. *Williams*, 15 Ves. 419; see *Platt* v. *Powles*, 2 M. & S. 65).

Tenants in tail where the reversion is in the crown, or who are restrained by Act of Parliament from barring the entail (with certain exceptions), and tenants in tail after possibility of issue extinct, can exercise the powers given to tenants for life by the S. L. Act, 1882 (See sect. 58, sub-sect. 1, (i.), (iii.), (vii.), of that act, *post*). See also the powers of leasing in the case of a lunatic tenant in tail under Lunacy Act, 1890, ss. 120, 122.

S. L. Act, 1882.

3 & 4 Will. 4, c. 74, s. 19.

Power to enlarge Base Fees.

Power after 31st December, 1833, to enlarge base fees; saving rights of certain persons.

19. After the thirty-first day of December, one thousand eight hundred and thirty-three, in every case in which an estate tail in any lands shall have been barred and converted into a base fee, either before or on or after that day, the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee simple absolute (*q*); saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

Corresponding clause of Irish Act.

* *Sic.*

(*q*) The remainder of the corresponding section of the Irish statute 4 & 5 Will. 4, c. 92, s. 16, runs thus:—"including the King's most excellent Majesty, his heirs and successors, as regards the title to * his Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was, previously to such forfeiture, limited by any settlement or will, but not in any other case, or where the title to the crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee and the rights of all other persons, except those against whom such disposition is by this act authorized to be made: provided always, that nothing in this act contained shall authorize any tenant in tail or other person to defeat or bar any estate or interest which may at the time of passing this act have been granted to any person or persons by his Majesty, or any of his predecessors, in any reversion or remainder which may have come to the crown by attainder or otherwise."

Cases on sect. 19.

A tenant in tail can under this section enlarge a base fee, notwithstanding that he has parted with it to a purchaser (*Bankes* v. *Small*, 36 Ch. Div. 716). And where the tenant in tail is a woman married since 1882, she may enlarge a base fee without the concurrence or acknowledgment required by sect. 40 (*Re Drummond and Davie*, 1891, 1 Ch. 524).

Disposition by Heirs Expectant restrained.

Issue inheritable not to bar expectancies.

20. Provided always, that nothing in this act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest (*r*) which he may have as issue inheritable to any estate tail therein (*s*).

Corresponding clause of the Irish Act.

(*r*) The words in the corresponding section of the Irish statute 4 & 5 Will. 4, c. 92, s. 17, are "expectant interest or *possibility*."

By sect. 22 of the same statute it is enacted, "that from and after the 31st day of October, 1834, it shall be lawful for any person, either before or after he shall become entitled in any manner, except as expectant heir of a living person, or as expectant heir of the body of a living person, to

an estate in lands, not being a vested estate, and whether he be or be not ascertained as the person or one of the persons in whom the same may become vested, to dispose of such lands for the whole or any part of such estate therein by any assurance, whether deed, will, or any other instrument by which he could have made such disposition if such estate were a vested estate in possession: provided nevertheless, that no such disposition shall be valid or have any effect where the person making the same shall not at the time of the disposition have become entitled to such estate, unless the deed, will, or other instrument by virtue of which he may become entitled be existing and in operation at the time of the disposition." As to the nature of this provision, see 1 Hayes, Conv. 219, 5th ed., and compare 8 & 9 Vict. c. 106, s. 6, *post*. This provision is not in terms confined to Ireland, but from the context it would probably be held to be so confined (Sugd. R. P. Stat. 243).

3 & 4 Will. 4, c. 74, s. 20.

(*s*) Sect. 20 of 3 & 4 Will. 4, c. 74, and the abolition of fines put an end to some powers of alienation which previously might have been exercised by persons having only expectant interests, such as the eldest son of a tenant in tail or fee simple had during the life of his father. A fine levied by a person who afterwards became heir was an estoppel (1 Roll. Abr. 482 (S.) pl. 2; *Helps* v. *Hereford*, 2 B. & Ald. 242; *Doe* v. *Martyn*, 2 Mann. & R. 485; *Doe* v. *Oliver*, 10 B. & C. 181; *Edwards* v. *Rogers*, W. Jones, 756; *Wright* v. *Wright*, 1 Ves. sen. 412); but a grant by such a person was void (*Wivel's case*, Hob. 45; Perk, sect. 65; 1 Anst. 11; 3 Term Rep. 365); and the fine did not bind collateral heirs unless the right to the entail descended to the cognisor or his heirs (*Bradstock* v. *Scovel*, Cro. Car. 434; see 8 Rep. 88 b).

Alienation of expectant interests.

A mere possibility could be only bound or extinguished at law by estoppel, by a fine, or a recovery (*Weale* v. *Lower*, Pollex. 54); or in equity by contract (*Beckley* v. *Newland*, 2 P. Wms. 182; *Hobson* v. *Trevor*, *Id.* 191; see *Lyde* v. *Mynn*, 1 M. & K. 693). But when a possibility is coupled with an interest, as where the person is fixed and ascertained, it may be released (*Jewson* v. *Moulson*, 2 Atk. 417), or be devised, though it cannot be granted or transferred by the ordinary rules of the common law (*Lampet's case*, 10 Rep. 46). A contingent remainderman conveyed his interest to secure a debt. The remainder was afterwards destroyed by the tenant of the prior estate. The interest which the remainderman afterwards acquired under the will of such tenant was held to be available by the creditor (*Noel* v. *Bewley*, 3 Sim. 103; see *Smith* v. *Baker*, 1 Y. & C. C. C. 223). An agreement, of which the subject is an expectancy contingent upon the will of a living person, is not illegal, but will be enforced in equity (*Lyde* v. *Mynn*, 1 M. & K. 683; see *Pope* v. *Whitcombe*, 3 Russ. 124). A specific performance was decreed of an agreement between two sons to share equally whatever property they might derive from their father either in his lifetime or at his decease (*Wethered* v. *Wethered*, 2 Sim. 183; see *Harwood* v. *Tooke*, 2 Sim. 192; *Alexander* v. *Wellington*, 2 R. & M. 55; *Carleton* v. *Leighton*, 3 Mer. 667); but a voluntary agreement will not be enforced (*Meek* v. *Kettlewell*, 1 Phil. 342).

Alienation of possibilities at law and in equity.

A fine by a contingent remainderman did not operate by estoppel only, but when the contingency happened the estate which then became vested fed the estoppel, so that the fine operated upon that estate as if it had been vested in the cognisors at the time the fine was levied (*Rawlin's case*, 4 Rep. 52; *Weale* v. *Lower*, Pollex. 54; *Trevivian* v. *Lawrence*, 6 Mod. 258; Ld. Raym. 1051; *Vick* v. *Edwards*, 3 P. Wms. 372; *Doe* v. *Oliver*, 10 Barn. & Cress. 181; *Doe* v. *Howell*, *Id.* 191; *Doe* v. *Martyn*, 8 B. & C. 527; *Davies* v. *Bush*, 1 M'Clel. & Y. 58; see Fearne, 365). The estoppel raised by the fine of a contingent remainderman was available only by parties and privies (*Doe* v. *Martyn*, 8 B. & C. 527).

Fines by contingent remaindermen.

A contingent interest in terms of years might be assigned in equity for valuable consideration, or for love and affection between parent and child (1 Ves. sen. 411; *Wind* v. *Jekyl*, 1 P. Wms. 572). As to the alienation of contingent interests by married women, see sect. 77, *post*; *Crofts* v. *Middleton*, 8 D. M. & G. 192; *Jones* v. *Frost*, 7 Ch. 773). Contingent

Contingent interests now alienable and devisable.

3 & 4 Will. 4, c. 74, s. 20.

interests in any tenements or hereditaments are now made alienable by deed (8 & 9 Vict. c. 106, s. 6, *post*). And all contingent, executory or other future interests in any real or personal estate are devisable (1 Vict. c. 26, s. 3, *post*).

ESTOPPEL.

An estoppel is when one is concluded and forbidden in law to speak against his own act or deed, even though it be to say the truth (Terms of the Law, 157; Litt. s. 667; Co. Litt. 352 a). There are three kinds of estoppels, (1) by matter of record, (2) by matter *in pais*, and (3) by deed, whether an indenture or a deed poll (*Bonner* v. *Wilkinson*, 5 B. & Ald. 682; Co. Litt. 47 b; *Lewis* v. *Willis*, 1 Wils. 314; Litt. s. 693). Estoppel by matter of record is discussed at length 2 Smith L. C. 831—856, 9th ed. See Co. Litt. 352.

Estoppel by matter *in pais*.

The acts *in pais*, which bind parties by way of estoppel, are but few, and these acts are of notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like (Co. Litt. 352 a). Thus a tenant who accepts a lease is estopped from disputing his landlord's title (*Langford* v. *Selmes*, 3 K. & J. 220). The doctrine of the surrender of a lease by operation of law, arising out of the granting and acceptance of a new lease, is based on estoppel (*Lyon* v. *Reed*, 13 M. & W. 306). The doctrine has been extended to cases where a landlord, with the tenant's assent, grants a new lease to a third person, the tenant giving up possession (*Thomas* v. *Cook*, 2 B. & Ald. 119; *Davidson* v. *Gent*, 26 L. J. Ex. 122). See as to the estoppel of the tenant in such a case, *Nickells* v. *Atherstone* (10 Q. B. 944); and of the landlord, *Oastler* v. *Henderson* (2 Q. B. Div. 575). As to conduct which in mercantile transactions binds parties by estoppel *in pais*, see *Carr* v. *L. & N. W. Ry. Co.* (10 C. P. 307); *Seton* v. *Lafone* (19 Q. B. Div. 68).

Estoppel by deed.

According to the doctrine of estoppel by deed (which will not be extended, *General Finance Co.* v. *Liberator Society*, 10 Ch. D. 21), a fictitious statement is treated as true (10 Ch. D. 20). The principle is that where a man has entered into a solemn engagement under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted (*Bowman* v. *Taylor*, 2 Ad. & El. 291; see *Goodtitle* v. *Bailey*, Cowp. 600; Co. Litt. 47 b; *Gwyn* v. *Neath Canal Co.*, L. R. 3 Ex. 209). The estoppel binds persons claiming under the person estopped (*Taylor* v. *Needham*, 2 Taunt. 278; *Doe* v. *Stone*, 3 C. B. 176); but a person taking under a conveyance is not estopped by recitals in a previous deed on which the title conveyed is founded when the suit relates to land other than those comprised in the conveyance (*Doe* v. *Shelton*, 3 Ad. & El. 265; see *Melbourne Corporation* v. *Brougham*, 7 App. Cas. 307).

By recital

In accordance with the above doctrine, the recital of a particular fact in a deed will estop the party making the statement (*Bowman* v. *Taylor*, 2 Ad. & El. 278; *Hill* v. *Manchester Waterworks Co.*, 2 B. & Ad. 544; *Pargeter* v. *Harris*, 7 Q. B. 708). Where a lease recited a will, the lessee who executed the counterpart was estopped from denying the execution of the will (*Bringloe* v. *Goodson*, 5 Bing. N. C. 738). The recital must be precise and unambiguous, *e.g.*, that a grantor is seised of the legal estate (*Heath* v. *Crealock*, 10 Ch. 30; *Right* v. *Bucknell*, 2 B. & Ad. 278; see *Re Horton*, *Horton* v. *Perks*, 51 L. T. 420); and since every deed must be construed according to the intention of the parties as appearing by the whole deed, when a recital is intended to be the statement of one party only, the estoppel is confined to that party (*Stroughill* v. *Buck*, 14 Q. B. 781; *S. E. R. Co.* v. *Wharton*, 6 H. & N. 526). As a general rule no estoppel arises by a deed upon the face of which the truth appears (*Doe* v. *Scarborough*, 3 Ad. & El. 2; *Doe* v. *Lawrence*, 4 Taunt. 23). As to the application of this rule to the case where the creation by estoppel of a tenancy between mortgagor and mortgagee was in question, see *Morton* v. *Woods*, L. R. 4 Q. B. 293, 303; *Ex p. Punnett*, 16 Ch. Div. 226, 234. Where an untrue recital has been introduced into a deed by mistake and without fraud there is no estoppel (*Brooke* v. *Haymes*, 6 Eq. 25; *Empson's case*, 9 Eq. 597). Again, a recital will not estop a party in an action not

founded on the deed, but wholly collateral to it (*Carpenter* v. *Buller*, 8 M. & W. 209; *Ex p. Morgan, Re Simpson*, 2 Ch. Div. 72). A married woman may be estopped by a recital in a deed duly executed and acknowledged by her (*Jones* v. *Frost*, 7 Ch. 773). 3 & 4 Will. 4, c. 74, s. 20.

Apart from the effect of recitals, the operative words of a grant or release will not by estoppel pass a subsequently-acquired legal estate (*Heath* v. *Crealock*, 10 Ch. 30; *Right* v. *Bucknell*, 2 B. & Ad. 278; the contrary decision in *Bensley* v. *Burdon*, 2 Sim. & Stu. 519; 8 L. J. Ch. 85, being overruled; *Lloyd* v. *Lloyd*, 4 Dru. & W. 369). Nor will covenants for title have that effect (*General Finance Co.* v. *Liberator Society*, 10 Ch. D. 15). As to estoppel by covenant, see *Doe* v. *Ford* (3 Ad. & El. 649). By other parts of a deed.

A nominal consideration being expressed in a deed does not prevent the admission of evidence *aliunde* of the real consideration if not inconsistent with the deed (*Re Leifchild*, 1 Eq. 231). Before the Judicature Acts the parties were bound by a receipt for the consideration money in the body of the deed (*Rowntree* v. *Jacob*, 2 Taunt. 141; *Baker* v. *Dewey*, 1 B. & C. 704); but not by an indorsed receipt, which, being no part of the deed, was not an estoppel, but only evidence (*Lampon* v. *Corke*, 5 B. & Ald. 606; *Graves* v. *Key*, 3 B. & Ad. 313). In either case it might be shown in equity that the money was not paid (*Ryle* v. *Haggie*, 1 Jac. & W. 234; *Wilson* v. *Keating*, 27 Beav. 121). The rule of equity now prevails. In favour, however, of third parties acting on the faith thereof, a receipt may be binding (*Bickerton* v. *Walker*, 31 Ch. Div. 151). Consideration.

Where a man executes a deed by forging the name of another, representing himself to be that other, he is bound by an estoppel, as to the nature of which see *Re Cooper*, *Cooper* v. *Vesey* (20 Ch. Div. 633). Forged deed.

The rule which requires a man to be bound by his own deliberate representations of matters of fact may be overbalanced by weightier considerations. Thus if a trustee, deriving his authority from a public act of parliament, grants by a deed unauthorized by the act, the grantor will not be estopped from insisting against the other party to the deed that he had no such power (*Fairtitle* v. *Gilbert*, 2 T. R. 169; see *Doe* v. *Hares*, 4 B. & Ad. 435, and *Webb* v. *Herne Bay Commrs.*, L. R. 5 Q. B. 642). So a party to the deed is not estopped from pleading its illegality (*Collins* v. *Blantern*, 2 Wils. 347; *Paxton* v. *Popham*, 9 East, 408); nor from showing that the consideration was immoral, or contrary to an act of parliament or public policy (*Prole* v. *Wiggins*, 3 Bing. N. C. 230). So a party is not estopped from showing that a deed is void under a statute (*Doe* v. *Howells*, 2 Ad. & Ell. 744; see *Doe* v. *Ford*, 3 Ad. & El. 649). But a man cannot avoid his own deed by an allegation of his own fraud, as that the deed was executed for the purpose of giving a colourable qualification to kill game (*Doe* v. *Roberts*, 2 B. & Ald. 367; see also the cases, *Doe* v. *Skirrow*, 7 Ad. & Ell. 157; *Gaunt* v. *Wainman*, 3 Scott, 413; *Whitton* v. *Peacock*, 2 Bing. N. C. 411; *Bringloe* v. *Goodson*, 4 Bing. N. C. 726; see an article on Estoppel by Deed, 5 Jur. 858, 1170). Cases where there is no estoppel.

A surrender of copyholds does not operate by estoppel (*Taylor* v. *Phillips*, 1 Ves. sen. 230; *Goodtitle* v. *Morse*, 3 T. R. 365; *Morse* v. *Faulkner*, 3 Swanst. 429; *Doe* v. *Tomkins*, 11 East, 185; *Doe* v. *Wilson*, 4 B. & Ald. 303; see *Doe* v. *Rolfe*, 8 Ad. & El. 650). Copyholds not bound by estoppel.

Dispositions for limited Purposes.

21. Provided always, that if a tenant in tail of lands shall make a disposition of the same under this act, by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as Extent of the estate created by a tenant in tail by way of mortgage, or for any other limited purpose.

3 & 4 Will. 4, c. 74, s. 21.

against whom such disposition is by this act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected: provided always, that if the estate created by such disposition shall be only an estate *pour autre vie*, or for years absolute or determinable, or if, by a disposition under this act by a tenant in tail of lands, an interest, charge, lien or incumbrance shall be created without a term of years absolute or determinable, or any greater estate for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected (*t*).

Effect of this section.

(*t*) This section was intended to put an end to such questions as arose in *Jackson* v. *Innes* (1 Bligh, 104), as to whether an equity of redemption was resettled by the mortgage deed (*Plomley* v. *Felton*, 14 App. Cas. 66).

By this section of the act, if a tenant in tail makes a mortgage in fee with a proviso for redemption in the usual form, he will thenceforth be entitled to the equity of redemption discharged from the entail; but if he creates an estate *pour autre vie*, or for years only, or an "*interest*, *charge*, or incumbrance," without a term of years, by way of mortgage, the entail will be affected only to the extent of the charge created, although there be an express declaration of intention that the deed shall operate as a complete bar of the entail. Assuming, what is not clear, that a conveyance by a tenant in tail to a trustee to the use of a mortgagee for a term of years, with remainder to such uses as the tenant in tail should appoint, or to the use of himself in fee, would not extinguish the entail altogether, it will be necessary, where the object is to make a mortgage for years, or to create a charge, and to bar the entail in the equity of redemption, to attain the latter object by a distinct deed, either before or after the creation of the mortgage or charge. Assuming also, what is not clear, that where a mortgage in fee is made with a proviso that on payment of the money the estate shall be reconveyed to the former uses, either by reference or by express limitation to the same uses, that the entail would not be revived, it will be necessary to have a distinct deed for preserving the entail, as to the equity of redemption; it may, however, be contended that the object of this section is not to apply to express limitations, but merely to prevent a simple declaration that the entail shall or shall not be barred from having any operation (see 9 Jarm. Conv. 404, 405); and therefore that, by one deed either of the last-mentioned objects may be accomplished. In mortgages in fee, whether of freeholds or copyholds, when it is intended that the equity of redemption shall be discharged from the entail without any further assurance, it will be proper to frame the proviso of redemption not so as to make the estate of the mortgagee *void* on payment of the money, but to direct that he shall reconvey it (which is the usual form) to the uses intended; for if the condition in the former case should be performed, it might be contended that the tenant in tail became seised of his former estate tail (See further as to the effect of this section, 1 Hayes, Conv. 183—185, 5th ed.)

Where a tenant in tail subject to charges for portions was lunatic, the court directed the charges to be raised by a mortgage for a term of years without a power of sale (*Re Pares*, 2 Ch. Div. 61; and see *S. C.*, 12 Ch. Div. 333).

Mortgage of entailed copyholds.

It has been suggested, as following from a comparison of the present section with sect. 50, *post*, that if a legal tenant in tail of copyholds mortgages by conditional surrender which is not followed by admittance, but

the money is paid off and the surrender vacated by the entry of satisfaction, the estate tail remains unaffected; but that the estate tail would be barred if the surrender were followed by admittance (Davidson, Mortgages, 4th ed. 39). 3 & 4 Will. 4, c. 74, s. 21.

Interest, charges, liens or incumbrances may be created by a tenant in tail under the act; but they must be created, and not left to vest in contract (Sugd. R. P. Stat. 197). Sect. 40 (*post*) expressly requires in every case a formal legal assurance; it would seem, therefore, that the words "interest, charge, lien or incumbrance" do not include an equitable mortgage by mere deposit of title deeds. As to such equitable mortgages, see Coote on Mortgages; Fisher on Mortgages, 4th ed. p. 51; *Russel* v. *Russel* (1 Wh. & Tud. L. C. Eq. 773, 6th ed.) Interest, charge, lien or incumbrance. Equitable mortgages.

VIII. Definition of the Protector.

22. If at the time when there shall be a tenant in tail of lands under a settlement there shall be subsisting in the same lands or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then, the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being for all the purposes of this act deemed the prior estate), shall be the protector of the settlement so far as regards the lands in which such prior estate shall be subsisting, and shall for all the purposes of this act be deemed the owner of such prior estate, although the same may have been charged or incumbered either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement within the meaning of this clause; and that an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause (*u*). The owner of the first existing estate under a settlement, prior to the estate tail under the same settlement, to be the protector of the settlement.

(*u*) In cases of lunacy the Lord Chancellor is protector (See *post*, ss. 33, 48). Where there is a tenant in tail in possession and a tenant in tail in remainder under the same settlement, the tenant in tail in possession is the protector as to the tenant in tail in remainder (*Re Blewitt*, 6 D. M. & G. 187).

Where the owner of the only prior estate holds under a different settlement from the tenant in tail, he is not the protector (*Berrington* v. *Scott*, 32 L. T. 125). The owner of the prior estate referred to in this section is the owner of the beneficial interest (*Re Dudson*, 8 Ch. Div. 632). Thus,

3 & 4 Will. 4, c. 74, s. 22.

where an equity of redemption was limited to trustees in trust for A. for life, with remainder to the use of B. in tail, A. was the protector, not the trustees (*Re Dudson*, *sup.*; compare the old law of recoveries, *ante*, p. 250). So, where lands were devised to trustee for a term on trust to pay an annuity, and manage the estate, and pay the surplus to A., who was also the joint life tenant, subject to the term, A. was the protector (*Ainsley* v. *Ainsley*, 51 L. T. 780; 33 W. R. 148). Where the trustees appointed protector by the settlor (See sect. 32, *post*) died, and new trustees were appointed by the court, the tenant for life became protector (*Clarke* v. *Chamberlain*, 16 Ch. D. 176). Where, however, a trustee is given an estate during the life of a person on trust to pay the rents to the settlor's creditors, it was said that the trustee would be the protector (*Re Dudson*, 8 Ch. Div. 633).

When there will be a resulting trust, see *Hill* v. *London* (1 Atk. 618); *King* v. *Denison* (1 Ves. & B. 260); *Cook* v. *Hutchinson* (1 Keen, 42); Lewin on Trusts, 150 *et seq.*, 9th ed.

Protector as to undivided Shares.

Each of two or more owners of a prior estate to be the sole protector as to his share.

23. Provided always, that where two or more persons shall be owners, under a settlement, within the meaning of this act, of a prior estate, the sole owner of which estate, if there had been only one, would in respect thereof have been the protector of such settlement, each of such persons, in respect of such undivided share as he could dispose of, shall for all the purposes of this act be deemed the owner of a prior estate, and shall, in exclusion of the other or others of them, be the sole protector of such settlement to the extent of such undivided share (*v*).

(*v*) Where A. had for life one-fifth of an estate with a remainder in tail in one-fifth, and had also one-fourth of another fifth for life, with a more remote remainder in tail in one-fourth of one-fifth, he was protector of the identical undivided share of which he was tenant in tail, and not merely protector of an equivalent aliquot share of the estate (*Tufnell* v. *Borrell*, 20 Eq. 196). See *Church* v. *Edwards*, 2 Br. C. C. 180; *Oakley* v. *Smith*, Amb. 90; 3 Prest. Conv. 90 *et seq.*

Protector in case of Married Women.

Where a married woman alone shall be the protector, and where she and her husband together shall be protector.

24. Provided always, that where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is not thereby settled, or agreed or directed to be settled, to her separate use, she and her husband together shall in respect of such estate be the protector of such settlement, and shall be deemed one owner; but if such prior estate shall by such settlement have been settled, or agreed or directed to be settled to her separate use, then and in such case she alone shall in respect of such estate be the protector of such settlement (*x*).

(*x*) See *Keer* v. *Brown* (Johns. 138). Where several persons constitute the protector, the term protector is applicable equally to the entire body and to each individual (*Re Wainwright*, 1 Phill. 258).

Protector as to Estates restored or confirmed.

As to estates confirmed or restored by settlement.

25. Provided always, that, except in the case of a lease hereinafter provided for, where an estate shall be limited by a settle-

ment by way of confirmation, or where the settlement shall merely have the effect of restoring an estate, in either of those cases such estate shall for the purposes of this act, so far as regards the protector of the settlement, be deemed an estate subsisting under such settlement. 3 & 4 Will. 4, c. 74, s. 25.

Lessees not to be Protector.

26. Provided always, that where a lease at a rent shall be created or confirmed by a settlement, the person in whose favour such lease shall be created or confirmed, shall not in respect thereof be the protector of such settlement. As to leases at rent created by settlement.

Doweresses, &c., not to be Protector.

27. Provided always, that no woman in respect of her dower, and (except in the case hereinafter provided for of a bare trustee under a settlement made on or before the thirty-first day of December, one thousand eight hundred and thirty-three), no bare trustee, heir, executor, administrator or assign, in respect to any estate taken by him as such bare trustee, heir, executor, administrator or assign, shall be the protector of a settlement (*y*). No tenant in dower, heir, executor, &c., to be protector, except in the case of a bare trustee.

(*y*) There is a discrepancy between this date and the date given in sect. 31 (28th August, 1833). It seems doubtful which enactment must control the other (1 Hayes, Conv. 180, 5th ed.; Sugd. R. P. Stat. 203). See as to this section the argument in *Re Dudson*, 8 Ch. D. 628.

Who to be Protector where owner of prior estate excluded by the two last Clauses.

28. Provided always, that where under any settlement there shall be more than one estate prior to an estate tail, and the person who shall be the owner within the meaning of this act of any such prior estate, in respect of which but for the two last preceding clauses, or either of them, he would have been the protector of the settlement, shall by virtue of such clauses, or either of them, be excluded from being the protector, then and in such case the person (if any) who, if such estate did not exist, would be the protector of the settlement, shall be such protector (*z*). Who shall be the protector where the owner of the prior estate shall, by the two last clauses, be excluded.

(*z*) See *Re Dudson* (8 Ch. Div. 633).

Tenant to the Præcipe to be Protector, when.

29. Provided always, that where already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, an estate under a settlement shall have been disposed of either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if this act had not been passed, have been the proper person to have made the tenant to the writ of entry or other writ Where, in the disposition of an estate before the 31st December, 1833, the person to make the tenant to the

3 & 4 Will. 4, c. 74, s. 29.

writ of entry in a recovery shall be the protector.

for suffering a common recovery of the lands entailed by such settlement, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement (*a*).

(*a*) This and the following section of the act will render it necessary, where it is intended to bar an entail created on or before the 31st December, 1833, to ascertain in whom the *immediate freehold* of the lands is vested, in the same way as was required for determining who was the proper person for making a tenant to the *præcipe* in a recovery (See *ante*, p. 250). This section must be attentively considered in connection with the 27th, 30th and 31st sections. In *Corrall* v. *Cattell* (4 Mees. & W. 734, and see *Cattell* v. *Corrall*, 3 Y. & Coll. 413), a tenant in tail, in 1817, conveyed to trustees for the life of the tenant in tail upon certain trusts. The impression of the court seemed to be that the trustees were not protectors. Mr. *Hayes* (1 Conv. 177), and Lord *St. Leonards* (Sugd. R. P. Stat. 203), were of opinion that the trustees were protectors (See s. 22, *ante*).

Where in the case of the disposition of a reversion on or before the 31st of December, 1833, the person to make the tenant to the writ of entry in a recovery shall be the protector.

30. Provided always, that where any person having either already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, either for valuable consideration or not, disposed of, either absolutely or otherwise, a remainder or reversion in fee in any lands, or created any estate out of such remainder or reversion, would, under this act, if this clause had not been inserted, have been the protector of the settlement by which the lands were entailed in which such remainder or reversion may be subsisting, and thereby be enabled to concur in the barring of such remainder or reversion, which he could not have done if he had not become such protector, then and in every such case the person who, if this act had not been passed, would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of such lands, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

Bare Trustee to be Protector, when.

Where a bare trustee under a settlement made before the passing of this act shall be the protector.

31. Provided always, that where, under any settlement of lands made before the passing of this act, the person who, if this act had not been passed, would have been the proper person to make the tenant to the writ of entry or other writ for suffering a common recovery of such lands for the purpose of barring any estate tail or other estate under such settlement, shall be a bare trustee, such trustee shall, during the continuance of the estate conferring on him the right to make the tenant to such writ of entry or other writ, be the protector of such settlement (*b*).

(*b*) The husband of a married woman taking an estate for her separate use under a settlement is not a bare trustee under the settlement within this section (*Keer* v. *Brown*, Johns. 138).

Under this section a trustee, having the first *immediate* estate of *freehold*, will be protector of a settlement made *before the passing of this act*

(28 Aug. 1833). Thus under a settlement to A. for ninety-nine years, if he should so long live, with remainder to trustees during the life of A. upon trust to preserve contingent remainders, with remainder in tail; the trustees would be protectors during the life of A. (See *Smith* v. *Packhurst*, 3 Atk. 135). A bare trustee, who under this section is protector of a settlement, can insist on retaining the legal estate only so long as the purposes of the trust exist; that is, so long as, according to the rules of the Court of Equity, he is required to be a trustee. This section is intended to meet the case where there are contingent remainders, which the trustees were intended to protect, but not a case where there are no contingent remainders. Therefore where there was a devise of lands to trustees upon trust for the testator's daughter during her life, for her separate use without power of anticipation, with remainder to the use of her children as tenants in common in tail, with remainders over: it was held that the testator's daughter, having become *discoverte* and being *sui juris*, could compel a conveyance by the trustees of the legal estate (*Buttanshaw* v. *Martin*, Johns. 89). This section will not apply where all the estates are equitable (*Re Dudson*, 8 Ch. Div. 633). 3 & 4 Will. 4, c. 74, s. 31.

Power to appoint Protector.

32. Provided always, that it shall be lawful for any settlor entailing lands to appoint, by the settlement by which the lands shall be entailed, any number of persons in esse, not exceeding three, and not being aliens, to be protector of the settlement in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector, and by means of a power to be inserted in such settlement to perpetuate, during the whole or any part of such period, the protectorship of the settlement in any one person or number of persons in esse, and not being an alien or aliens, whom the donee of the power shall think proper by deed to appoint protector of the settlement in the place of any one person or number of persons who shall die or shall by deed relinquish his or their office of protector; and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the protector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: provided nevertheless, that by virtue or means of any such appointment, the number of the persons to compose the protector shall never exceed three: provided further nevertheless, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof: provided further nevertheless, that the person who but for this clause would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector, if the other persons constituting Power to any settlor to appoint the protector.

3 & 4 Will. 4, c. 74, s. 32.

the protector shall have ceased to be so by death or relinquishment of the office by deed, and no other person shall have been appointed in their place (*c*).

Trustee of executory settlement a settlor within this section.

(*c*) The trustee of an executory settlement is a settlor within this section of the act, and as such is entitled to appoint a protector at his discretion. A protector should not be appointed by the court, unless upon a special case (*Bankes* v. *Le Despencer*, 11 Sim. 527). If one of the persons appointed under this section dies, the survivors can act as protector (*Bell* v. *Holtby*, 15 Eq. 178). If they all die, the owner of the first life estate is protector (*Clarke* v. *Chamberlin*, 16 Ch. D. 176).

Where Protector a Lunatic, &c.

In cases of lunacy, the Lord Chancellor or Lord Keeper, or Lords Commissioners, or other persons entrusted with lunatics, or in cases of treason or felony, &c., the Court of Chancery to be the protector.

33. Provided always, that if any person, protector of a settlement, shall be lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, then the Lord High Chancellor of Great Britain, or the Lord Keeper or the Lords Commissioners for the custody of the great seal of Great Britain for the time being or other the person or persons for the time being entrusted by the King's sign manual with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, shall be the protector of such settlement in lieu of the person who shall be such lunatic or idiot, or of unsound mind as aforesaid (*d*); or if any person, protector of a settlement, shall be convicted of treason or felony, or if any person not being the owner of a prior estate under a settlement shall be protector of such settlement, and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then his Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid (*e*); or if any settlor entailing lands shall in the settlement by which the lands shall be entailed, declare that the person who as owner of a prior estate under such settlement would be entitled to be protector of the settlement, shall not be such protector, and shall not appoint any person to be protector in his stead, then the said Court of Chancery shall, as to the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate; or if in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands.

(*d*) As to the persons by whom the jurisdiction here conferred on the Lord

Chancellor can be exercised, see 15 & 16 Vict. c. 87, s. 15, and 16 & 17 Vict. c. 70, s. 2. 3 & 4 Will. 4, c. 74, s. 33.

The Lord Chancellor of Great Britain, and not the Lord Chancellor of Ireland, is the protector of a settlement in the place of a lunatic of estates situate in Wales, although the party is resident in Ireland, and has been found lunatic by inquisition issued by the Lord Chancellor of Ireland (*Re Graydon*, 1 Mac. & G. 655). The cases as to the exercise by the Lord Chancellor of his power of consenting are stated in the note to sect. 48, *post*, p. 276.

(*e*) On the husband of a married woman, tenant for life under a settlement, being convicted of felony, the Court of Chancery becomes protector of the settlement (*Re Wainwright*, 1 Phill. C. C. 258). There is an omission in this section of *the case of a person convicted of treason or felony*. But the omission must be supplied by implication, otherwise no effect can be given to the previous words, "if any person, protector of a settlement, shall be convicted of treason or felony" (*Ib.* pp. 261, 262).

As to the form of petition, evidence and order on an application to the court to consent as a protector of a settlement to the barring of an entail, see *Re Gravenor* (1 De G. & S. 700; Seton, 1280).

IX. Powers of the Protector.

His Consent required.

34. Provided always, that if at the time when any person, actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is hereinbefore authorized to dispose of the same; but such actual tenant in tail may, without such consent, make a disposition under this act of the lands entailed, which shall be good against all persons who, by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same shall claim the lands entailed (*f*). Where there is a protector, his consent requisite to enable an actual tenant in tail to create a larger estate than a base fee.

(*f*) Formerly, where an estate tail was being barred, a tenant for life was a conveying, not merely a consenting, party, which occasioned inconvenience; as to which, see Co. Litt. 203 b, n. by Butl.; 1 Prest. Conv. 107—118; 2 Sand. on Uses, 207, 4th ed.; *Pelham's case* (1 Rep. 14 b); *Smith* v. *Clifford* (1 T. R. 738); *Doe* v. *Mulgrave* (5 T. R. 320); *Jersey* v. *Deane* (5 B. & Ald. 575); *Roper* v. *Halifax* (8 Taunt. 845); *Doe* v. *Scarborough* (3 Ad. & Ell. 43); *Tyrrell* v. *Marsh* (3 Bing. 31); Sug. Pow. 71—78, 8th ed.) Advantage of *consent* to a conveyance.

Where in a settlement there was a power of sale and exchange with the assent of the tenant for life, it was held, that her concurrence in a disentailing deed did not bar her power of assenting to a subsequent exercise of the power of sale and exchange (*Hill* v. *Pritchard*, Kay, 394).

In a case where there was an adult tenant for life, and an infant tenant Vesting order.

3 & 4 Will. 4, c. 74, s. 34.

in tail, a vesting order under the Trustee Act, 1850, will, if the protector consents to it, bar all estates in remainder, and not pass a base fee only under the act (*Powell* v. *Matthews*, 1 Jur. N. S. 973).

Protector must consent to Enlargement of Base Fee.

Where a base fee and a protector, his consent requisite to the exercising of a power of disposition.

35. Provided always, that where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail, if the same had not been barred, to exercise, as to the lands, in respect of which there shall be such protector, the power of disposition hereinbefore contained.

Protector not to be controlled.

The protector to be subject to no control in the exercise of his power of consenting.

36. Any device, shift, or contrivance, by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void; and the protector of a settlement shall not be deemed to be a trustee in respect of his power of consent; and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust (*g*).

(*g*) It seems that a contract under seal by a protector to give his consent might be such a consent as is required by the act (*Bankes* v. *Small*, 36 Ch. Div. 724). It has been said that this section enables a protector to act from mere caprice, ill-will, or any bad motive (*Bankes* v. *Le Despenser*, 11 Sim. 527).

Exclusion of Equity as to Protector.

Certain rules of equity not to apply between the protector and a tenant in tail under the same.

37. Provided always, that the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and a tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this act (*h*).

(*h*) The rules in equity as to frauds on powers were not extended to the case of a tenant in tail in remainder joining with his father, a tenant for life, in suffering a recovery and resettling the estate, although an *immediate benefit* was conferred on the son as a consideration for his barring the entail (*Tweddell* v. *Tweddell*, T. & R. 1; *Davis* v. *Uphill*, 1 Sw. 129).

Frauds on powers.

Corrupt bargain.

An appointment under a power is invalid where the appointee has agreed with the appointor that a benefit shall thereby accrue to the appointor (*Marlborough* v. *Godolphin*, 2 Ves. sen. 70; *Boyle* v. *Peterborough*, 1 Ves. 310; *Farmer* v. *Martin*, 2 Sim. 502; *Arnold* v. *Hardwich*, 7 Sim. 343), or to a stranger to the power (*Pryor* v. *Pryor*, 2 D. J. & S. 205; *Salmon* v. *Gibbs*, 3 D. G. & S. 343; *Birley* v. *Birley*, 25 Beav. 299; *Re Kirwan*, 25 Ch. D. 373; *Crawshay* v. *Crawshay*, 43 Ch. D. 624). A mere

suspicion, however, of a corrupt agreement will not be sufficient to invalidate an appointment (*Palmer* v. *Locke*, 15 Ch. Div. 300; *Hamilton* v. *Kirwan*, 2 Jo. & Lat. 393). Again, an appointment will not be invalidated (1) by the mere fact of a bargain between the appointor and appointee (*Langston* v. *Blackmore*, Amb. 288; *Roach* v. *Trood*, 3 Ch. Div. 429; see *Cooper* v. *Cooper*, 5 Ch. 203), as where the bargain did not induce the appointment (*Re Turner*, 28 Ch. Div. 205); or (2) by a bargain between the appointor and all the objects of the power, being *sui juris* (*Davis* v. *Uphill*, 1 Sw. 136); or (3) by reason of the appointor having covenanted to appoint (*Bulteel* v. *Plummer*, 6 Ch. 160; *Palmer* v. *Locke*, 15 Ch. Div. 294). In some cases an appointment to a stranger may be valid if made with the assent of an object of the power; as where it can be considered as in effect an appointment to an object and a settlement by that object (*Daniel* v. *Arkwright*, 2 H. & M. 95; *Wright* v. *Goff*, 22 Beav. 207; *Goldsmid* v. *Goldsmid*, 2 Hare, 187). Where the invalidity arises by reason of a corrupt agreement, the appointment will be wholly bad, even as to the benefit appointed to an object (*Jackson* v. *Jackson*, Dru. 113); unless some consideration (*e. g.*, marriage) has been given which cannot be restored, when the appointment may be good as to the appointee (*Daubeny* v. *Cockburn*, 1 Mer. 643); or unless the honest part of the appointment can be separated from the dishonest part, when the former may be good (*Topham* v. *Portland*, 1 D. J. & S. 572; *Whelan* v. *Palmer*, 39 Ch. D. 659). Where a corrupt appointment has been carried into effect, the appointor may be liable for loss to the trust estate (*Re Deane, Bridger* v. *Deane*, 42 Ch. Div. 9).

8 & 4 Will. 4, c. 74, s. 37.

An appointment is void where there is no bargain, but it is clear that the appointor intends to benefit either himself (*Henty* v. *Wrey*, 21 Ch. Div. 342; *Wellesley* v. *Mornington*, 2 K. & J. 143; *Re Little, Harrison* v. *Harrison*, 40 Ch. Div. 424), or a stranger to the power (*Re Marsden*, 4 Drew. 594; see *Topham* v. *Portland*, 5 Ch. 40; *Whelan* v. *Palmer*, 39 Ch. D. 648). A release of a power by the donee with a view to his own benefit is valid (*Re Radcliffe, Radcliffe* v. *Bewes*, 1892, 1 Ch. 227). A *bonâ fide* appointment is not necessarily void merely because a benefit in fact accrues to the *appointor* (*Henty* v. *Wrey*, *sup.*; *Re Huish*, 10 Eq. 5; *Beere* v. *Hoffmeister*, 23 Beav. 101), or to a stranger (*Fearon* v. *Debrisay*, 14 Beav. 635; *Roach* v. *Trood*, 3 Ch. Div. 440).

Corrupt intention.

A purchaser with notice of the invalidity of an appointment will not get a good title (*Palmer* v. *Wheeler*, 2 Ba. & Be. 18), nor will a purchaser without notice, in the case of an equitable interest (*Daubeny* v. *Cockburn*, 1 Mer. 626). But a mere suspicion of a fraudulent appointment is not a good objection by a purchaser to title (*M'Queen* v. *Farquar*, 11 Ves. 467; *Green* v. *Pulsford*, 2 Beav. 70).

Purchasers.

X. Confirmation of voidable Estates created by Tenant in Tail.

38. Provided always, that when a tenant in tail of lands under a settlement, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate, in favour of a purchaser for valuable consideration, and shall afterwards under this act, by any assurance other than a lease not requiring inrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector,

A voidable estate by a tenant in tail, in favour of a purchaser, confirmed by a subsequent disposition of such tenant in tail under this act, but not against a purchaser without notice.

3 & 4 Will. 4, c. 74, s. 38.

have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be capable under this act of confirming the same without such consent (*k*): provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him (*l*).

(*k*) The proviso in the corresponding clause in the Irish stat. 4 & 5 Will. 4, c. 92, s. 36, is as follows: "provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, and if the deed or instrument creating such voidable estate shall not have been registered previous to such disposition, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him."

Old rule as to the effect of recoveries in confirming prior acts of tenant in tail.

(*l*) If a tenant in tail who had executed any settlement, lease or mortgage, or created any charge or incumbrance by statute, judgment, or otherwise, affecting the entailed land, afterwards suffered a recovery, its effect was to confirm such prior acts, and to make the lands chargeable with them, although before they were defeasible by the issue (*Capel's case*, 1 Rep. 60; *S. C.*, Poph. 5, 6; *Beck* v. *Welsh*, 1 Wills. 277; *Tourle* v. *Rand*, 2 Br. C. C. 652; *Goodright* v. *Mead*, 3 Burr. 1703; *Cheney* v. *Hall*, 3 Atk. 9; Ambl. 526; *Stapleton* v. *Stapleton*, 1 Atk. 2); but not if the settlement was voluntary (*Cormick* v. *Trapaud*, 6 Dow, 60). As to the similar effect of a fine in such a case, see *Shelburn* v. *Biddulph* (6 Br. P. C. 356, Toml. ed.); *Symonds* v. *Cudmore* (Show. 370; 1 Salk. 338; Skin. 284, 317, 328; 3 Salk. 335; Carth. 257; 12 Mod. 32; Holt, 666; 1 Freem. 503; 2 Atk. 204); see 7 Ves. 497; *Lloyd* v. *Lloyd* (4 Dru. & War. 374); *Browne* v. *Blake* (1 Molloy, 368).

Effect of fines.

Cases on s. 38.

A base fee voidable by the issue in tail was, notwithstanding an intervening bankruptcy, confirmed by a subsequent assurance enrolled under the act (*Hankey* v. *Martin*, 49 L. T. 560).

The proviso at the end of this section does not require that the disentailing instrument should pass the estate to the purchaser. It is sufficient if the instrument forms part of a transaction in respect of which the person claiming the benefit of the proviso is a purchaser (*Crocker* v. *Waine*, 5 B. & S. 697).

XI. Enlargement of Base Fees.

Base fee, when united with the immediate reversion, enlarged, instead of being merged.

39. If a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but

shall be *ipso facto* enlarged into as large an estate as a tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act if such remainder or reversion had been vested in any other person (*m*). 3 & 4 Will. 4, c. 74, s. 39.

(*m*) Generally speaking, when two estates unite in the same person in the same right, the smaller one is merged in the other, except in the case of an estate tail and a reversion in fee, which may exist together; in such a case, by the operation of the statute *De Donis*, the estate tail is kept alive, not merged in the reversion in fee (5 Term Rep. 109, 110; 2 Rep. 61; *Kynaston* v. *Clarke*, 2 Atk. 204; *Shelburn* v. *Biddulph*, 4 Br. P. C. 594). But if a tenant in tail with a reversion in fee to himself, levied a fine, the effect was to create a base fee, which became merged in the other fee, and let in all the incumbrances of the ancestor. A base fee will merge by union with the absolute fee; the possibility of reverter on a conditional fee at common law will merge in the fee simple absolute (*Simpson* v. *Simpson*, 4 Bing. N. C. 333; see 2 Ves. sen. 35; Hob. 323; *Symonds* v. *Cudmore*, 1 Salk. 338; Carth. 258; *Crow* v. *Baldmere*, 5 T. R. 109); an estate tail after possibility of issue extinct (Co. Litt. 27 b), an estate of mere freehold, legal or conventional (Co. Litt. 338 b), a term of years (*Salmon* v. *Swann*, Cro. Jac. 619; *Hughes* v. *Robotham*, Cro. Eliz. 302), or estate at will (Vin. Abr. tit. Est. at Will), will be extinguished by the acquisition of the fee. On the subject of merger of base fees, the Real Property Commissioners made the following remarks: "If a tenant in tail, claiming the immediate remainder or reversion in fee, bars his estate tail by means of a fine instead of a recovery, he frequently prejudices his title by merging in the remainder or reversion the base fee acquired by the fine, as he thereby not only lets in all the charges and estates made and created by the persons through whom he derived the remainder or reversion, but also renders it necessary, afterwards, to make out his title to the remainder or reversion, which, in many instances, is attended with great difficulty and expense" (1 Real Property Report, p. 28; but see *Sperling* v. *Trevor*, 7 Ves. 497). It will be observed that this difficulty is removed by this section of the act, by preserving base fees from merger, and enlarging them, when united with the immediate reversion, into as large an estate as the tenant in tail, if in possession, could have created. The effect of a fine in merging a base fee in the reversion.

The rule, that where there is in the same person a legal and equitable interest the former absorbs the latter (*Wade* v. *Paget*, 1 Br. C. C. 367), holds only where the legal and equitable estates are co-extensive and commensurate, but is not admitted where a party has the whole legal estate and a *partial* equitable estate (*Champernoon* v. *Williams*, 2 Ch. C. 63—78; 1 Vern. 13; *Robinson* v. *Cummings*, Forr. 164; 1 Atk. 473; *Brydges* v. *Brydges*, 3 Ves. 126; see *Capel* v. *Girdler*, 9 Ves. 509; *Selby* v. *Alston*, 3 Ves. 339; *Alston* v. *Wells*, Dougl. 771, 2nd ed.) The estates must also be of the same quality, and an estate tail and fee simple not being of the same quality, an equitable estate tail in a copyhold does not merge by the accession of the legal fee (*Merest* v. *James*, 6 Madd. 118; *Brown* v. *Blake*, 1 Molloy, 382). See now as to merger, Judicature Act, 1873, s. 25 (4); *Snow* v. *Boycott*, 1892, ~~W. N. 99~~; *Chambers* v. *Kingham*, 10 Ch. D. 743. Merger by union of legal and equitable interests in same person. Jud. Act, 1873.

XII. Modes in which Dispositions of Land under this Act by Tenants in Tail are to be effected.

40. Every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the Tenant in tail to make a disposition by deed as if

3 & 4 Will. 4, c. 74, s. 40.

seised in fee, but not by will or contract; and if a married woman, with her husband's concurrence.

disposition if his estate were an estate at law in fee simple absolute: provided nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed (*n*); and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed (*o*).

Old rule as to effect of contracts by tenant in tail.

(*n*) This section of the act adopts an established rule that the issue in tail was not bound, either at law or in equity, to complete any contract made by his ancestor, respecting the estate tail, because the issue claims by a paramount title *per formam doni*, from the person by whom the estate tail was originally granted, and not from his ancestors (3 Rep. 41 b; 1 P. Wms. 271; 2 Ves. sen. 634; Hob. 203; 1 Ch. Cas. 171; 2 Ventr. 350; 1 Lev. 237; 2 Eq. Cas. Abr. 28, pl. 34; *A. G.* v. *Day*, 1 Ves. sen. 218). And such rule applied, although the ancestor had received part, or even the whole of the purchase-money, and a decree had been made against him to levy a fine (Prec. Ch. 278; 2 Vern. 306; Gilb. Eq. R. 104; 1 Ves. sen. 224; see *Franks* v. *Mainwaring*, 2 Beav. 115). And even where tenant in tail, in pursuance of a covenant had acknowledged a fine, but died before it was perfected (2 Vern. 3). And the rule was applicable to copyholds, and to equitable tenants in tail of lands whether freehold or copyhold (See Sugd. V. & P. 227, 11th ed.; 1 Prest. Conv. 153).

Effect of this section upon contracts by tenant in tail.

There is nothing in this section to affect contracts as such, and therefore, although they will not operate to bar or bind the entail under the act, nor can equity give to them that operation, yet they may still be recovered upon at law, or be made the foundation of a specific performance against the tenant in tail. A specific performance of a covenant for further assurance in a mortgage by a tenant in tail in remainder not inrolled was refused by *Stuart*, V. C., in *Davis* v. *Tollemache* (2 Jur. N. S. 1181). But it has since been decided by the Court of Appeal that, notwithstanding sect. 47 (*post*), the Court will decree, as against the tenant in tail, specific performance of a contract for disentailment entered into by him with a purchaser (*Bankes* v. *Small*, 36 Ch. Div. 716). Where a tenant in tail of copyholds deposited his title deeds with an agreement to "make a formal surrender" to secure a loan, a remainderman who joined in the deposit was held bound to carry out the agreement (*Bryce* v. *Bury*, 2 Drew. 11). See further Sugd. R. P. Stat. 197, 2nd ed.; *Hilbers* v. *Parkinson* (25 Ch. D. 202); *Hall-Dare* v. *Hall-Dare* (31 Ch. Div. 251); *Dering* v. *Kynaston* (6 Eq. 210).

No particular form of disentailing deed necessary.

No particular form of disentailing deed is necessary; any deed which by its legal operation would have conveyed the fee simple, if the grantor had been seised in fee, will, if executed by a tenant in tail in possession and duly inrolled, bar the entail (*Nelson* v. *Agnew*, I. R. 6 Eq. 232). A mere declaration of trust is not a "disposition" under this act (*Green* v. *Paterson*, 32 Ch. Div. 95).

Where a disentailing deed operates as a grant, and not by the Statute of Uses, it must be executed by the grantee; if not, it may be rendered inoperative by the subsequent disclaimer by the grantees (*Peacock* v. *Eastland*, 10 Eq. 21). But where the disentailing deed operates by the Statute of Uses, it is not necessary that it should be executed by the grantees to uses (*Nelson* v. *Agnew*, *sup.*)

As to the form of disentailing assurance necessary under this act, see further, 1 Hayes Conv. 154 *et seq.* In every case the question to be asked is, what mode of assurance, if the estate or interest were really a fee simple at law, would be necessary to convey it (*Ib.* 158). As to the effect of an order under the Trustee Act, 1850, vesting the estate of an infant tenant in tail, see *Powell* v. *Matthews* (1 Jur. N. S. 973), *ante*, p. 267.

3 & 4 Will. 4, c. 74, s. 40.

Forms of disentailing assurances will be found in 3 Davidson, Conv. 1166 *et seq.*

(*o*) In the case of a married woman tenant in tail, it is not necessary that the acknowledgment should precede the inrolment (*Ex parte Tavener*, 7 De G. M. & G. 627). The concurrence of the husband is necessary in the case of separate property (*Cooper* v. *Macdonald*, 7 Ch. D. 295). The husband may concur, though a discharged bankrupt (*Ib.* 298). In the case of women married since 1882, or of property acquired by a married woman since 1882, no concurrence or acknowledgment is necessary (*Re Drummond and Davie*, 1891, 1 Ch. 531).

Acknowledgment by married woman, tenant in tail, need not precede inrolment.

Inrolment of Assurance.

41. Provided always, that no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (except a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent, or not less than five sixth parts of a rack rent) shall have any operation under this act unless it be inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and if the assurance by which any disposition of lands shall be effected under this act shall be a bargain and sale, such assurance, although not inrolled within the time prescribed by the act passed in the twenty-seventh year of the reign of his Majesty King Henry the Eighth, intituled "For Inrolment of Bargains and Sales," shall, if inrolled in the said Court of Chancery within the time prescribed by this clause, be as good and valid as the same would have been if the same had been inrolled in the said court within the time prescribed by the said act of Henry the Eighth (*p*).

Every assurance by a tenant in tail, except a lease not exceeding twenty-one years at a rack rent, or not less than five-sixths of a rack rent, to be inoperative unless inrolled in Chancery within six months.

(*p*) The inrolment of the deed of disposition under this statute may be effected either by the vendor or the purchaser; and as the inrolment relates to the execution of the deed, it follows that a tenant in tail, who has not barred the entail under the statute, can nevertheless make a good title in fee simple (*Cattell* v. *Corrall*, 4 Y. & Coll. 228). If the disentailing deed requires inrolment or registration by any other statute, the requisitions of such statute must be observed; if lands lie within a registry district, the deed must be registered. But the inrolment of a bargain and sale, or of a conveyance to charitable uses, according to this act, will satisfy the requisition of the statutes 27 Hen. 8, c. 13; 9 Geo. 2, c. 36.

A deed is valid if inrolled within six months, although such inrolment is after the death of the tenant in tail who executed the deed (*Re Piers*, 14 Ir. Ch. R. 452. See further as to inrolment the note to sect. 74, *post*, p. 291). As to inrolment in the case of copyholds, see sect. 54 (*post*, p. 280).

Assurances under this act are now inrolled in the Enrolment Department of the Central Office (R. S. C. Ord. 60, r. 9).

3 & 4 Will. 4, c. 74, s. 42.

Consent of Protector how to be given.

Consent of the protector to be given by the same assurance or by a distinct deed.

42. The consent of the protector of a settlement to the disposition under this act of a tenant in tail shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void.

Consent by distinct Deed.

If by distinct deed, to be considered unqualified, unless he refer to the assurance.

43. If the protector of a settlement shall, by a distinct deed, give his consent to the disposition of a tenant in tail, it shall be considered that such protector has given an absolute and unqualified consent, unless in such deed he shall refer to the particular assurance by which the disposition shall be effected, and shall confine his consent to the disposition thereby made (*q*).

(*q*) It has been said that a contract under seal by a protector to give his consent might amount to a consent within the act (*Bankes* v. *Small*, 36 Ch. Div. 724).

Consent irrevocable.

Protector not to revoke his consent.

44. It shall not be lawful for the protector of a settlement who under this act shall have given his consent to the disposition of a tenant in tail, to revoke such consent.

Consent of Married Women.

A married woman protector to consent as a feme sole.

45. Any married woman, being either alone or jointly with her husband protector of a settlement, may under this act, in the same manner as if she were a feme sole, give her consent to the disposition of a tenant in tail.

Inrolment of distinct Deed.

Consent of a protector by distinct deed void, unless inrolled with or before the assurance.

46. Provided always, that the consent of a protector to the disposition of a tenant in tail shall, if given by a deed distinct from the assurance by which the disposition shall be effected by the tenant in tail, be void, unless such deed be inrolled in his Majesty's High Court of Chancery either at or before the time when the assurance shall be inrolled.

Exclusion of Jurisdiction of Equity.

Courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in

47. In cases of dispositions of lands under this act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by

this act to tenants in tail, or of the powers of consent given by this act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a court of law would not be an effectual disposition or consent under this act; and that no disposition of lands under this act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this act in a court of law (*r*).

3 & 4 Will. 4, c. 74, s. 47.

courts of law would not be effectual.

(*r*) This section prevents the court from holding that a contract to execute a disentailing deed is, as against the issue in tail and remaindermen, as effectual as if a disentailing deed had been executed; or from remedying any defects in the execution of a deed intended to bar an estate tail (*Bankes* v. *Small*, 36 Ch. Div. 723; see *Mills* v. *Fox*, 37 Ch. D. 162). But the section does not prevent the court from ordering, as against a tenant in tail, specific performance of a contract for disentailment entered into by him with a purchaser (*Bankes* v. *Small*, *sup.*; see *Petre* v. *Duncombe*, 7 Hare, 24). It would seem that under the ordinary covenant to settle after-acquired property a married woman could not be compelled to execute a disentailing deed (*Hilbers* v. *Parkinson*, 25 Ch. D. 200; see *Re Anstis*, *Chetwynd* v. *Morgan*, 31 Ch. Div. 605; *Mills* v. *Fox*, 37 Ch. D. 162; *Derry* v. *Kynaston*, 6 Eq. 210). An infant has been ordered under 1 Will. 4, c. 47, s. 11, to execute a disentailing deed (*Radcliffe* v. *Eccles*, 1 Keen, 130). As to lunatics, see *ante*, p. 253. The above section does not prevent the rectification, on the ground of mistake, of a deed enrolled under the act (*Hall-Dare* v. *Hall-Dare*, 31 Ch. Div. 251).

Consent, how to be given where Lord Chancellor, &c. is Protector.

48. Provided always, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons entrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement, such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so entrusted as aforesaid (*s*), or the said Court of Chancery (as the case may be), while protector of such settlement, shall, on the motion or petition in a summary way by a tenant in tail under such settlement, have full power to consent to a disposition under this act by such tenant in tail, and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid shall be such as shall be approved of by such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be); and it shall be lawful for such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or

Lord Chancellor, &c., to have the power to consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary; and if any other person shall be joint protector, the disposition not to be valid without his consent.

3 & 4 Will. 4, c. 74, s. 48.

persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be), to make such orders in the matter as shall be thought necessary (*t*); and if such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be), shall, in lieu of any such person as aforesaid, be the protector of a settlement, and there shall be any other person protector of the same settlement jointly with such person as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person being protector as aforesaid shall consent thereto in the manner in which the consent of the protector is by this act required to be given.

(*s*) See *ante*, p. 266.

(*t*) The cases *Re Blewitt* (3 M. & K. 259); *Re Wood* (3 My. & Cr. 266); deciding that the Lord Chancellor has no jurisdiction where the tenant in tail in possession is a lunatic, have been overruled (*Re Blewitt*, 6 D. M. & G. 187; see *ante*, p. 261).

As protector of the settlement, the only duty of the court is to see what, in reference to the interests of the family, it would be proper for the tenant for life to do; and the object must be rather to protect the objects of the settlement, than to give any benefit to one member of the family to the exclusion of the others (*Re Newman*, 2 My. &. Cr. 112). So, consent was refused to a disposition which would benefit the husband of the tenant in tail to the detriment of the brother of the lunatic (*ib.*; *Re Graydon*, 1 Mac. & G. 655). Consent was also refused to the sale of the next presentation to a family living, the sale not being for the benefit of the lunatic tenant for life (*Re Tharp*, 3 Ch. Div. 59). Consent, however, was given, for the purpose of carrying out a reasonable arrangement likely to have been made by the lunatic (*Re Blewitt*, 6 D. M. & G. 198); also, for the purpose of enabling a tenant in tail in remainder to secure by mortgage the repayment to the estate of a lunatic tenant for life of an allowance made to the tenant in tail out of the surplus income forming part of the tenant for life's estate (*Re Sparrow*, 20 Ch. Div. 320; *Re Beridge*, 50 L. T. 653); also, for the purpose of raising money for the advancement of a son of the lunatic (*Grant* v. *Yea*, 3 M. & K. 245).

Evidence of Consent of Lord Chancellor, &c., as Protector.

Order of the Lord Chancellor, &c., to be evidence of consent.

49. Provided always, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, or of unsound mind (*u*), or his Majesty's High Court of Chancery, shall be the protector of a settlement, no document or instrument, as evidence of the consent of such protector to the disposition of a tenant in tail under such settlement, shall be requisite beyond the order in obedience to which the disposition shall have been made.

(*u*) See *ante*, p. 266, n. (*d*).

XIII. Estates Tail in Copyholds.

3 & 4 Will. 4, c. 74, s. 50.

Qualified Application of previous Clauses to.

50. All the previous clauses in this act, so far as circumstances and the different tenures will admit, shall apply to lands held by copy of court roll, except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be an estate at law, shall be made by surrender, and except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be merely an estate in equity, may be made either by surrender or by a deed as hereinafter provided, and except so far as such clauses are otherwise altered or varied by the clauses hereinafter contained (*v*).

The previous clauses to apply to copyholds, with certain variations.

(*v*) Copyholds are not within the stat. *De donis* (13 Edw. 1, c. 1; Cro. Car. 44, 45), and therefore not entailable, except by special custom (*Doe* v. *Truby*, 2 W. Bl. 946; see *Goold* v. *White*, Kay, 683; 3 Rep. 8). Where no custom exists, the party, who would otherwise be tenant in tail, will take a fee simple conditional (*Doe* v. *Clark*, 5 B. & Ald. 458; *Simpson* v. *Simpson*, 4 Bing. N. C. 333; *Moore* v. *Moore*, 2 Ves. sen. 596; *Doe* v. *Simpson*, 3 Scott, N. R. 774; *Hardcastle* v. *Dennison*, 10 C. B. N. S. 606; see *ante*, p. 242).

Entails in copyholds.

Copyholds were devised to trustees for a term, and subject thereto, to A. for life with remainder in tail, and the trustees were admitted. The property having been sold, a question arose as to the fine payable, it was held that the tenant for life and remainderman in tail might by one surrender have barred the entail and conveyed to the purchaser, and that only one fine would in such case have been payable (*Reg.* v. *Weedon-Beck*, 13 Q. B. 808). As to the enrolment of an assurance dealing with copyholds, see sect. 54, *post*, p. 280.

Before the passing of this act there were several modes of barring entails in copyholds besides that by recovery:—By forfeiture and re-grant (*Pilkington* v. *Stanhop*, 1 Sid. 314; 2 Keb. 127; *Pilkington* v. *Bagshaw*, Sty. 450; *Carr* v. *Singer*, 2 Ves. sen. 606). By surrender (*Goold* v. *White*, Kay, 683; *Carr* v *Singer*, *sup.*) Concurrent customs to bar entails by recovery and by surrender were good (*Doe* v. *Ossingbrooke*, 2 Bing. 70; *Everall* v. *Smalley*, 2 Str. 1197; 1 Wils. 26; *Doe* v. *Truby*, 2 W. Bl. R. 944; *Doe* v. *Dauncey*, 7 Taunt. 674; see *Roe* v. *Jeffrey*, 2 Maule & Selw. 92; *Doe* v. *Mason*, 3 Wils. 63; see 1 Watk. on Cop. 178; Scriv. on Cop. p. 42, 6th ed.) Before this act the same mode of barring an equitable entail in copyholds must have been pursued as was required by the special custom of the manor for barring an entail in the legal estate (3 Ves. 127; 3 Atk. 815; 1 Watk. on Cop. 180, 181.) By this act, an equitable entail in copyholds may be barred either by surrender or by deed (See *post*, s. 53, p. 279). An entail in copyholds may be barred by an enfranchisement by the tenant in tail (*Challoner* v. *Marshall*, 2 Ves. 524). A bar may be presumed after long possession in fee (*Roe* v. *Lowe*, 1 H. B. 459).

Old mode of barring entails in copyholds.

Consent of Protector by Deed.

51. Provided always, that if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall be given by deed, such deed shall, either at or before the time when the surrender shall be made by which the disposition shall be effected, be executed by such protector, and produced to the lord of the manor of which

As to the deed of consent and the entry of it on the court rolls where the protector of a settlement of copyholds

3 & 4 Will. 4, c. 74, s. 51.

consents by deed to the disposition of a tenant in tail.

the lands are parcel, or to his steward, or to the deputy of such steward; and the consent of such protector shall be void unless such deed shall be so executed and produced; and on the production of the deed the lord, or steward or deputy steward, shall, by writing under his hand to be indorsed on the deed, acknowledge that the same was produced within the time limited, and shall cause such deed, with the indorsement thereon, to be entered on the court rolls of the manor; and the indorsement, purporting to be so signed, shall of itself be *primâ facie* evidence that the deed was produced within the time limited, and that the person who signed the indorsement was the lord of the manor, or his steward, or the deputy of such steward; and after such deed shall have been so entered the lord of the manor or his steward, or the deputy of such steward, shall indorse thereon a memorandum signed by him, testifying the entry of the same on the court rolls.

Consent of Protector not by Deed.

As to the consent of the protector of a settlement of copyholds when not given by deed, and the preserving of evidence of the same on the court rolls.

52. Provided always, that if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall not be given by deed, then and in such case the consent shall be given by the protector to the person taking the surrender by which the disposition shall be effected; and if the surrender shall be made out of court, it shall be expressly stated in the memorandum of such surrender that such consent had been given, and such memorandum shall be signed by the protector; and the lord of the manor of which the lands are parcel, or his steward, or the deputy of such steward, shall cause the memorandum, with such statement therein as to the consent, to be entered on the court rolls of the manor; and such memorandum shall be good evidence of the consent and of the surrender therein stated to be made; and the entry of the memorandum on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof; but if the surrender shall be made in court, the lord of the manor, or his steward, or the deputy of such steward, shall cause an entry of such surrender, containing a statement that such consent had been given, to be made on the court rolls; and the entry of such surrender on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof (*x*).

Evidence of entry in court rolls.

(*x*) A copy of a court roll under the steward's hand is good evidence to prove the copyholder's estate (1 Keb. 567, 720; Comb. 138, 337; 12 Mod. 24; Bull. N. P. 247 a, 7th ed.) A surrender and admittance may be proved by the original entries made by the steward, without producing a copy stamped, as required by stat. 48 Geo. 3, c. 149 (*Doe* v. *Hall*, 16 East, 208), or by an examined copy of the court roll (*Doe* v. *Mee*, 4 B. & Ad. 617; *Doe* v. *Freeman*, 12 M. & W. 844); or where a surrender of a copyhold was duly made and presented by the homage, but no entry of such surrender and presentment was made on the court rolls, it was proved by a draft of an entry produced from muniments of the manor, and the parol testimony

of the foreman of the homage who made such presentment (*Doe* v. *Calloway*, 6 Barn. & Cress. 484). In ejectment for copyholds, the court rolls of the manor, containing an entry of a presentment by the homage of a surrender to the plaintiff out of court, and of his admittance, are evidence of his title against the alleged surrenderor (*Doe* v. *Olley*, 12 Ad. & Ell. 481; see further Scriv. 392, *et seq.*, 6th ed.)

3 & 4 Will. 4, c. 74, s. 52.

Disposition of equitable Estates Tail in Copyholds.

53. Provided always, that a tenant in tail of lands held by copy of court roll, whose estate shall be merely an estate in equity, shall have full power by deed to dispose of such lands under this act in the same manner in every respect as he could have done if they had been of freehold tenure; and all the previous clauses in this act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause; and the deed by which the disposition shall be effected shall be entered on the court rolls of the manor of which the lands thereby disposed of may be parcel; and if there shall be a protector to consent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the court rolls (*y*); and it shall be imperative on the lord of the manor, or his steward, or the deputy of such steward, when required so to do, to enter such deed or deeds on the court rolls, and he shall indorse on each deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls: provided always, that every deed by which lands held by copy of court roll shall be disposed of under this clause, by an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the court rolls of the minor * of which the lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls of such manor before the subsequent assurance shall have been entered (*z*).

Power to equitable tenants in tail of copyholds to dispose of their lands by deed.

* *Lege* manor.

(*y*) It seems to be the intention of the act that the deed of consent must be entered on the court rolls at or before the time when the principal assurance is so entered (Dart, V. & P. 781, n. (*q*). In applying for a mandamus to the steward of a manor to inrol a deed of disposition pursuant to stat. 3 & 4 Will. 4, c. 74, s. 53, it is not necessary to annex a copy of the deed itself, if the contents are stated in the affidavit (*Crosby* v. *Fortescue*, 5 Dowl. P. C. 275). See further *Green* v. *Paterson*, 32 Ch. Div. 95, where the documents were held not to amount to a disposition of an equitable estate tail in copyholds.

(*z*) In commenting upon the proviso at the end of this section, Lord St. Leonards considered it probable that notice would not be held to supply

3 & 4 Will. 4, c. 74, s. 53.

This section does not extend to customary freeholds.

in equity the want of an entry on the court rolls (Sugd. R. P. Stat. 223, 2nd ed.; and V. & P. 471).

This section does not apply to customary freeholds (*R.* v. *Ingleton*, 8 Dowl. P. C. 693; see *Carlisle* v. *Towns*, 2 B. & Ad. 585).

Dispensation with Inrolment.

Inrolment not necessary as to copyholds.

54. Provided always, that in no case where any disposition under this act of lands held by copy of court roll, by a tenant in tail thereof, shall be effected by surrender or by deed, shall the surrender or the memorandum, or a copy thereof, or the deed of disposition, or the deed, if any, by which the protector shall consent to the disposition, require inrolment, otherwise than by entry on the court rolls (*a*).

Entry on court rolls to be within six months.

(*a*) A disentailing assurance of copyholds must be entered on the court rolls within six calendar months after the date of its execution (*Honeywood* v. *Foster*, 30 Beav. 1; *Gibbons* v. *Snape*, 1 D. J. & S. 621; *Green* v. *Paterson*, 32 Ch. Div. 95; see sect. 41, *ante*, p. 273). An indorsement by the steward of a manor at his residence, that the same was produced before him at his residence, is not a sufficient inrolment within the statute (*Boyd* v. *Pawle*, 14 W. R. 1009).

XIV. Bankrupt's Estate Tail.

[*Sect.* 55, *which repealed the bankruptcy provisions of* 6 *Geo.* 4, *c.* 16, *was itself repealed by* 37 & 38 *Vict. c.* 35.]

Actual Tenant in Tail.

The commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st of December, 1833, by deed to dispose of the lands of the bankrupt to a purchaser.

56. Any commissioner acting in the execution of any fiat which after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be issued in pursuance of the said act (1 & 2 Will. 4, c. 56), under which any person shall be adjudged a bankrupt who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail of lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this act at the time of such disposition: provided always, that if at the time of the disposition of such lands, or any of them, by such commissioner as aforesaid, there shall be a protector of the settlement by which the estate of such actual tenant in tail in the lands disposed of by such commissioner was created, and the consent of such protector would have been requisite to have

enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this act have disposed of the same, and such protector shall not consent to the disposition, then and in such case the estate created in such lands, or any of them, by the disposition of such commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this act in such lands without the consent of the protector (*c*). 3 & 4 Will. 4, c. 74, s. 56.

(*c*) Sect. 56 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), empowers the trustee of the bankrupt's estate to deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt with the same. And the same section provides that sects. 56—73 (both inclusive) of 3 & 4 Will. 4, c. 74, shall extend and apply to proceedings in bankruptcy under the Bankruptcy Act, 1883, as if those sections were there re-enacted and made applicable in terms to such proceedings.

Where in the case of copyholds, the entail in which by custom could not be barred until it fell into possession, the tenant in tail in remainder obtained his certificate and purchased from his assignees his life estate, the assignees could not on the death of the tenant for life bar the entail and acquire the remainder in fee (*Johnson* v. *Smiley*, 17 Beav. 223).

Clauses in 3 & 4 Will. 4, c. 74, with respect to the disposition of estates tail under bankruptcies, extended to proceedings under subsequent bankruptcy acts.

Base Fee.

57. Any commissioner acting in the execution of any such fiat as aforesaid, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of the person so entitled as aforesaid, provided at the time of the disposition there be no protector of the settlement by which the estate tail converted into the base fee was created; and by such disposition the base fee shall be enlarged into as large an estate as the same could at the time of such disposition have been enlarged into under this act by the person so entitled if he had not become bankrupt.

Commissioner in case of a tenant in tail entitled to a base fee becoming bankrupt, and of there being no protector, by deed to dispose of the lands of the bankrupt to a purchaser.

Consent of Protector.

58. The commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining the certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, shall, if there shall be a protector of the settlement by which the estate tail of such actual tenant in tail, or the estate tail converted into a base fee (as the case may be), was created, stand in the place of such

As to the consent of the protector in case of bankruptcy.

3 & 4 Will. 4, c. 74, s. 58.

actual tenant in tail, or tenant in tail so entitled as aforesaid, so far as regards the consent of such protector; and the disposition of such lands, or any of them, by such commissioner as aforesaid, if made with the consent of such protector, shall, whether such commissioner may have made under this act a prior disposition of the same lands without the consent of such protector or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any acts hereafter to be passed concerning bankrupts, have the same effect as such disposition would have had if such actual tenant in tail, or tenant in tail so entitled as aforesaid, had not become bankrupt, and such disposition had been made by him under this act with the consent of such protector; and all the previous clauses in this act, in regard to the consent of the protector to the disposition of a tenant in tail of lands not held by copy of court roll, and in regard to the time and manner of giving such consent, and in regard to the inrolment of the deed of consent, where such deed shall be distinct from the assurance by which the disposition of the commissioner shall be effected, shall, except so far as the same may be varied by the clause next hereinafter contained, apply to every consent that may be given by virtue of this present clause.

Inrolment, &c. of Deeds of Disposition and Consent.

As to the inrolment in Chancery of the deed of disposition of freehold lands, and the entry on the court rolls of the deed of disposition of copyhold lands, and of the deed of consent.

59. Every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands not held by copy of court roll, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands held by copy of court roll, shall be entered on the court rolls of the manor of which the lands may be parcel; and if there shall be a protector who shall consent to the disposition of such lands held by copy of court roll, and he shall give his consent by a distinct deed, the consent shall be void, unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the commissioner; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of every manor of which any lands disposed of under this act by any such commissioner as aforesaid may be parcel, or the steward of such lord, or the deputy of such steward, to enter on the court rolls of the manor every deed required by this present clause to be entered on the court rolls, and he shall indorse on every deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls.

Enlargement of Base Fees.

3 & 4 Will. 4, c. 74, s. 60.

Subsequent enlargement of base fees created by the disposition of the commissioner.

60. If any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of any lands of any tenure, of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement by which the estate of such actual tenant in tail was created, and of his not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the disposition by such commissioner as aforesaid there had been no such protector.

Enlargement of Base Fees subsequent to Conveyance.

Enlargement of base fees subsequent to the sale or conveyance of the same under the Bankrupt Acts.

61. If a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the adjudication of such bankruptcy there had been no such protector, and the commissioner acting in the execution of the fiat under which the tenant in tail so entitled shall have been adjudged a bankrupt had disposed of such lands under this act.

Confirmation of voidable Estates.

A voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, confirmed by the disposition of the commissioner,

62. Provided always, that where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under any such fiat as aforesaid, and the commissioner acting in the execution of such fiat shall make any disposition under this act of the lands in which such voidable estate shall be created, or any of them, then and in such case, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee,

3 & 4 Will. 4, c. 74, s. 62.

if no protector, or being such with his consent, or on there ceasing to be a protector; but not against a purchaser without notice.

as the case may be, was created, or being such protector he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under this act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; and if at the time of the disposition by such commissioner in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not without such consent have been capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under this act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the disposition by such commissioner, then and in such case such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons except those whose rights are saved by this act: provided always, that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed against such purchaser and the persons claiming under him (*d*).

(*d*) See *Beck* v. *Welsh* (1 Wils. 276); *Pye* v. *Daubuz* (3 Br. C. C. 595); *Edwards* v. *Appleby* (2 Br. C. C. 652, n.); *Ex p. Fripp* (1 D. G. 293); *Ex p. Wise* (1 Mont. & M. 65); *Sturgis* v. *Morse* (2 D. F. & J. 223); *Hankey* v. *Martin* (49 L. T. 560).

Avoidance of Acts of Bankrupt.

Acts of a bankrupt tenant in tail void against any disposition under this act by the commissioner.

63. All acts and deeds done and executed by a tenant in tail of lands of any tenure, who shall be adjudged a bankrupt under any such fiat as aforesaid, and which shall affect such lands, or any of them, and which, if he had been seised of or entitled to such lands in fee simple absolute, would have been void against

the assignees of the bankrupt's estate, and all persons claiming under them, shall be void against any disposition which may be made of such lands under this act by such commissioner as aforesaid.

3 & 4 Will. 4, c. 74, s. 63.

Powers of Bankrupts reserved, where.

64. Provided always, that, subject and without prejudice to the powers of disposition given by this act to the commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, and also subject and without prejudice to the estate in such lands which may be vested in the assignees of the bankrupt's estate and also subject and without prejudice to the rights of all persons claiming under the said assignees in respect of such lands or any of them, such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall have the same powers of disposition under this act in regard to such lands as he would have had if he had not become bankrupt (*e*).

Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt tenant in tail shall retain his powers of disposition.

(*e*) See *Davis* v. *Tollemache* (2 Jur. N. S. 1181).

Disposition where Bankrupt is dead.

65. Any disposition under this act of lands of any tenure by any commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of such lands, or a tenant in tail entitled to a base fee in such lands, shall be adjudged a bankrupt, shall, although the bankrupt be dead at the time of the disposition, be in the following cases as valid and effectual as the same would have been, and have the same operation under this act as the same would have had, if the bankrupt were alive; (that is to say,) in case at the time of the bankrupt's decease there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall at the time of the disposition be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue who if the base fee had not been

The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if the bankrupt be dead, have in the cases herein mentioned the same operation as if he were alive.

3 & 4 Will. 4, c. 74, s. 65.

created would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition.

Disposition of Copyholds.

Every disposition by the commissioner of copyhold lands where the estate shall not be equitable, to have the same operation as a surrender; and the person to whom such land shall have been disposed of may claim to be admitted on paying the fines, &c.

66. Every disposition which under this act may be made by any commissioner acting in the execution of any such fiat as aforesaid of lands held by copy of court roll shall, in every case in which the estate of the bankrupt in such lands shall not be merely an estate in equity, operate in the same manner as if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, been duly surrendered into the hands of the lord of the manor of which they may be parcel, to the use of the person to whom the same shall have been disposed of by such commissioner; and the person to whom the lands shall have been so disposed of by such commissioner may claim to be admitted tenant of such lands, to hold the same by the ancient rents, customs and services, in the same manner as if such lands had been duly surrendered to his use into the hands of the lord of the manor of which such lands may be parcel, and shall, upon being admitted tenant of such lands, to hold the same as aforesaid, pay the fines, fees, and other dues which could have been lawfully demanded upon such admittance if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, passed by surrender into the hands of the lord, to the use of the person so admitted (*f*).

As to copyholds and customary lands of bankrupt.

(*f*) Sect. 50, sub-sect. 4 of the Bankruptcy Act, 1883, enacts, that where any portion of the bankrupt's estate consists of copyhold or customary property or any like property passing by surrender and admittance or in any similar manner, the trustee shall not be compellable to be admitted to such property, but may deal with the same in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted to or otherwise invested with the property accordingly (See *Poole* v. *Bursell*, 10 W. R. 861).

Rents, Covenants, and Conditions.

Assignees to recover rents of the lands of a bankrupt of which the commissioner has power to make disposi-

67. The rents and profits of any lands of which any commissioner acting in the execution of any such fiat as aforesaid hath power to make disposition under this act shall in the meantime and until such disposition shall be made, or until it shall be ascertained that such disposition shall not be required for the benefit of the creditors of the person adjudged bankrupt

under the fiat, be received by the assignees of the estate of the bankrupt, for the benefit of his creditors; and the assignees may proceed by action of debt for the recovery of such rents and profits, or may distrain for the same upon the lands subject to the payment thereof, and in case any action of trespass shall be brought for taking any such distress may plead thereto the general issue, and give this act or other special matter in evidence, and also, in case any such distress shall be replevied, shall have power to avow or make cognizance generally in such manner and form as any landlord may now do by virtue of the statute 11 Geo. 2, c. 19, or by any other law or statute now in force or hereafter to be made for the more effectually recovering of rent in arrear; and such assignees and their bailiffs, agents and servants, shall also have all such and the same remedies, powers, privileges and advantages of pleading, avowing and making cognizance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof as landlords, their bailiffs, agents and servants, are now or hereafter may be by law entitled to have when rent is in arrear; and such assignees shall also have the same power and authority of enforcing the observance of all covenants, conditions and agreements in respect of the lands of which such commissioner as aforesaid hath the power of disposition under this act, and in respect of the rents and profits thereof, and of entry into and upon the same lands for the non-observance of any such covenant, condition and agreement, and of expelling and amoving therefrom the tenants or other occupiers thereof, and thereby determining and putting an end to the estate of the persons who shall not have observed such covenants, conditions and agreements, as the bankrupt would have had in case he had not been adjudged a bankrupt: provided always that this clause shall apply to all lands held by copy of court roll, but shall only apply to those lands of any other tenure which any commissioner acting in the execution of any such fiat as aforesaid may have power to dispose of under this act after the bankrupt's decease (*g*).

3 & 4 Will. 4, c. 74, s. 67.

tion, and to enforce covenants as if entitled to the reversion. This clause to apply to all copyhold lands, but as to other lands only to such as the commissioner may dispose of after the bankrupt's death.

(*g*) This section does not apply to a case where there has been, before the bankruptcy, a voidable estate created in favour of a purchaser (*Hankey* v. *Martin*, 49 L. T. 564).

Clauses as to Bankrupts to apply to their Lands in Ireland.

68. All the provisions in this act contained for the benefit of the creditors of persons who under such fiats as aforesaid shall be adjudged bankrupts after the thirty-first day of December, one thousand eight hundred and thirty-three, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in Ireland of such persons as fully and effectually as if this act had throughout extended to lands of any tenure in Ire-

All the provisions of the act in regard to bankrupts shall apply to their lands in Ireland.

3 & 4 Will. 4, c. 74, s. 68.

land; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland (*h*).

Provisions of the Irish Act as to bankrupts apply to their lands in England.

(*h*) Sections 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58 and 59 of the 4 & 5 Will. 4, c. 92, as to bankrupts' lands in Ireland, with the omission of copyholds, agree in substance and effect with sects. 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 67 of the 3 & 4 Will. 4, c. 74. By the 4 & 5 Will. 4, c. 92, s. 60, it is enacted, that all the provisions in that act contained for the benefit of the creditors of persons who, under such commissions as aforesaid, (i. e. *issued under Irish stat.* 11 & 12 *Geo.* 3, *c.* 8,) shall be adjudged bankrupts after the 31st October, 1834, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in England of such persons, as fully and effectually as if the act had throughout extended to land of any tenure in England.

Inrolment of Deeds in Ireland.

Deeds relating to the lands of bankrupts in Ireland to be inrolled in the Court of Chancery there.

69. Provided always, that in all cases of bankruptcy, every deed of disposition under this act of lands in Ireland by any commissioner acting in the execution of any such fiat as aforesaid, and also every deed by which the protector of a settlement of lands in Ireland shall consent, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in England (*i*).

Deeds relating to Irish bankrupts' lands in England to be inrolled in Court of Chancery there.

(*i*) The 61st section of the Irish stat. 4 & 5 Will. 4, c. 92, provides, that in all cases of bankruptcy every deed of disposition under that act of lands in England, by any commissioner acting in the execution of any such commission as aforesaid, and also every deed by which the protector of a settlement of lands in England shall consent, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland.

XV. Money to be laid out in Lands to be Entailed.

[*Sect.* 70, *which repealed* 7 *Geo.* 4, *c.* 45, *was itself repealed by* 37 & 38 *Vict. c.* 35, *without reviving the former statute.*]

Mode of Disposition of Entailed Money.

The previous clause, with certain variations, to apply to lands of any tenure to be sold, where the purchase-

71. Lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein,

shall for all the purposes of this act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in this act, so far as circumstances will admit, shall, in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled; and shall, in the case of the lands to be sold as aforesaid being held by copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and shall in the case of money subject to be invested in the purchase of lands to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in case of bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed, which shall have no operation under this act unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the commissioner, and completed by inrolment in the same manner as hereinbefore required in regard to lands not held by copy of court roll (*l*).

3 & 4 Will. 4, c. 74, s. 71.

money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner.

(*l*) Money directed to be laid out in the purchase of freehold land is considered by a court of equity as converted into real estate. Formerly a person who would have been entitled to the land, if purchased, as tenant in tail, was enabled by a court of equity to receive the money if he could have acquired the fee by fine, but not if a recovery would have been requisite, in which case it was necessary to purchase land in order to suffer a recovery (5 Ves. 12; 6 Ves. 116; *In re Lord Somerville*, 2 Sim. & Stu. 470; 3 Russ. 369, 416; 5 Russ. 5). The Irish stat. 4 & 5 Will. 4, c. 92, s. 62, repealed the Irish stats. 58 Geo. 3, c. 46, and 7 Geo. 4, c. 45.

Old mode of barring estates tail in entailed money.

For the earlier cases, see *Fletcher* v. *Ashburner*, 1 L. C. Eq. 867, 4th ed.; and as to entailed money see also *Mosley* v. *Ward* (29 Beav. 407).

A fund in court representing entailed land will not be paid out to a tenant in tail without a disentailing deed having been executed (*Re Butler*, 16 Eq. 479; *Re Broadwood*, 1 Ch. D. 438; *Re Reynolds*, 3 Ch. Div. 61; *Re Norcop*, 31 L. T. 85; *Re Tylden*, 11 W. R. 869; *Re Smythe*, 3 M. & K. 249; see *contra*, *Sowry* v. *Sowry*, 8 W. R. 339; *Re Row*, 17 Eq. 300; *Re Wood*, 20 Eq. 372). An affidavit proving the execution has been required (*Bishop* v. *De Burgh*, 15 L. J. Ch. 35; *Re Field*, 11 W. R. 927; see, however, *Re Butler*, *sup.*; *Re Reynolds*, *sup.*) As to an affidavit of no incumbrances, see *Thornhill* v. *Milbank* (12 W. R. 523).

Payment out of court of entailed money.

3 & 4 Will. 4, c. 74, s. 71.

Where entailed land had been sold and the money paid into court, a subsequent deed which purported to disentail the land did not disentail the money (*Mills* v. *Fox*, 37 Ch. D. 153).

Where the money had been paid into court by a company and a disentailing deed had been executed, the company was ordered to pay the costs of the deed (*Re Brooking*, 2 Giff. 31; *Re North Staffordshire R. Co.*, 3 Giff. 224).

The entail of lands to be purchased with rents hereafter to become due to trustees may be barred under this section (*Fordham* v. *Fordham*, 34 Beav. 59).

Entailed Money—Ireland.

Lands of any tenure in Ireland to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and money under the control of a court of equity in Ireland, subject to be invested in like manner, to be subject to this act in cases of bankruptcy.

72. So far as regards any person adjudged a bankrupt under any such fiat as aforesaid, the provisions of the clause lastly hereinbefore contained shall, for the benefit of the creditors of the bankrupt, apply to lands in Ireland to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subjected to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of any court of equity in Ireland, or of or to which any individuals as trustees may be possessed or entitled in Ireland, and which shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, as fully and effectually as if this act had throughout extended to Ireland: provided always, that every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to lands in Ireland to be so sold, as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof; but every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to money subject to be invested in the purchase of lands to be so settled as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland to be sold (*m*).

(*m*) This saving is not in the corresponding section in the Irish stat. 4 & 5 Will. 4, c. 92, s. 64.

XVI. The Inrolment of Deeds, &c.

As to deeds being acknowledged before inrolment.

73. Any rule or practice requiring deeds to be acknowledged before the inrolment shall not apply to any deed by this act required to be inrolled in his Majesty's High Court of Chancery in England or Ireland (*n*).

(*n*) The stat. 12 & 13 Vict. c. 109, ss. 17, 18, directs a seal to be provided for the inrolment office, and certificates of inrolment to be written upon

every deed to be inrolled, which certificates, when sealed, are to be admitted as evidence. 3 & 4 Will. 4, c. 74, s. 73.

By the Irish Act, 4 & 5 Will. 4, c. 92, s. 73, it is provided that any rule or practice requiring deeds to be acknowledged before inrolment shall not apply to any deed by that act required to be inrolled in the Court of Chancery in Ireland.

Relation back of Inrolled Deeds.

74. Every deed required to be inrolled in his Majesty's High Court of Chancery in England or Ireland, by which lands or money subject to be invested in the purchase of lands shall be disposed of under this act, shall, when inrolled as required by this act, operate and take effect in the same manner as it would have done if the inrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly inrolled under this act, if such subsequent deed shall be first inrolled (*o*). Every deed to be inrolled by which lands or money shall be disposed of under this act, to take effect as if inrolment not required.

(*o*) See sect. 41 (*ante*, p. 273). Sect. 74 will render it necessary for purchasers and mortgagees to have the deed under which they take inrolled without any delay, and it will be proper for them to ascertain, by search at the inrolment office, that no conveyance prior to that under which they claim, made by the tenant in tail, has been inrolled. A bargain and sale when acknowledged and inrolled, has relation to the time of execution, and if the grantee dies within six months, and afterwards it is acknowledged and inrolled, it is good, because it is a collateral act required by act of parliament, and not arising from the nature of the instrument itself (2 Ves. sen. 79. See Com. Dig. Bargain and Sale (B. 9)).

It has been held, under the corresponding section of the Irish Act (4 & 5 Will. 4, c. 92, s. 66), that this section applies only to disentailing deeds executed by the same tenant in tail, and not to deeds executed by successive tenants in tail (*Re Piers*, 14 Ir. Ch. R. 452).

[*Sect.* 75 *dealing with fees on inrolment was repealed by* 42 & 43 *Vict. c.* 78, *s.* 29. *For the present fees, see post, p.* 311.]

76. It shall be lawful for his Majesty's Court of Common Pleas at Westminster from time to time to make such orders as the court shall think fit touching the amount of the fees and charges to be paid for the entries of deeds by this act required to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of lands held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders by which dispositions shall be made under this act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders or the memorandums thereof on the court rolls. The Court of Common Pleas to regulate the fees for entries on court rolls and indorsements on deeds, and for taking consents, &c.

3 & 4 Will. 4, c. 74, s. 77.

XVII. Of Alienation by Married Women.

General enabling Clause.

A married woman, with her husband's concurrence, to dispose of lands and money subject to be invested in the purchase of lands, and of any estate therein; and to release and extinguish powers as a feme sole.

77. After the thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act (*q*), by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release (*r*), surrender or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole, save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always, that this act shall not extend to lands held by a copy of court roll of or to which a married woman, or she and her husband in her right, may be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel (*s*).

Not to extend to copyholds in certain cases.

(*q*) See section 40, *ante*, p. 271.

(*r*) The Irish stat. 4 & 5 Will. 4, c. 92, s. 68, contains the word "disclaim."

(*s*) By 8 & 9 Vict. c. 106 (*post*), contingent and other like interests, and also rights of entry, may be disposed of by a married woman conformably to the provisions of this act (See *Crofts* v. *Middleton*, 8 D. M. & G. 192).

Cases when acknowledgment necessary.

Under the present section, read in connection with the interpretation clause, a married woman may by deed acknowledged dispose of any interest in land either at law or in equity, or any charge, lien or incumbrance in or upon or affecting land either at law or in equity (*Briggs* v. *Chamberlain*, 11 Hare, 74). This power of disposition includes (1) the married woman's interest in a mortgage debt when she and her husband are entitled to the debt (*Williams* v. *Cooke*, 4 Giff. 343; *secus*, where she was only interested in such a debt as one of several *cestuis que trusts*, *Re Newton*, 23 Ch. D. 181; or where the charge had been paid off: *Re Algeo*, I. R. 2 Eq. 485); (2) the married woman's interest whether in possession or reversion in proceeds of real estate devised on trust for sale, whether the sale be or be not made (*Briggs* v. *Chamberlain*, 11 Ha. 69; *Tuer* v. *Turner*, 20 Beav. 560: *Re Jakeman*, 23 Ch. D. 344). So where personalty in which the married woman had a reversionary interest under a settlement prior to 20 & 21 Vict. c. 57, had in breach of trust been invested in land, she could dispose of her interest under this section (*Re Durrant and Stonor*, 18 Ch. Div. 106). The fact that the husband is at the time an undischarged bankrupt does not invalidate a conveyance under this section (*Re Jakeman*, 23 Ch. D. 344).

A conveyance by *cestuis que trusts* of land held on trust for sale to the trustee for sale who had purchased it, was held void as against a married woman *cestui que trust* who had not acknowledged the deed (*Franks* v. *Bollans*, 3 Ch. 717). A lease by a husband and wife of the wife's land not acknowledged by her was under the circumstances held binding on the lessee (*Toler* v. *Slater*, L. R. 3 Q. B. 42). 3 & 4 Will. 4, c. 74, s. 77.

The formalities of this section are unnecessary in the following cases: (1) Generally in the case of separate estate, see *post*, p. 297. (2) In cases within the proviso at the end of the section; see *Green* v. *Paterson*, 32 Ch. Div. 95. (3) Where a married woman trustee is conveying land sold under an order of the court in an administration action when she can convey as bare trustee under sect. 6 of the V. and P. Act, 1874 (*Re Docwra*, *Docwra* v. *Faith*, 29 Ch. D. 693). (4) Where the provisions of an act of parliament substitute other proceedings (*Ex p. Ellison*, 2 Y. & Coll. 528). As to leases or sales of a married woman's property under S. E. Act, 1877, see sects. 12, 22, 50 and 51 of that act. In the case of conveyances by a married woman under the S. L. Act, 1882, sect. 61 of that act seems to render an acknowledgment unnecessary. Where her property is sold in a partition action, she can, without deed acknowledged, request a sale under sect. 6 of the 39 & 40 Vict. c. 17, and elect by examination in court to take the proceeds as personalty (*Standering* v. *Hall*, 11 Ch. D. 652; *Wallace* v. *Greenwood*, 16 Ch. D. 362). Cases when acknowledgment unnecessary.

Purchase-money of real estate belonging to a married woman, which has been paid into court, may be paid out to her upon her examination without a deed acknowledged (*Re Hayes*, 9 W. R. 769; see *Re Trevylyan*, 31 L. J. Ch. 560; *Gibbons* v. *Kibbey*, 10 W. R. 55; *Clark* v. *Clark*, 14 W. R. 449; *White* v. *Herrick*, 4 Ch. 345). Where the fund is small the examination will be dispensed with (*Re Clark*, 13 W. R. 401; *Knapping* v. *Tomlinson*, 18 W. R. 684; *Frith* v. *Lewis*, 1881, W. N. 145). Purchase-money in court belonging to married woman.

Where the married woman is a lunatic her heir and her own beneficial, but not her legal, interest, can be bound by an order of the court (*Re Stables*, 4 D. J. & S. 257). Lunacy.

By the present section a married woman was enabled, with the concurrence of her husband, to contract by an acknowledged deed so as to bind her non-separate real estate, but not herself personally (*Crofts* v. *Middleton*, 8 D. M. & G. 192; *Pride* v. *Bubb*, 7 Ch. 64). A contract unacknowledged will not bind her (*Castle* v. *Wilkinson*, 5 Ch. 534; *Cahill* v. *Cahill*, 8 App. Cas. 420; *Williams* v. *Walker*, 9 Q. B. D. 576); even if she is a trustee for sale (*Avery* v. *Griffin*, 6 Eq. 606). Nor will her husband's contract bind her (*Barnes* v. *Wood*, 8 Eq. 424; *Nicholl* v. *Jones*, 3 Eq. 696; see now M. W. P. Act, 1882, s. 1, sub-ss. (3), (4), *post*, p. 325. Contracts.

As to the effect of fines under the old law, see *May* v. *Roper*, 4 Sim. 360; *Forbes* v. *Adams*, 9 Sim. 462.

By a deed to which a husband and wife were parties, the equity of redemption of the husband was conveyed in certain lands. The deed was duly acknowledged by the wife. Held, that the wife had extinguished her right to dower (*Dent* v. *Clayton*, 12 W. R. 903). Dower.

A married woman can elect so as to affect her interest in real property, without deed acknowledged under this act, and where she has so elected, the court can order a conveyance accordingly, the ground of such order being, that no married woman shall avail herself of fraud (*Barrow* v. *Barrow*, 4 K. & J. 409; *Griggs* v. *Gibson*, 1 Eq. 685; see *Wilder* v. *Pigott*, 22 Ch. D. 263). As to her election to take as personal estate money arising from the sale of her real estate in a partition action, see *Standering* v. *Hall*, 11 Ch. D. 652; *Wallace* v. *Greenwood*, 16 Ch. D 362). Election.

As to the release and extinguishment of powers, see *post*, p. 296. Release.

The Irish statute 4 & 5 Will. 4, c. 92, s. 68, contains the additional word *disclaim*, after the words "dispose of." By 8 & 9 Vict. c. 106, s. 7, a married woman may disclaim by deed made conformable to this act. Disclaimer by married women.

An interest devised vests in the devisee by presumption of law before entry (Co. Litt. 111 a). The old doctrine was, that an estate of freehold could be disclaimed only by matter of record (*Butler and Baker's case*, 3 Disclaimer generally.

3 & 4 Will. 4, c. 74, s. 77.

Disclaimer generally.

Rep. 26). But it is now established that a deed is sufficient for that purpose (*Townson* v. *Tickell*, 3 B. & Ald. 31). This case has been followed in a case where a deed of disclaimer by a devisee in trust of freehold and copyhold property was held to vest the entire legal estate in his co-trustees (*Begbie* v. *Crook*, 2 Bing. N. C. 70; and see observations on *Townson* v. *Tickell*, in 4 M. & R. 189). The disclaimer must be clear and unequivocal (*Doe* v. *Smyth*, 6 B. & C. 112).

It is most prudent that a deed of disclaimer should be executed by a person named trustee, who refuses to accept the trust, but there may be conduct which amounts to a clear disclaimer (*Re Birchall*, *Birchall* v. *Ashton*, 40 Ch. Div. 436). As where a trustee under a will purchased a part of the real estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended, upon the disclaimer of the trust (*Stacey* v. *Elph*, 1 M. & K. 195). A disclaimer by one of the three executors of a will, who were directed to sell copyholds, by a deed executed some time after the sale, reciting that he had from the testator's decease declined to act, and had never acted in the executorship or trusts of the will, was held to be a refusal *ab initio*, there being nothing to impeach the *bona fides* of the transaction (*Peppercorn* v. *Wayman*, 5 De G. & S. 230; see *Harris* v. *Watkins*, 2 K. & J. 473, as to presuming a disclaimer by a devisee). A disclaimer after the exercise of various acts of ownership is void (*Bence* v. *Gilpin*, L. R. 3 Ex. 76). A devise of copyholds may be disclaimed by word of mouth only before the devisee has been admitted (*R.* v. *Wilson*, 10 B. & C. 5; see Shepp. Touchs. 452). A gift of personal chattels or a term of years, may be waived and avoided by parol (1 Ventr. 128). On a disclaimer by a devisee the estate will descend to the heir, or pass to a remainderman (*Ib.* 116). And on the disclaimer of one of two assignees of a term, the whole interest will vest in the other (*Smith* v. *Wheeler*, 1 Vent. 128). The disclaimer of one of several trustees has the effect of vesting the estate in the other trustees exclusively (*Small* v. *Marwood*, 9 B. & C. 300; *Browell* v. *Reed*, 1 Hare, 435; see *Re Birchall*, *Birchall* v. *Ashton*, 40 Ch. Div. 436; *Doe* v. *Harris*, 16 M. & W. 517).

The execution of a conveyance of trust premises has been held sufficient evidence of acceptance of the trust (*Urch* v. *Walker*, 3 M. & C. 702). In *Crewe* v. *Dickin* (4 Ves. 97), one of two trustees released and conveyed to his co-trustee; and it was held, that the trustee must be considered as having accepted the trust (See, however, *Nicholson* v. *Wordsworth*, 2 Swanst. 371). A trustee of real estate, who disclaimed all estate, powers, &c. in the estate devised, was held not to be a necessary party in a conveyance to a purchaser, nor in a receipt for the purchase-money (*Adams* v. *Taunton*, 5 Madd. 433. See, in addition to the cases cited, Litt. ss. 684, 685; stat. 21 Hen. 8, c. 4; Co. Litt. 113 a; *Bonifant* v. *Greenfield*, Cro. Eliz. 80; Godb. 77; *Anon.*, 4 Leon. 207; *Hawkins* v. *Kemp*, 3 East, 410; *Thomson* v. *Leach*, 2 Vent. 198; Carth. 211, 230; 2 Salk. 616; Show. P. C. 151; 3 Lev. 284; 1 Show. 296; Rep. temp. Holt, 665). It was held, that a discretionary power given to two trustees to sell copyholds, one of whom disclaimed, might be exercised by the other trustee (*Affleck* v. *James*, 13 Jur. 739). In *Sharp* v. *Sharp* (2 B. & Ald. 405), it was held that trustees had not acted, though they had conveyed the estate instead of disclaiming.

A *feme covert* made a disposition of property, as to which it was doubtful whether it was settled to her separate use. The husband disclaimed: it was held, that, whether separate property or not, the husband's disclaimer gave effect to the disposition of the wife (*Rycroft* v. *Christy*, 3 Beav. 238). See, further, as to disclaimer, Lewin on Trusts, 206 *et seq.*, 9th ed.

Saving of other Powers.

3 & 4 Will. 4, c. 74, s. 78.

78. Provided always, that the powers of disposition given to a married woman by this act shall not interfere with any power which, independently of this act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition (*t*).

The powers of disposition given to a married woman by this act not to interfere with any other powers.

(*t*) In the corresponding clause in the Irish statute, 4 & 5 Will. 4, c. 92, s. 69, the following qualification is added, "but such powers of disposition shall not enable a married woman to dispose of lands, or any estate therein, where the settlement or other instrument under which she may be entitled to the same shall contain a valid restriction against the anticipation thereof by such married woman." This has been said to be an expression by the legislature of what was meant by the English act (*Baggett* v. *Meux*, 1 Phil. 628). As to how far other statutory powers of disposing of a married woman's property are affected by a restraint on anticipation, see S. E. Act, 1877, s. 50, *post*; S. L. Act, 1882, s. 61, *post*.

Restraint on anticipation.

By the custom of London, confirmed by statute 34 & 35 Hen. 8, c. 22, and of several other cities and boroughs, as Norwich, &c., &c., a married woman, on being privately examined before the mayor, may bind herself by a deed acknowledged and inrolled (Hob. 225; Com. Dig. London (N. 3); 2 Inst. 673; 1 Prest. Abst. 336; Roper on Husband and Wife, 531; 4 Cruise's Dig. tit. xxxii. ch. 2, pl. 33). By statute 32 Hen. 8, c. 28, the husband and wife were empowered to make leases of the wife's lands (See *Doe* v. *Weller*, 7 T. R. 478). This act has been repealed by 19 & 20 Vict. c. 120, s. 35, and certain powers of leasing a married woman's lands are given by the S. E. Act, 1877, s. 46, *post*; see also S. L. Act, 1882, s. 61, *post*. By 11 Geo. 4 & 1 Will. 4, c. 65, s. 12, power was given to a married woman under an order of court to surrender leases and take new leases (extended to Ireland, 5 & 6 Will. 4, c. 17).

Other statutory powers.

Prior to the M. W. P. Act, 1882, the disabilities of married women at common law, independent of statute or particular customs, to alien their property, whether real or personal, either by deed or will, were well known (See Harg. Co. Litt. 111 b, n. (4)). The wife of a man who had abjured the realm, or been transported, might act as if her husband were dead (Co. Litt. 132; 2 Vern. 104; 3 P. Wms. 37). Through the medium of powers and trusts, however, a married woman was long allowed to have, both at law and in equity, the full dominion over property independent of her husband. A wife might, without her husband, execute a naked authority to sell lands whether given before or after coverture, and though no special words were used to dispense with the disability of coverture (Co. Litt. 112 a, and n. (6)). The rule was the same where both an *interest* and an authority passed to the wife, if the authority was collateral to and did not flow from the interest, because then the two were unconnected, as if they were vested in different persons (Rep. temp. Finch, 346). As, too, a *feme covert* might convey lands in execution of a mere power, so she might with equal effect in performance of a *condition*, where land was vested in her on condition to convey to others (W. Jones, 137, 138). As regards estates of freehold which a married woman had as trustee, the better opinion was that no effectual conveyance could formerly be made by her without fine or recovery, nor, after 3 & 4 Will. 4, c. 74, without a deed duly acknowledged (1 Prest. on Abs. 337; *Re Caine*, 10 Q. B. D. 284; see *Avery* v. *Griffin*, 6 Eq. 606).

Dominion of married women over their property.

By means of powers.

Before the M. W. P. Act, 1882, it was settled that a power of disposing of real estate might be given to a married woman (1) by way of trust, *e.g.*, by a proper conveyance of an estate to trustees in trust for herself during

In what way powers may be reserved

3 & 4 Will. 4, c. 74, s. 78. to married women.

her coverture for her separate use; and afterwards in trust for such person as she shall appoint; or (2) by way of power over an use, as where an estate is conveyed to the use of herself for life, remainder to the use of such persons as she shall appoint (2 Ves. sen. 191).

Where by articles before marriage it was agreed that the wife should have a power of appointment over her property, the power was held well created and exerciseable (*Ripon* v. *Dawding*, Amb. 565; *Wright* v. *Cadogan*, 1 Br. P. C. 486; Amb. 468; 2 Eden. 239; see *Doe* v. *Staple*, 2 T. R. 684; Sug. Pow. 158). A mere contract by the wife to convey, entered into after marriage, whether for her own benefit or that of others, would be void (*Dillon* v. *Grace*, 2 Sch. & Lef. 462; *Worrall* v. *Jacob*, 3 Mer. 256).

Different kinds of powers.

A power may be (1) *appendant*, when the exercise of it takes effect out of the estate of the donee, as a power of leasing; (2) *in gross*, when the exercise of it takes effect after the determination of the estate of the donee, as a power of a tenant for life to jointure; or (3) simply *collateral*, when the donee has no estate at all in the property the subject of the power (1 Saund. on Uses, 4th ed. 169; Sug. Pow. 8th ed. 46).

Exercise of powers by married women.

It has long been settled, that a married woman may execute a power whether appendant, in gross or simply collateral (*Harris* v. *Graham*, 1 Roll. Abr. 329, pl. 12; 2 Roll. Abr. 247, pl. 6; *Gibbons* v. *Moulton*, Finch, 346; *Daniel* v. *Upley*, Latch. 39; Godb. 327, pl. 419; *Tomlinson* v. *Dighton*, 1 P. Wms. 149; *Travel* v. *Travel*, 3 Atk. 711; cited 2 Ves. sen. 191; *Doe* v. *Eyre*, 5 C. B. 741, 745); unless a contrary intention appears in the instrument creating it (*Antrim* v. *Buckingham*, 1 Ch. Cas. 17). She may exercise power as well over a copyhold as a freehold estate (*Driver* v. *Thompson*, 4 Taunt. 294). See further Sug. Pow. 154, 8th ed.; *Wood* v. *Wood*, 10 Eq. 220).

Release of powers.

The statute 3 & 4 Will. 4, c. 74, s. 77 (*ante*, p. 292), provides a machinery whereby a married woman can release or extinguish any power as if she were a *feme sole*. Prior to the Conv. Act, 1881, powers appendant or in gross could be released (*Albany's case*, 1 Rep. 111; *Leigh* v. *Winter*, Sir W. Jones, 411; Sug. Pow. 8th ed. 82). But powers simply collateral could not (Co. Litt. 265 b; 11 Rep. 111 a; see *Weller* v. *Ker*, L. R. 1 H. L. Sc. 11; *Saul* v. *Pattinson*, 54 L. T. 670; 55 L. J. Ch. 831); unless the power was for the benefit of the donee (*West* v. *Berney*, 1 R. & M. 434). See now as to releasing and disclaiming powers, Conv. Act, 1881, s. 52; Conv. Act, 1882, s. 6 (*post*).

Extinguishment of powers—

Formerly a power appendant or in gross could be extinguished by a fine or a recovery (*Digge's case*, 1 Rep. 173; *Bird* v. *Christopher*, Styles, 389; *King* v. *Melling*, 1 Ventr. 225; *Tomlinson* v. *Dighton*, 1 P. Wms. 149; *Saville* v. *Blackett*, *ib.* 777); even where the power was for the benefit of the donee's children (*Bickley* v. *Guest*, 1 Russ. & M. 440; *Smith* v. *Death*, 5 Madd. 371; see, however, *Jesson* v. *Wright*, 2 Bligh. 15).

appendant;

A power appendant to a life estate—including a power of leasing (*Simpson* v. *Bathurst*, 5 Ch. 193), a power to consent to a sale of the corpus (*Alexander* v. *Mills*, 6 Ch. 124), or to consent to an advancement thereout to children (*Re Cooper*, *Cooper* v. *Slight*, 27 Ch. D. 565)—is not extinguished by an alienation of the donee's interest. It is immaterial whether the alienation is by the donee's assignment (*Alexander* v. *Mills*, *sup.*; *Ren* v. *Bulkeley*, 1 Dougl. 292; *Simpson* v. *Bathurst*, 5 Ch. 193), or upon his bankruptcy (*Holdsworth* v. *Goose*, 29 Beav. 111; *Eisdale* v. *Hammersley*, 31 Beav. 255; *Doe* v. *Britain*, 2 B. & Ald. 93; *Hole* v. *Escott*, 2 Keen, 444). The power, however, cannot be exercised without the consent of the alienee (*Re Cooper*, *Cooper* v. *Slight*, 27 Ch. D. 565), unless the power is expressly reserved upon the alienation (*Warburton* v. *Farne*, 16 Sim. 625; *Long* v. *Rankin*, Sug. Pow. 8th ed. 899; *Morgan* v. *Rutson*, 16 Sim. 234; see *Re Wright and Marshall*, 28 Ch. D. 93); or the exercise of it does not derogate from the donee's grant, as in the case of a power to appoint new trustees (*Hardaker* v. *Moorhouse*, 26 Ch. D. 417).

in gross.

A power in gross may be exercised notwithstanding the alienation of the donee's interest (*Parsons* v. *Parsons*, 9 Mod. 464), whether by his

assignment (*Re Stone*, I. R. 8 Eq. 621), or by means of a clause of forfeiture on bankruptcy (*Wickham* v. *Wing*, 2 H. & N. 436; *Re Aylwin*, 16 Eq. 585; see *Jones* v. *Winwood*, 3 M. & W. 653; *Haswell* v. *Haswell*, 2 D. F. & J. 456). 3 & 4 Will. 4, c. 74, s. 78.

The trustee in bankruptcy can exercise a power which the bankrupt could have exercised for his own benefit (46 & 47 Vict. c. 52, s. 44 (ii.)). This does not apply after the death of the bankrupt (*Nichols* v. *Nixey*, 29 Ch. D. 1005); nor in the case of a married woman made bankrupt under the M. W. P. Act, 1882 (*Ex p. Gilchrist*, 17 Q. B. Div. 521). A judicial separation does not prevent a wife from joining in the exercise of any joint power given to herself and her husband (20 & 21 Vict. c. 85, s. 26). See further as to the extinguishment of powers, Sug. Pow. 8th ed. 57 *et seq.*; Farwell, 10 *et seq.*

Trust for separate use of married woman.

A further power conferred on a married woman by the general law (independently of the M. W. P. Acts, 1870 and 1882, which see *post*, pp. 317, 325) was the power of disposing of separate estate, whether real or personal. Thus, by the general law, a married woman, in the absence of any clause against alienation, can deal with the equitable interest in real property to which she is entitled to her separate use, as if she were a *feme sole* (*Taylor* v. *Meads*, 4 D. J. & S. 597; *Hall* v. *Waterhouse*, 5 Giff. 64; *Pride* v. *Bubb*, 7 Ch. 64; *Cooper* v. *Macdonald*, 7 Ch. Div. 288; *Adams* v. *Gamble*, 12 Ir. Ch. R. 102; see *Major* v. *Lansley*, 2 R. & M. 355). Her power exists not only as to strangers, but as to her husband (*Logan* v. *Birkett*, 1 M. & K. 220; *Woodward* v. *Woodward*, 3 D. J. & S. 672). As to the legal estate in such property where there are no trustees, see the note to sect. 91, *post*, p. 305.

Married woman's power of disposition over personalty settled to her separate use.

Again, by the general law, a married woman entitled to personal property to her separate use, without any restraint on alienation, may not only receive and apply to her separate use the income, but dispose of the corpus, either by an act *inter vivos* or by will (*Rich* v. *Cockell*, 9 Ves. 369; *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; 3 Br. C. C. 8; see also *Peacock* v. *Monk*, 2 Ves. sen. 191; *Hearle* v. *Greenbank*, 3 Atk. 696; 1 Ves. sen. 298). And her power of disposition extends to reversionary interest in personalty settled to her separate use as well as to interests in possession (*Keene* v. *Johnstone*, 1 Jones & Carey, I. R. 255; *Sturgis* v. *Corp*, 13 Ves. 190; see *King* v. *Lucas*, 23 Ch. Div. 712). And to contingent as well as vested interests (*Lechmere* v. *Brotheridge*, 32 Beav. 353; but see *Batt* v. *Cuthbertson*, 4 Dr. & War. 392; *Stamford Co.* v. *Ball*, 10 W. R. 196).

Contracts binding separate estate.

Further, by the general law the contract of a married woman bound her separate estate, when it appeared that such contract was made with reference to and upon the faith or credit of that estate (*Johnson* v. *Gallagher*, 3 D. F. & J. 515; *London Chartered Bank* v. *Lemprière*, L. R. 4 P. C. 597; *Wainford* v. *Heyl*, 20 Eq. 324); such a contract, however, being enforceable only against so much of the separate estate to which at the time of the contract the married woman was entitled, free from restraint, as remained at the time of judgment (*Pike* v. *Fitzgibbon*, 17 Ch. Div. 454).

Creation of separate use.

No particular form of words was necessary to create separate use (*Stanton* v. *Hall*, 2 R. & M. 175). As to what words would do so, see *Massy* v. *Rowen* (L. R. 4 H. L. 288); *Re Peacock* (10 Ch. D. 490); *Bland* v. *Dawes* (17 Ch. D. 794), and the cases there referred to; *Williams* v. *Waters* (14 M. & W. 166); *Acton* v. *White* (1 Sim. & Stu. 429); *Carnegie* v. *Carnegie*, 22 W. R. 783). A trust for separate use will not be inferred from the existence of a restraint on alienation (*Stogdon* v. *Lee*, 1891, 1 Q. B. 661).

As to whether a trust for separate use can be created by parol, see, in the case of real estate, *Dye* v. *Dye* (13 Q. B. Div. 147); and in the case of personal estate, *Simmons* v. *Simmons* (6 Ha. 352); *Warden* v. *Jones* (2 De G. & J. 76); *Re Whitehead* (14 Q. B. Div. 419) (cases of ante-nuptial agreements); and *Haddon* v. *Fladgate* (27 L. J. Prob. 21, a post-nuptial agreement).

Duration of separate use.

There is no such thing as separate property of an unmarried woman (*Pelton* v. *Harrison*, 1891, 2 Q. B. 425). Separate use can only apply during coverture (*Re Price, Stafford* v. *Stafford*, 28 Ch. D. 712). But a

3 & 4 Will. 4, c. 74, s. 78.

trust for separate use will apply to any existing coverture and to all subsequent covertures (*Tullett* v. *Armstrong*, 4 My. & Cr. 377; *Re Gaffee*, 1 Mac. & G. 541; *Hawkes* v. *Hubback*, 11 Eq. 5). Such a trust may be destroyed during discoverture, *e. g.*, by conversion of the property (*Wright* v. *Wright*, 2 J. & H. 647). And on its creation it may be confined to an existing coverture (*Moore* v. *Morris*, 4 Drew. 33; *Stogdon* v. *Lee*, 1891, 1 Q. B. 661), or to future covertures (*King* v. *Lucas*, 23 Ch. Div. 712; see *Steedman* v. *Poole*, 6 Ha. 193).

Restraint on anticipation.

Operation of.

A restraint may be imposed on the alienation or anticipation of property given to a woman for her separate use (*Tullett* v. *Armstrong*, 4 M. & Cr. 377; *Baggett* v. *Meux*, 1 Phil. 627). Such a restraint can never exist except as an accessory to a trust for separate use (*Stogdon* v. *Lee*, 1891, 1 Q. B. 670; *Pike* v. *Fitzgibbon*, 17 Ch. Div. 464). The principle recognized in *Pike* v. *Fitzgibbon* (*sup.*) is that a married woman can in no way dispose by way of anticipation, of property subject to such a restraint. She cannot dispose of it by making an engagement authorizing another person to intercept it; she cannot do so even by practising a fraud (*Re Glanvill*, *Ellis* v. *Johnson*, 31 Ch. Div. 539; see the form of judgment in *Scott* v. *Morley*, 20 Q. B. Div. 132; *Re Sykes*, 2 J. & H. 415; *Re Brettle*, 2 D. J. & S. 79; *Kenrick* v. *Wood*, 9 Eq. 333). The restraint may control a married woman's statutory powers of disposition (See note, *ante*, p. 295). The effect may be to prevent alienation only during a particular period (*Re Bown*, 27 Ch. Div. 411; see *Re Spencer*, *Thomas* v. *Spencer*, 30 Ch. D. 183). A restraint on anticipation will be void if it transgresses the rule against perpetuities (*Re Ridley*, *Buckton* v. *Hay*, 11 Ch. D. 645; *Cooper* v. *Laroche*, 17 Ch. D. 368; see *Herbert* v. *Webster*, 15 Ch. D. 610).

Property on which imposed.

The restraint may be imposed whether the property be real or personal, and whether it be absolute or for life (*Baggett* v. *Meux*, 1 Phil. 627). Where the restraint is attached to an absolute bequest, the question whether it is effectual does not depend on whether the gift is of an income-bearing fund or of a sum of cash—(See this distinction taken in the older cases, *Re Ellis*, 17 Eq. 409; *Re Benton*, *Smith* v. *Smith*, 19 Ch. D. 277; *Re Clarke*, 21 Ch. D. 748); but on whether the testator has shown an intention that the trustees are to keep the fund and pay only the income to the married woman (*Re Bown*, *O'Halloran* v. *King*, 27 Ch. Div. 411). Accordingly, the fund may be paid to her if such appears to be the intention (*Ib.*; see *Re Croughton*, 8 Ch. D. 460); but payment will be refused if this intention is absent (*Re Grey*, *Acason* v. *Greenwood*, 34 Ch. Div. 712; *Re Tippett and Newbold*, 37 Ch. Div. 444; see *Re Currey*, *Gibson* v. *Way*, 32 Ch. D. 361, a case of real estate).

What words will create a restraint on anticipation.

No particular form of words is necessary to impose a restraint on anticipation, the question being one of intention (*Baker* v. *Bradley*, 25 L. J. Ch. 7). As to what words will create a restraint, see *Harrop* v. *Howard* (3 Hare, 624); *Moore* v. *Moore* (1 Coll. 54); *Medley* v. *Horton* (8 Jur. 853); *Brown* v. *Bamford* (1 Phil. 620); *Field v. Evans* (15 Sim. 375); *Harnett* v. *Macdougall* (8 Beav. 187); *Steedman* v. *Poole* (6 Hare, 193); *Re Ross* (1 Sim. 190); *Sturgis* v. *Corp* (13 Ves. 190); *Parkes* v. *White* (11 Ves. 222); *Alexander* v. *Young* (6 Hare, 393): *Goulder* v. *Camm* (1 D. F. & G. 146). A life estate in land without impeachment of waste is inconsistent with a restraint on anticipation (*Clive* v. *Clive*, 7 Ch. 433).

Duration of the restraint.

A restraint on anticipation is in force only during coverture (*Barton* v. *Briscoe*, Jac. 603; *Brown* v. *Pocock*, 2 M. & K. 189; *Massey* v. *Parker*, *Id.* 174; *Woodmeston* v. *Walker*, 2 R. & M. 197; *Re Young*, 18 Beav. 199), and does not therefore prevent a disposition by will (*Re Grey*, *Acason* v. *Greenwood*, 34 Ch. Div. 714; *Re Currey*, *Gibson* v. *Way*, 56 L. T. 80). The restraint does not continue in force after a decree for judicial separation (*Munt* v. *Glynes*, 20 W. R. 823). If property be given to a woman for her separate use subject to a restraint on anticipation, the restraint will operate during any existing or subsequent coverture (*Tullett* v. *Armstrong*, 4 M. & C. 377). It may, however, be destroyed during discoverture, *e. g.*, by conversion of the property (*Wright* v. *Wright*, 2 J. & H. 647), and on its creation it may be confined to a particular coverture (*Re Gaffee*, 1 Mac. & G. 541; *Shafto* v. *Butler*, 19 W. R. 595). The restraint

does not affect arrears of a married woman's income in the hands of her trustees (*Cox* v. *Bennett*, 1891, 1 Ch. 625). *See Everett v Paabor, 65 L.J.*

3 & 4 Will. 4, c. 74, s. 78.

When a trustee has committed a breach of trust at the request of a *cestui que trust* who is a married woman restrained from anticipation, the court may, under sect. 6 of the Trustee Act, 1888, impound her interest to indemnify him (See *Ricketts* v. *Ricketts*, 64 L. T. 263; *Griffith* v. *Hughes*, 1892, W. N. 89). The court may also in certain cases dispense with the restraint, under sect. 39 of the Conv. Act, 1881 (*post*). Independently of these provisions, the court cannot dispense with the restraint, even where it would be for the benefit of the married woman (*Robinson* v. *Wheelwright*, 6 D. M. & G. 535; *Peillon* v. *Brooking*, 25 Beav. 218; *Re Glanvill, Ellis* v. *Johnson*, 31 Ch. Div. 532; see *Michell* v. *Michell*, 1891, P. 208); and even in cases of fraud (*Arnold* v. *Woodhams*, 16 Eq. 29; *Stanley* v. *Stanley*, 7 Ch. D. 589).

Dispensing with the restraint.

In the case of an executory trust for the separate use of a married woman, the court has directed a restraint on anticipation to be inserted in the settlement (*Turner* v. *Sargent*, 17 Beav. 515; *Dunnill* v. *Dunnill*, I. R. 6 Eq. 323; *Loch* v. *Bagley*, 4 Eq. 122; *Re Parrott, Walter* v. *Parrott*, 33 Ch. Div. 274). See further as to the restraint, the notes to the M. W. P. Act, 1882, *post*, pp. 325 *et seq.*

Neither a *feme sole* nor a man can be restrained from disposing by way of anticipation of any property to which she or he is entitled (*Pike* v. *Fitzgibbon*, 17 Ch. Div. 464; see *Brandon* v. *Robinson*, 18 Ves. 429, the case of a life interest). Further, a gift over upon an attempt to alien an absolute interest previously given is void as a condition, both in the case of real and personal estate (*Dugdale* v. *Dugdale*, 38 Ch. D. 180; *Re Machu*, 21 Ch. D. 838; *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285). But such a gift over will be good if it follows a life interest (*Dugdale* v. *Dugdale*, *sup.*; *Hurst* v. *Hurst*, 21 Ch. D. 278). So property may be well limited to a man until he shall become bankrupt, and after his bankruptcy over (*Brandon* v. *Robinson*, 18 Ves. 433). The effect of gifts for life determinable on bankruptcy or alienation was discussed in *Samuel* v. *Samuel* (12 Ch. D. 158; see also *Robertson* v. *Richardson* (30 Ch. D. 623); *Metcalfe* v. *Metcalfe* (1891, 3 Ch. 1); *Sartoris* v. *Sartoris* (1892, 1 Ch. 11).

Restraint or alienation in the case of men and unmarried women.

A condition in a feoffment or grant not to alien to any person is void (6 Rep. 41 b.; see *Bradley* v. *Peixoto*, Tudor's L. C. Conv. 968, 3rd ed.) A grantee may, however, be restrained from aliening to a particular person (*Large's case*, 2 Leon. 82; 3 Leon. 182; *Muschamp's case*, Bridgm. 134). So, a devise in fee on condition that the devisees should not alien, except to their sisters or their children, is good (*Doe* v. *Pearson*, 6 East. 172; *Cuthbert* v. *Purrier*, Jac. 417; *Ross* v. *Ross*, 1 Jac. & W. 158; *Re Macleay*, 18 Eq. 186; see, however, *Attwater* v. *Attwater*. 18 Beav. 330). But a condition in absolute restraint of alienation during a particular time is void (*Rosher* v. *Rosher*, 26 Ch. D. 801).

Condition restraining alienation of realty.

Acknowledgment of Deeds.

79. Every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or before [*two of the perpetual commissioners, or two special commissioners*], to be respectively appointed as hereinafter provided (*u*).

Every deed by a married woman, not executed by her as protector, to be acknowledged by her before a judge, &c.

(*u*) For the words in italics, the following have been substituted, "one of the perpetual commissioners or one special commissioner" (Conv. Act, 1882, s. 7, sub-s. (1), *post*, p. 306).

3 & 4 Will. 4, c. 74, s. 79.

Acknowledgments may be received by judge of county court.

An acknowledgment may be received by a judge of a county court in England or Wales (51 & 52 Vict. c. 43, s. 184).

A married woman and her husband may convey land for the purpose of sites for schools by deed, without any acknowledgment thereof (4 & 5 Vict. c. 38, s. 5).

As to acknowledgments being taken by persons interested, see Conv. Act, 1882, s. 7, sub-s. (3), and rules under that section (*post*, pp. 306, 308). And as to the effect of an acknowledgment, see *Tennant* v. *Welch*, 37 Ch. D. 622; *Roberts* v. *Cooper*, 1891, 2 Ch. 347, and the other cases quoted *post*, p. 308.

Examination.

The judge, &c., before receiving such acknowledgment, to examine her apart from her husband.

30. Such judge or commissioners aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and, unless she freely and voluntarily consent to such deed, shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void (*x*).

(*x*) As to the examination of a married woman, see *post*, p. 308. No person connected with the husband ought to be present when a married woman's examination as to her consent is taken (*Re Bendyshe*, 26 L. J., Chan. 814; see, however, *Re Lewis*, 24 W. R. 103). The court directed the officers to file an acknowledgment of a married woman who was deaf and dumb (*Re Harper*, 6 M. & G. 732).

Acknowledgment by deaf and dumb woman.

Court cannot order married woman to convey under this act.

The court has no jurisdiction to compel a conveyance under this act by a married woman (*Jordan* v. *Jones*, 2 Phil. 170; *Field* v. *Moore*, 7 D. M. & G. 691). In such cases, however, the married woman may usually be established to be a trustee, and a vesting order obtained under the Trustee Acts (Dart, V. & P. 6th ed. 1347; see *Billing* v. *Webb*, 1 De G. & S. 716).

But she may be declared a trustee.

Appointment of Perpetual Commissioners.

As to the appointment of perpetual commissioners for each county or place, and the making out and keeping of the lists of the commissioners and the delivery of copies.

31. For the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke or place, for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their place of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the Court of Common Pleas at Westminster with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or

reward, to the clerk of the peace for each county, riding, division, soke or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke or place, and such officer shall deliver a copy signed by him, of the list for the time being for any county, riding, division, soke or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same (*y*). 3 & 4 Will. 4, c. 74, s. 81.

(*y*) The appointment is now made by the Lord Chief Justice of England (44 & 45 Vict. c. 68, s. 26). As to entering the names on the lists, see 23 & 24 Vict. c. 127, s. 30.

Power of Perpetual Commissioners.

82. Provided always, that any person appointed commissioner for any particular county, riding, division, soke or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be (*z*). Power of perpetual commissioners not confined to any particular place.

(*z*) The commissioner who takes the acknowledgment in England need not be appointed for the county in which the acknowledgment is taken (*Blackmur* v. *Blackmur*, 3 Ch. D. 633; see formerly *Webster* to *Carline*, 4 M. & G. 27).

The commissioners for taking acknowledgments have a lien for their fees on the instruments in their possession (*Ex p. Grove*, 3 Bing. N. C. 364).

Special Commissioners.

83. In those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a judge, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster, or any judge of that court, to issue a commission specially appointing any person therein named to be commissioner to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid: provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said court or judge shall think fit (*a*). If, from being beyond seas, &c., a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

(*a*) An acknowledgment may be taken in Scotland, Ireland, or the Channel Islands, or any colony or place under the dominion of her Majesty, before any judge, court, notary public, or person lawfully authorized to administer oaths in such country, colony, or place, or before any of her Majesty's consuls or vice-consuls in any foreign parts out of her Majesty's dominions (15 & 16 Vict. c. 86, s. 22; *Re Smith*, 43 L. T. 438).

The court will not enlarge the time for returning a special commission for taking an acknowledgment, where it has been executed after the When time for returning

3 & 4 Will. 4, c. 74, s. 83.

commission will be enlarged.

return day named therein (*Re Carter*, 9 C. B. N. S. 701; see, however, *Re Grierson*, I. R. 4 C. L. 232); unless its return has been unavoidably delayed (*Re Van Ufford*, 9 C. B. N. S. 789); as by reason of the remoteness of the residences of the parties (*Re Booth*, 5 C. B. N. S. 540); or by reason of the loss of the documents in the post (*Ex p. White*, L. R. 8 C. P. 106). In the last case a duplicate commission was sent.

Variances between signatures of commissioners and names in commission.

Where the signatures of the commissioners differed from the names in the commission, affidavits of identity were required (*Re Booth*, 5 C. B. N. S. 541; *Re Price*, 17 C. B. 708; *Re Smith*, 10 C. B. N. S. 344; *Re Edsall*, L. R. 10 C. P. 472). Where the acknowledgment had been taken under peculiar circumstances before two gentlemen who were not named in the commission, the court allowed the commission to be amended by inserting their names therein (*Re Stubbs*, 4 M. & G. 609). The court allowed a commission for taking the acknowledgment of a married woman to go out with a blank for her christian name, which was unknown (*Re Appleton*, 1 C. B. 477); but when the commission is returned, the court will require strict proof of her identity (*Re Atherton*, 3 Dowl. & L. 26). So, also, where the husband's name was not known (*Re Legge*, 15 C. B. 364). It is not necessary to state in a certificate under this section the specific place at which the acknowledgment has been taken; it is enough if the deed appear to have been executed within the terms of the commission (*Ex p. Hutchinson*, 17 L. J. C. P. 111).

As to *primâ facie* evidence of the sealing of a deed acknowledged by a married woman before special commissioners appointed under this section, see *Re Sandilands* (L. R. 6 C. P. 411).

Memorandum of Acknowledgment.

When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned.

84. When a married woman shall acknowledge any such deed as aforesaid, the judge or commissioners taking such acknowledgment shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed (*b*).

(*b*) The latter part of this section, and sects. 85—88 inclusive, which referred to certificates of acknowledgments and affidavits verifying the same, have been repealed (Conv. Act, 1882, s. 7, *post*, p. 306), and have accordingly been omitted (See as to the repealed sections, Shelford's R. P. Stat. 8th ed., pp. 388 *et seq.*) The memorandum should be in the form given in rule 3 of the new rules made under sect. 7 of the Conv. Act, 1882 (*post*, p. 309), which form has been substituted for the form originally given in sect. 84. As to the effect of the memorandum, see Conv. Act, 1882, s. 7, sub-s. (2), *post*, p. 306.

Power of Court of Common Pleas defined.

Court to make orders touching the examination, &c.

89. The Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the court shall think fit, touching the mode of examination to be pursued by the commissioners to be appointed under this act, and touching the particular matters to be mentioned in such memorandums, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings, matters and

things required by this act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations (*c*). 3 & 4 Will. 4, c. 74, s. 89.

(*c*) From this section divers words have been omitted which have been repealed by 38 & 39 Vict. c. 66; 42 & 43 Vict. c. 78, s. 29, and 51 & 52 Vict. c. 57. The power of making rules as regards acknowledgments (under this section and sect. 7 of the Conv. Act, 1882) is now vested in the Rule Committee (Judicature Act, 1879, s. 22).

For the present rules as to taking examinations, and as to fees, see *post*, pp. 303 *et seq.*

Disposition of Equitable Interests in Copyholds.

90. In every case in which a husband and wife shall, either in or out of court, surrender into the hands of the lord of the manor any lands held by copy of court roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband in her right, may be entitled in such lands were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are hereby declared to be good and valid (*d*). A married woman to be separately examined on the surrender of an equitable estate in copyholds, as if such estate were legal.

(*d*) *A feme covert* who surrenders copyhold lands ought previously to be examined separately from her husband by the steward of the manor, although by special custom such examination may be made before two customary tenants (*Driver* v. *Thompson*, 4 Taunt. 293; see 1 Watk. on Cop. by Cov. 89). Special customs must be strictly observed (*Doe* v. *Shelton*, 3 Ad. & Ell. 265). It seems that a special custom may authorize a surrender by the wife alone, with the assent of the husband (*Taylor* v. *Phillips*, 1 Ves. sen. 229; 1 Watk. on Cop. 64). But a custom for the wife to dispose of her copyhold estate by surrender without the husband's assent is bad (*Stevens* v. *Tyrrell*, 2 Wils. 1; see *White* v. *Driver*, 4 Taunt. 294; *Doe* v. *Bartle*, 5 B. & Ald. 492). A surrender of a copyhold estate, after secret examination by the steward, to the use of a married woman's husband, in his presence and with his consent, testified by his immediate admittance, was valid (*Scamon* v. *Maw*, 3 Bing. 378). A surrender by the wife of a copyholder with his consent, and after having been separately examined, was held effectual to bar her right to freebench (*Wood* v. *Lambirth*, 1 Phil. 8). See further, Scriven on Copyholds, 84, 6th ed. As to whether previously to this act, a married woman could have conveyed an equitable interest in copyholds by fine, see Scriven, 46, 6th ed.

Dispensation with Husband's Concurrence.

91. Provided always, that if a husband shall in consequence of being a lunatic, idiot, or of unsound mind, and whether he Court of Common Pleas, in the case of a

3 & 4 Will. 4, c. 74, s. 91.

shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred (*f*): provided always, that this clause shall not extend to the case of a married woman where under this act the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, or of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement in lieu of her husband.

husband being lunatic, &c., may dispense with his concurrence, except where the Lord Chancellor or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

(*f*) Application for orders under this section should now be made to the Queen's Bench Division of the High Court (See Jud. Act, 1873, sects. 16 and 34; Order in Council of 16 Dec. 1880; *Re Caine*, 10 Q. B. D. 284).

This section gives no authority to the court to grant a dispensation order unless the land is actually contracted to be sold or conveyed (*Re Graham*, 13 W. R. 782; see, however, *Re Hart*, 1882, W. N. 36). Where the concurrence of the husband is dispensed with under this section, the deed need not be acknowledged (*Goodchild* v. *Dougal*, 3 Ch. D. 650). A dispensation order under this section does not deprive the husband of his common law rights in the property (*Fowke* v. *Draycott*, 29 Ch. D. 996). If an order is obtained by fraud it may be set aside (*Ex p. Cockerell*, 4 C. P. D. 39).

Husband of unsound mind.

Where the application is on the ground that the husband is of unsound mind, the affidavit must show in distinct terms, or by necessary inference, that the husband is a lunatic *at the time of the application* (*Re Turner*, 3 C. B. 166). The court refused to act upon an affidavit merely stating that the husband and wife were living apart, and that the former was in a very nervous and excitable state, and that it was believed that it would be very difficult, if not wholly impossible, to procure the execution by him of any deed, but required an affidavit showing an ineffectual application to him for the purpose (*Re Murphy*, 4 M. & G. 635; *Re Clare*, 49 L. J. C. P. 557). The affidavit as to mental condition should be by a medical man (*Re Reeves*, 24 W. R. 848; *Re Clare*, *sup.*)

Husband abroad—dispensation granted;

Orders have been made in the following cases:—Where the husband had absconded after committing an act of bankruptcy, and had never been heard of since (*Ex p. Gill*, 1 Bing. N. R. 168; see Cruise's Dig. vol. vii. p. 1, 4th ed.) Where the husband had resided abroad for more than

twenty years with another woman (*Ex p. Shirley*, 5 Bing. N. S. 226). Where the husband had absconded from home, and had since sailed for a foreign port, and had been made a bankrupt (*Ex p. Stone*, 9 Dowl. P. C. 843). Where it appeared that the parties lived together only seventeen weeks after marriage, when the husband went away, and the wife after many inquiries was not able to find him (*Anon.*, 2 Jur. 945). Where the affidavit stated that about two months previously the husband went to Australia with the intention of never returning (*Re Kelsey*, 16 C. B. 197). The court refused to dispense with the concurrence of a husband in the following cases:—Where the wife's affidavit merely stated that her husband entered a government steamer in January, 1844, and that the last the wife had heard of him was, that in January, 1845, he was on board another government steamer at New Zealand; and that she believed it was his intention never to return (*Ex p. Gilmore*, 3 C. B. 967). Where it appeared that the husband was in correspondence with the wife, and remitting sums of money for her support, however small (*Re Squires*, 17 C. B. 176). Where, in 1852, the husband went to Australia and had not been heard of since 1857, and the wife deposed to her belief that he would never return to this country, it also appearing that no application had been made to him to concur (*Re Eden*, 5 C. B. N. S. 232). Upon the mere statement that the husband, a seaman, had gone abroad, and had not been heard of for some years, and that the wife had been informed that he was dead. The affidavit must show some reasonable ground for presuming the statement to be true (*Ex p. Taylor*, 7 C. B. 1).

3 & 4 Will. 4, c. 74, s. 91.

dispensation refused.

Under the words of the section as to living apart, orders have been made in the following cases:—Where she and her husband lived separate from each other, and he had been found a lunatic by inquisition (*Ex p. Thomas*, 4 M. & Scott, 331). Where the husband left his wife, and she had never heard of him since, and his present residence was altogether unknown to her; and where, if the application were not granted, the wife would be liable to incur a forfeiture (*Ex p. Shuttleworth*, 4 M. & Scott, 332, n. (b); see *Re Hart*, 1882, W. N. 36). Where she held the property as trustee for sale, and they were living apart, and the husband contributed to her support, but refused to concur except on payment (*Re Caine*, 10 Q. B. D. 284). Where the husband had deserted the wife, but they were in communication (*Ex p. Sutcliffe*, 29 L. T. 747; see, however, *Re Horsfall*, 3 M. & G. 132). An order was refused where the wife had left her husband in consequence of his violence (*Re Price*, 13 C. B. N. S. 286). In addition to an affidavit that the parties were living apart, the court has required a further affidavit that the husband has refused to concur (*Ex p. Trenery*, 1 C. B. N. S. 187), and that he contributes nothing to the wife's support (*Ex p. Fish*, 9 C. B. N. S. 715; *Re Carburton*, 16 W. R. 84; *Re Fletcher*, 17 W. R. 319; *Ex p. Robinson*, L. R. 4 C. P. 205). An order having been made upon the usual affidavit that the husband and wife were living apart by mutual consent, the court refused to rescind the order after it had been acted upon, and the rights of third parties had intervened, upon the application of the husband, who swore that though he resided apart from his wife (upon an allowance made to him out of her separate estate) he occasionally visited and slept with her (*Re Rogers*, L. R. 1 C. P. 47).

Husband and wife separated.

In cases not within the M. W. P. Act, 1882, where there are no trustees of separate property, the husband is trustee of the legal estate (*Bennet* v. *Davis*, 2 P. Wms. 316). Orders under this section to enable a married woman to convey the legal estate in her separate property have been made in the following cases:—Where the husband was a minor (*Re Haigh*, 2 C. B. N. S. 198). Where he had absconded, and had not been heard of for eighteen years, although it also appeared that she had in the meantime married again (*Ex p. Yarnall*, 17 C. B. 189). Where the husband lived separate from his wife and had refused to execute the deed (*Re Perrin*, 14 C. B. 420; *Re Woodcock*, 1 C. B. 437). As to conveyance of separate property by a married woman when living apart by a sentence of judicial separation without alimony, see *Ex p. Andrews* (19 C. B. N. S. 371). As to the equitable interest in a married woman's separate property, see *ante*, p. 297.

Wife's separate property.

3 & 4 Will. 4, c. 74, s. 91.

Affidavits.

The court will not dispense with the affidavit of the married woman herself (*Ex p. Bruce*, 9 Dowl. P. C. 840), and if speechless, she must be examined (*Re Williams*, 1 M. & G. 881). The affidavit is sufficient if sworn (where the party is residing abroad) before an officer, whom the certificate of a notary public certifies to be a person empowered by law to take affidavits (*Re Schiff*, 1 Dowl. & L. 911). The affidavit must describe the deponent as "the wife of, &c.," even though circumstances are disclosed showing a well-grounded belief that the husband is dead (*Ex p. Sparrow*, 12 C. B. 334; *Re Noy*, 7 Scott, N. R. 434; *Re Anderson*, 2 C. B. N. S. 811). The affidavit must contain the addition or description of the husband (*Re Gardner*, 1 C. B. N. S. 215; see also *Re Firth*, 1872, W. N. 220).

Form of rule to dispense with husband's concurrence.

The following form of rule has been made to dispense with the husband's concurrence:—"It is ordered that the said Ann Tanner Duffill be at liberty, by deed or surrender, to dispose of, release, surrender, or extinguish all her estate and interest of and in the hereditaments and premises in the said affidavit mentioned, to such person or persons as she may think fit, without the concurrence of her said husband, it appearing to the court, by the said affidavit, that the said Henry Holland Duffill is living apart from his said wife by sentence of divorce" (*Ex p. Duffill*, 5 M. & G. 378).

Final proviso.

See, in connection with the final proviso in the above section, sects. 24, 33, and *Re Wainwright* (1 Phil. 258).

XVIII. Ireland.

Ireland.

92. This act shall not extend to Ireland, except where the same is expressly mentioned (*g*).

(*g*) By 4 & 5 Will. 4, c. 92, the provisions of this act have been extended to Ireland, with the omission of sects. 4, 5 and 6 (*ante*, pp. 246, 247, 248), relating to lands held by ancient demesne, and sects. 50—54 (*ante*, pp. 277—280), 66, 76, 90, relating to copyholds (see *ante*, pp. 286, 291, 303). The other variations between the two statutes have been already noticed (See *ante*, pp. 240, 253, 256, 270, 288, 291, 292).

The clauses in 4 & 5 Will. 4, c. 92, with respect to the disposition of estates tail under bankruptcies, are extended to proceedings under the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58, s. 50).

This act applies to lands locally situate in the town of Berwick-upon-Tweed (6 & 7 Will. 4, c. 103, s. 6).

Section 7 of the Conveyancing Act, 1882, is as follows:—

45 & 46 Vict. c. 39, s. 7.

Acknowledgment of deeds by married women.

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this act, be substituted for the words "two of the perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners, or one special commissioner"; and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this act, be substituted for the word "persons" the word "person," and for the word "commissioners" the words "a commissioner"; and all other provisions of those acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

(2.) Where the memorandum of acknowledgment by a married

woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged. 45 & 46 Vict. c. 39, s. 7.

(3.) A deed acknowledged before or after the commencement of this act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a county court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise in the transaction giving occasion for the acknowledgment; and general rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such rule shall make invalid any acknowledgment; and those rules shall, as regards England, be deemed rules of court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed rules of court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this act, to take effect on or after the commencement of this act. 39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68. 40 & 41 Vict. c. 57.

(4.) The enactments described in the schedule to this act are hereby repealed.

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this act.

(6) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this act shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this act shall be delivered to any person

45 & 46 Vict. c. 39, s. 7.

applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

Schedule.

Sect. 7 (4).

Repeals.

3 & 4 Will. 4, c. 74... in part.	The Fines and Recoveries Act - in part; namely,— Section eighty-four, from and including the words "and the same judge," to the end of that section. Sections eighty-five to eighty-eight, inclusive.
4 & 5 Will. 4, c. 92... in part.	The Fines and Recoveries (Ireland) Act - - - in part; namely,— Section seventy-five, from and including the words "and the same judge," to the end of that section. Sections seventy-six to seventy-nine, inclusive.
17 & 18 Vict. c. 75 ...	An Act to remove doubts concerning the due acknowledgments of deeds by married women in certain cases.
41 & 42 Vict. c. 23 ...	The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878.

Rules as to acknowledgments.

Under the above section and sect. 89 of 3 & 4 Will. 4, c. 74, the following rules have been made:—

Rules under the Act for the Abolition of Fines and Recoveries, and Section 7 of the Conveyancing Act, 1882.

1. No person authorised or appointed under the act 3 & 4 Will. 4, c. 74 (in these rules referred to as the Fines and Recoveries Act) to take the acknowledgments of deeds by married women shall take any such acknowledgment if he is interested or concerned either as a party or as solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.

2. Before a commissioner shall receive an acknowledgment, he shall inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative and the commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment (*a*); but if it shall appear to him that it is intended that provision is to be made for the married woman, then the commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him; or if such provision shall not have been actually made before, then the commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot, or at the back thereof.

(*a*) If the married woman answers in the affirmative, the purchase-money becomes the absolute property of the husband, even though it is never reduced into possession by him, but remains outstanding for any purpose (*Tennant* v. *Welch*, 37 Ch. D. 622). The examination of a married woman was taken into consideration on a question affecting her equity to a settlement (*Roberts* v. *Cooper*, 1891, 2 Ch. 335).

The following cases were decided on the old rule for which the above has been substituted, viz., *Re Foster* (7 C. B. 120); *Ex parte Webber* (5 C. B. 179); *Re Dowling* (18 C. B. N. S. 223); *Re Dixon* (4 C. B. 631); *Re Dallas* (10 C. B. N. S. 346). See the statement of these cases in Shelf. R. P. Stat. 8th ed. 401.

Rules.

3. The memorandum to be indorsed on or written at the foot or in the margin of a deed acknowledged by a married woman shall be in the following form in lieu of the form set forth in section 84 of the Fines and Recoveries Act:

This deed was this day produced before me and acknowledged by therein named to be her act and deed [*or* their several acts and deeds] previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or* their] knowledge of the contents of the said deed and her [*or* their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her.

4. When an acknowledgment is taken by any person other than a judge, the following declaration shall be added to the memorandum of acknowledgment:

And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment.

5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memorandum purporting to be signed by a person authorised to take the acknowledgment:—

(Signed) A. B.
A Judge of the High Court of Justice in England,
or A Judge of the County Court of ,
or A perpetual Commissioner for taking acknowledgments of deeds by married women,
or The special Commissioner appointed to take the aforesaid acknowledgment.

But this rule is not to derogate from the effect of any memorandum purporting to be signed by a person authorised to take the acknowledgment, though not signed in accordance with any of the above forms.

6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.

7. Every commission appointing a special commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of acknowledgments of deeds by married women, and shall be there filed. An index shall be prepared and kept in the said office, giving the names and addresses of the married women named in all such commissions filed in the said office after the 31st December, 1882. The same rules shall apply to searches in the index so to be prepared as to searches in the other indexes and registers kept in the Central Office.

8. The costs to be allowed to solicitors in respect of the matters hereinafter mentioned, when not otherwise regulated by the general orders in force for the time being under the Solicitors' Remuneration Act, 1881, or by special agreement, shall be as follows; anything in the Rules of the Supreme Court as to costs, dated the 12th August, 1875, to the contrary notwithstanding:—

Charges under the Act 3 *&* 4 *Will.* 4, *c.* 74 (*The Fines and Recoveries Act*).

	£	*s.*	*d.*
For the endorsements on deeds required by the Fines and Recoveries Act, to be entered on the court rolls of manors of the memorandum of production and memorandum of entry on court rolls, to be signed by the lord steward or deputy steward, each indorsement of memorandum 5*s.*, together - - - - - - - - - -	0	10	0
For the entries on the court rolls of deeds and the indorsements thereon, at per folio of 72 words - - - -	0	0	6

Rules.

	£	s.	d.
For taking the consent of each protector of settlement of lands	0	13	4
For taking the surrender by each tenant in tail of lands	0	13	4
For entries of such surrenders or the memorandums thereof in the court rolls, at per folio of 72 words	0	0	6

9. The following rules and orders are hereby repealed, except as to certificates not lodged before the 1st January, 1883, of acknowledgments by married women of deeds executed before the 1st January, 1883, and the affidavits relating thereto:—

The General Rules of the Court of Common Pleas, Hil. Term, 1834.

The General Rules of the Court of Common Pleas, Trin. Term, 1834.

The General Order of the Court of Common Pleas, dated the 24th November, 1862.

The General Order of the Court of Common Pleas, dated the 13th January, 1863.

10. These rules shall take effect from and after the 31st December, 1882.

For the old rules and the practice cases decided upon them, see Shelf. R. Stat. 8th ed. 400 *et seq.*

Order as to court fees.

The following order as to court fees was made in January, 1883.

ORDER AS TO COURT FEES.

1. The following portion of the schedule to the order as to Court Fees made on the 28th October, 1875, is hereby repealed, that is to say:

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
On taking acknowledgment of a deed by a married woman	1	0	0	6	0	0

And instead thereof the following fees shall henceforth be chargeable in respect of the matters hereinafter mentioned (namely):

Fees under the Act 3 & 4 Will. 4, c. 74 (the Fines and Recoveries Act).

	£	s.	d.
For taking the acknowledgment of a married woman by a judge of the High Court of Justice	1	0	0
To a perpetual commissioner for taking the acknowledgment of a married woman when not required to go further than a mile from his residence	0	13	4
To a perpetual commissioner when required to go more than one mile, but not more than three miles, besides his reasonable travelling expenses	1	1	0
To a perpetual commissioner where the distance exceeds three miles, besides his reasonable travelling expenses	2	2	0
Where more than one married woman at the same time acknowledges the same deed respecting the same property, these fees are to be taken for the first acknowledgment only, and the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one half of the original fees, and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property.			
To the clerk of the peace or his deputy for every search	0	1	0
To the same for every copy of a list of commissioners, provided such list shall not exceed the number of 100 names	0	5	0
To the same for every further complete number of 50 names, an additional	0	2	6
For every official copy of a list of commissioners, provided such list shall not exceed the number of 100 names	0	5	0

	£	s.	d.
For every further complete number of 50 names, additional -	0	2	6
For preparing every special commission - - - - -	1	0	0
For examining the certificate and affidavit, and filing, and indexing the same - - - - - - - - -	0	5	0
Upon the return of a special commission to the central office -	0	5	0
For every search in the registry of certificates of acknowledgments of deeds by married women - - - - -	0	1	0
For enrolling recognizances, deeds, and other instruments, per folio of 72 words, including the certificate of enrolment endorsed on the instrument, but not including maps, plans, and drawings, which are to be charged at their actual cost -	0	1	0
For endorsing a certificate of enrolment on a duplicate of any enrolled instrument, for each folio of the instrument if it does not exceed 24 folios - - - - - - - -	0	0	6
For the like certificate if the instrument exceeds 24 folios -	0	12	0
For office copies of enrolled instruments, per folio of 72 words	0	0	6
For examining copies of enrolled instruments and marking them as office copies, per folio of 72 words - - -	0	0	2

Order as to Fees.

MARRIAGE SETTLEMENTS BY INFANTS.

18 & 19 Victoriæ, cap. 43.

An Act to enable Infants, with the Approbation of the Court of Chancery, to make binding Settlements of their Real and Personal Estate on Marriage.

[2nd July, 1855.]

18 & 19 Vict. c. 43, s. 1.

Whereas great inconveniences and disadvantages arise in consequence of persons who marry during minority being incapable of making binding settlements of their property (*a*); for remedy whereof it is enacted as follows:

Infants may, with the approbation of the Court of Chancery, make valid settlements or contracts for settlements of their real and personal estate upon marriage.

1. From and after the passing of this act it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant (*b*).

Law independently of the act.

(*a*) Independently of this act a male infant could not enter into a binding contract to settle either his own real estate (*Trowell* v. *Shenton*, 8 Ch. Div. 325), or his own personal estate (*Nelson* v. *Stocker*, 4 De G. & J. 458), or his wife's personal estate (*Kingsman* v. *Kingsman*, 6 Q. B. Div. 122). But he could, when adult, confirm such contract (*Trowell* v. *Shenton*, *sup.*), or repudiate it within a reasonable time (*Carter* v. *Silber*, 1891, 3 Ch. 553). The reasonableness of the time depends on the circumstances of each case (*Ib.* 563; see S.C., 1892, 2 Ch. 285).

Male infant.

Female infant.

Nor, independently of this act, could a female infant enter into a binding contract to settle her non-separate property whether real (*Milner* v. *Harewood*, 18 Ves. 275; see *Mills* v. *Fox*, 37 Ch. D. 162), or personal (*Cunningham* v. *Antrobus*, 16 Sim. 436). She might, however, when adult, confirm such contract (See as to real estate, *Cooke* v. *Cooke*, 38 Ch. D. 202; *Field* v. *Moore*, 7 D. M. & G. 691; *Barrow* v. *Barrow*, 4 K. & J. 409; and as to personal estate, *Davies* v. *Davies*, 9 Eq. 468).

Further, if the settlement contained a covenant by an adult husband to settle his wife's property, such covenant bound the wife's personal estate

to the extent of the husband's interest therein (*Fisher* v. *Shirley*, 43 Ch. D. 290); and not only bound his interest in her real estate but prevented him from concurring with her in defeating the settlement (*Pimm* v. *Insall*, 1 Mac. & G. 449; *Ex p. Blake*, 16 Beav. 463; *Sharpe* v. *Foy*, 4 Ch. 35). 18 & 19 Vict. c. 43, s. 1.

Nor, independently of this act, could a female infant enter into a binding contract to settle her separate estate (*Simpson* v. *Jones*, 2 R. & M. 365). But she might, when adult, confirm such contract (*Smith* v. *Lucas*, 18 Ch. D. 531), *e.g.*, by appointing new trustees (*Merryweather* v. *Jones*, 4 Giff. 509; see *Haywood* v. *Tidy*, 63 L. T. 679).

Infant's contract voidable.

An infant's contract to make a settlement has been held to be voidable, not void (*Smith* v. *Lucas*, 18 Ch. D. 531; *Cooke* v. *Cooke*, 38 Ch. D. 209; *Duncan* v. *Dixon*, 44 Ch. D. 211); and has also been held not to fall within 37 & 38 Vict. c. 62 (*Duncan* v. *Dixon*, *sup.*)

Where a person elects to avoid a settlement made by him or her when an infant, any interest to which he or she is entitled in property brought into settlement by the other person may be impounded to make good the loss to the other beneficiaries (*Carter* v. *Silber*, 1891, 3 Ch. 553; *Hamilton* v. *Hamilton*, 1892, 1 Ch. 396). In the case, however, of a woman, property subject to a restraint on anticipation cannot be impounded (*Hamilton* v. *Hamilton*, *sup.*)

(*b*) The act applies to Ireland (23 & 24 Vict. c. 83).

Jurisdiction under the act.

The court has no jurisdiction to compel an infant ward to make a settlement of his own property (*Leigh* v. *Leigh*, 40 Ch. Div. 290; *Buckmaster* v. *Buckmaster*, 35 Ch. Div. 21; *Seaton* v. *Seaton*, 13 App. Cas. 80; as to an undertaking given by a suitor of a ward, see *Bolton* v. *Bolton*, 1891, 3 Ch. 270). In the case of infants not wards who marry after the age at which they are capable of contracting marriage, the court has no jurisdiction to settle their property (*Re Potter*, 7 Eq. 484). The court may, however, compel a representation to be made good on the faith of which a settlement of an infant's property has been sanctioned under this act (*Mills* v. *Fox*. 37 Ch. D. 153). An application under the act does not make the infant a ward of court (*Re Dalton*, 6 D. M. & G. 201); and the court will not inquire into the propriety of the marriage (*Ib.*; but see *Re Strong*, 26 L. J. Ch. 64).

Post-nuptial settlements.

In *Re Sampson and Wall* (25 Ch. Div. 482) the Court of Appeal decided that notwithstanding the words "upon or in contemplation of his or her marriage," the act enabled a settlement to be made after the marriage had taken place; but the House of Lords declined to express an opinion on the point (*Seaton* v. *Seaton*, 13 App. Cas. 61); and the decision would not authorize a settlement where a considerable interval had elapsed since the marriage (*Leigh* v. *Leigh*, 40 Ch. Div. 295). Where an infant had married before the age mentioned in sect. 4, a post-nuptial settlement was approved after she had attained that age (*Re Philips*, 34 Ch. D. 467; but see *Leigh* v. *Leigh*, *sup.*) It was said by *Stuart*, V.-C., that the court had no jurisdiction under the act to approve a settlement originally made without its concurrence (*Re Fuller*, 10th February, 1860; Morgan, 213, 5th ed.)

Effect of the act.

The disability of infancy is the only disability with which the act deals. It does not affect the disability of coverture (*Seaton* v. *Seaton*, 13 App. Cas. 70, 79). Nor does it enable an infant to execute during infancy a power conferred upon her by a settlement approved by the court (*Re Armit*, I. R. 5 Eq. 352; see, however, as to the decision in this case, *Re D'Angibau*, *Andrews* v. *Andrews*, 15 Ch. Div. 228). An order under this section which has not been acted upon will not prevent the transfer of the fund to the infant after twenty-one (*Sams* v. *Cronin*, 22 W. R. 204).

The power of making a settlement given by sect. 1 is not limited to a settlement upon the infant's husband and children (*Re Scott*, *Scott* v. *Hanbury*, 1891, 1 Ch. 298). Where a settlement made in execution of a power of appointment was sanctioned by the court, and the objects failed, there was a resulting trust for the appointor (*Ib.*) A legacy bequeathed to the wife after marriage was held to be "property in expectancy" within this section, and capable of being bound by the settlement (*Re Johnson*, *Moore* v. *Johnson*, 1891, 3 Ch. 48).

18 & 19 Vict. c. 43, s. 2.

In case infant die under age, appointment, &c., to be void.

2. Provided always, that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void (*c*).

(*c*) The section is limited to tenants in tail (*Re Scott, Scott* v. *Hanbury*, 1891, 1 Ch. 298).

The sanction of the Court of Chancery to be given upon petition.

3. The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given, upon petition presented by the infant or his or her guardian in a summary way, without the institution of a suit (*d*); and if there be no guardian, the court may require a guardian to be appointed or not, as it shall think fit (*e*); and the court also may, if it shall think fit, require that any person interested or appearing to be interested in the property should be served with notice of such petition.

(*d*) Applications under the act, which were formerly by petition (*Pearetk* v. *Marriott*, 1866, W. N. p. 48), are now by summons (R. S. C. Ord. 55, r. 2 (10)).

Ord. 55, r. 26, provides that applications to obtain the sanction of the court to infants making settlements on marriage under the act of 18 & 19 Vict. c. 43, evidence is to be produced to show—(a) the age of the infant; (b) whether the infant has any parents or guardians; (c) with whom or under whose care the infant is living, and if the infant has no parents or guardians, what near relations the infant has; (d) the rank and position in life of the infant and parents; (e) what the infant's property and fortune consist of; (f) the age, rank and position in life of the person to whom the infant is about to be married; (g) what property, fortune, and income such person has; (h) the fitness of the proposed trustees and their consent to act. The proposals for the settlement of the property of the infant and of the person to whom such infant is proposed to be married are to be submitted to the judge.

The settlement.

As to the clauses which will be inserted in the settlement, see *Re Williams* (8 W. R. 678); *Re M'Clintock* (10 Ir. Ch. R. N. S. 469); *Ex p. Smith* (22 W. R. 294); *Rudge* v. *Winnall* (11 Beav. 98). A covenant to settle after-acquired property may be inserted (*Re Johnson, Moore* v. *Johnson*, 1891, 3 Ch. 48). As to the form of settlement where the marriage was in contempt of court, see *Re Sampson and Wall* (25 Ch. Div. 482). The costs of the settlement may be paid out of the corpus of the fund (*De Stacpoole* v. *De Stacpoole*, 37 Ch. D. 139).

(*e*) As to the appointment of guardians, see Dan. Ch. Pr., and note in Annual Practice to R. S. C. Ord. 16, r. 16.

Not to apply to males under twenty or females under seventeen years of age.

4. Provided always, that nothing in this act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years (*f*).

(*f*) Where a female infant married under seventeen a settlement was approved after she attained that age (*Re Phillips*, 34 Ch. D. 467; but see *Leigh* v. *Leigh*, 40 Ch. Div. 297).

ALIENATION OF THE INTERESTS OF MARRIED WOMEN IN PERSONAL ESTATE.

20 & 21 Victoriæ, cap. 57.

An Act to enable Married Women to dispose of Reversionary Interests in Personal Estate.

[25th August, 1857.]

Be it enacted as follows:

20 & 21 Vict. c. 57, s. 1.

1. After the thirty-first day of December, one thousand eight hundred and fifty-seven, it shall be lawful for every married woman by deed to dispose of (*a*) every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever, to which she shall be entitled under any instrument made after the said thirty-first day of December, one thousand eight hundred and fifty-seven (*b*) (except such a settlement as after mentioned), and also to release or extinguish any power (*c*) which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a feme sole, and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will or instrument, by which she shall be restrained from alienating or affecting the same.

Married women may dispose of reversionary interests in personal estate, and release powers over such estate, and also their rights to a settlement out of such estate in possession.

(*a*) For a married woman's power of disposition over reversionary interests in personalty settled to her separate use, see the note to 3 & 4 Will. 4, c. 74, s. 78, *ante*, p. 297. As regards her reversionary interests in personalty not settled to her separate use, it was well established before 20 & 21 Vict. c. 57, that a husband could not assign or release his wife's reversionary choses in action so as to bind her surviving, and the fact of her joining in the assignment made no difference (*Purdew* v. *Jackson*, 1 Russ. 1; *Cresswell* v. *Dewell*, 4 Giff. 460; see *Winter* v. *Easum*, 2 D. J. & S. 272; *Bolitho* v. *Hillyar*, 34 Beav. 180; *Rogers* v. *Ancaster*, 14 Beav. 445; *Hore* v. *Becher*, 12 Sim. 465; *Fitzgerald* v. *Fitzgerald*, L. R. 2 P. C. 87). Nor could a married woman by election part with her reversionary choses in action (*Williams* v. *Mayne*, I. R. 1 Eq. 519). A husband and wife could not effectually dispose of the life interest of the wife in a fund not

Married woman unable to dispose of reversionary choses in action not settled to her separate use, except under 20 & 21 Vict. c. 57.

20 & 21 Vict. c. 57, s. 1.

settled to her separate use beyond the duration of the coverture (*Stiffe* v. *Everitt*, 1 M. & C. 37; *Re Godfrey*, I. R. 1 Eq. 533). A husband and son, having surrendered and released their respective interests to the wife, for the express purpose of giving her a present absolute interest in a fund, and thereby enabling her to assign it to the son, the court refused to establish an equitable merger to defeat its own practice in the protection of married women (*Whittle* v. *Henning*, 2 Phill. C. C. 731; *Story* v. *Tonge*, 7 Beav. 91; *Hanchett* v. *Briscoe*, 22 Beav. 496; see however 14 Sim. 592—599; *Bishop* v. *Colebrooke*, 16 Sim. 39).

Cases under section.

An assignment under this act ought not to be regarded as that of the husband and wife according to their respective interests (*Re Batchelor*, *Sloper* v. *Oliver*, 16 Eq. 485). Where the property assigned consisted of a wife's reversionary interest under a will, the assignment prevented the executors from exercising any right of retainer over the interest assigned in respect of a debt due from the husband to the testator (*Re Batchelor*, *sup.*; compare the effect on such retainer of the wife's equity to a settlement: *Re Briant*, *Poulter* v. *Shackel*, 39 Ch. D. 471). A policy of insurance effected by a married woman in her own name may be disposed of under this act (*Witherby* v. *Rackham*, 1891, W. N. 57).

If the act 18 & 19 Vict. c. 43 (*ante*, p. 312), applies to post-nuptial settlements, it does not enable a married woman to evade the formalities of this act (*Seaton* v. *Seaton*, 13 App. Cas. 70).

An acknowledgment under this act by a married woman of an assignment was taken into consideration even where the act did not apply (*Roberts* v. *Cooper*, 1891, 2 Ch. 335).

(*b*) An appointment of a reversionary interest in personalty by deed after 1857, under a special power in a deed dated before 1857, does not bring the interest within this act, even if the prior life interest is assigned at the same time (*Re Butler*, I. R. 3 Eq. 138).

Powers.

(*c*) As to the various kinds of powers, their suspension and extinction, and as to the execution of powers by married women, see the note to 3 & 4 Will. 4, c. 74, s. 78, *ante*, p. 296.

Deeds to be acknowledged by married women in the manner required by 3 & 4 Will. 4, c. 74, for disposing of interests in or powers over land in England or Wales;

In Ireland, as by 4 & 5 Will. 4, c. 92.

2. Every deed to be executed in England or Wales by a married woman for any of the purposes of this act shall be acknowledged by her, and be otherwise perfected, in the manner by the act 3 & 4 Will. 4, c. 74, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and every deed to be executed in Ireland by a married woman for any of the purposes of the act shall be acknowledged by her and be otherwise perfected in the manner by the act 4 & 5 Will. 4, c. 92, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land: and all and singular the clauses and provisions in the said acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said acts mentioned shall extend and be applicable to such interests in personal estate, and to such powers as may be disposed of, released, or extinguished by virtue of this act, as fully and effectually as if such interests or powers were interests in or powers over land (*d*).

(*d*) An order was made under this act, enabling a married woman, without the concurrence of her husband, to dispose of a reversionary interest in government stock (*Re Rogers*, L. R. 1 C. P. 47). If such an order be obtained by fraud or suppression of facts it will be set aside (*Ex p. Cockerell*, 4 C. P. D. 39).

3. Provided always, that the powers of disposition given to a married woman by this act shall not interfere with any power which independently of this act may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition.

20 & 21 Vict. c. 57, s. 3.

The powers of disposition given by this act not to interfere with any other powers.

4. Provided always, that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage (*e*).

Act not to extend to settlements of married women upon marriage.

(*e*) An agreement in contemplation of marriage was executed by the husband and wife to settle a money fund of the wife's for her separate use —to return to the husband if he should survive. The court considered that the wife was to have the absolute interest in the event of her surviving, and that the case fell within the exception contained in this section (*Clarke* v. *Green*, 2 H. & M. 474).

5. This act shall not extend to Scotland.

Not to extend to Scotland.

MARRIED WOMEN'S PROPERTY.

33 & 34 Victoriæ, cap. 93.

An Act to amend the Law relating to the Property of Married Women. [9th August, 1870.]

33 & 34 Vict. c. 93, s. 1.

Whereas it is desirable to amend the law of property and contract with respect to married women:

Be it enacted as follows:

1. The wages and earnings of any married woman acquired or gained by her after the passing of this act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property (*a*).

Earnings of married women to be deemed their own property.

This act has been repealed, saving all acts done and rights or liabilities acquired thereunder (M. W. P. Act, 1882, s. 22, *post*, p. 338).

(*a*) Under the old law a husband might in his own name recover his

33 & 34 Vict. c. 93, s. 1.

Old law.

wife's wages (*Dengate* v. *Gardiner*, 4 M. & W. 7), or the profits of a business carried on by her (*Savile* v. *Sweeny*, 4 B. & Ad. 524). And payment to her of her own earnings was not good, unless she had her husband's authority to receive them (*Offley* v. *Clay*, 2 M. & G. 172).

As to a married woman's separate trading before this act under her husband's agreement, see 2 Bright's Husband and Wife, 292; and under the custom of the city of London, see 2 Bright, 76.

Cases under the act.

The question whether a trade is carried on by a married woman separately from her husband, becomes of importance under this section. The question is one of fact, to be determined on the circumstances of the case (*Petty* v. *Anderson*, 3 Bing. 170; *Smallpiece* v. *Dawes*, 7 C. & P. 40; *Lovell* v. *Newton*, 4 C. P. D. 7; *Laporte* v. *Cortick*, 31 L. T. 434; 23 W. R. 131; *Whittaker* v. *Whittaker*, 46 L. T. 802; 30 W. R. 787; *Re Dearmer*, *James* v. *Dearmer*, 53 L. T. 905). All the stock-in-trade and property connected with the trade is protected by this section, as well as the earnings (*Ashworth* v. *Outram*, 5 Ch. Div. 923). The earnings are equitable assets (*Re Poole*, 6 Ch. D. 739). This section does not protect the earnings from an unlawful industry (*Mason* v. *Mitchell*, 34 L. J. Ex. 68). As to the liability of the husband in respect of a separate trade of his wife, see *Re Shepherd* (39 L. T. 652). And as to a married woman's bankruptcy, see the note to sect. 12, *post*, p. 322, and sect. 1, sub-s. 5 of the M. W. P. Act, 1882, *post*, p. 325.

By 20 & 21 Vict. c. 85, s. 21, a wife deserted by her husband may apply to a police magistrate or justices in petty sessions for an order to protect any money or property she may acquire by her own lawful industry; and by virtue of the order such earnings and property will belong to her as if she were a *feme sole*.

Deposits in savings banks by a married woman to be deemed her separate property.

2. Notwithstanding any provision to the contrary in the act of the tenth year of George the Fourth, chapter twenty-four, enabling the Commissioners for the Reduction of the National Debt to grant life annuities and annuities for terms of years, or in the acts relating to savings banks and post office savings banks, any deposit hereafter made and any annuity granted by the said commissioners under any of the said acts in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, shall be deemed to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman; provided that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this act, order such deposit or annuity or any part thereof to be paid to the husband.

Proviso.

As to a married woman's property in the funds.

3. Any married woman, or any woman about to be married, may apply to the Governor and Company of the Bank of England, or to the Governor and Company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds, and not being less than twenty pounds, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to or made to stand in the books of the governor and company to whom such application is made in the name or intended name of the woman as a married woman entitled to her separate use, and

on such sum being entered in the books of the said governor and company accordingly, the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman; provided that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband (*b*). 33 & 34 Vict. c. 93, s. 3.

(*b*) Orders were made under this section in *Re Bartholomew* (23 L. T. 433); *Re Butlin* (*Ib.* 523); *Re Tanner* (1874, W. N. 198); see also *Howard* v. *Bank of England* (19 Eq. 295).

4. Any married woman, or any woman about to be married, may apply in writing to the directors or managers of any incorporated or joint stock company that any fully paid up shares, or any debenture or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be transferred and the dividends and profits paid as if she were an unmarried woman; provided that if any such investment as last mentioned is made by a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this act, order such investment and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband (*c*). As to a married woman's property in a joint stock company.

(*c*) As to the law before this act, see *Re Matthewman* (3 Eq. 788); *Butler* v. *Cumpston* (7 Eq. 16); *Dalton* v. *Midland R. Co.* (13 C. B. 474); and as to this section, see *R.* v. *Carnatic R. Co.* (L. R. 8 Q. B. 299).

5. Any married woman, or any woman about to be married, may apply in writing to the committee of management of any industrial and provident society, or to the trustees of any friendly society, benefit building society, or loan society, duly registered, certified, or enrolled under the acts relating to such societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the society in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right, or claim shall be deemed to be the separate property of such woman, and shall be transferable and As to a married woman's property in a society.

33 & 34 Vict. c. 93, s. 5.

payable with all dividends and profits thereon as if she were an unmarried woman; provided that if any such share, benefit, debenture, right, or claim has been obtained by a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this act, order the same and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

Deposit of moneys in fraud of creditors invalid.

6. Nothing hereinbefore contained in reference to moneys deposited in or annuities granted by savings banks or moneys invested in the funds or in shares or stock of any company shall as against creditors of the husband give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if this act had not passed.

Personal property not exceeding 200*l.* coming to a married woman to be her own.

7. Where any woman married after the passing of this act shall, during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same (*d*).

(*d*) The words "become entitled" include the case of a legacy subject to a life interest falling into possession (*Lane* v. *Oakes*, 30 L. T. 726; 22 W. R. 709). The limit of 200*l.* applies only to sums given by deed or will (*Re Voss, King* v. *Voss*, 13 Ch. D. 504).

Before this act, a legacy left to a married woman in general terms must have been paid to her husband (*Palmer* v. *Trevor*, 1 Vern. 261). Where, however, she had obtained a protection order under 20 & 21 Vict. c. 85, s. 25, payment to herself was ordered (*Re Kingsley*, 6 W. R. 849; *Re Rainsdon*, 4 Drew. 446).

The inaccuracy of the marginal note to this section should be observed. The marginal note forms no part of the statute itself (*Claydon* v. *Green*, L. R. 3 C. P. 511; *Re Venour, Venour* v. *Sellon*, 2 Ch. D. 522; *A. G.* v. *G. E. R. Co.*, 11 Ch. Div. 461).

Freehold property coming to a married woman, rents and profits only to be her own.

8. Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same (*e*).

(*e*) This section does not enable a married woman to convey descended freeholds by an unacknowledged deed (*Johnson* v. *Johnson*, 35 Ch. D. 345; see *Re Voss, King* v. *Voss*, 13 Ch. D. 504).

[*Sect.* 9 *contained provisions for settling questions between husband and wife. See now sect.* 17 *of the M. W. P. Act*, 1882.]

Married woman may effect policy of insurance.

10. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face

of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman. 33 & 34 Vict. c. 93, s. 10.

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the civil bill court of the division of the county in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid (*f*). As to insurance of a husband for benefit of his wife.

(*f*) Before this act it was held that a wife had an insurable interest in the life of her husband, but that a husband had not such an interest in the life of his wife (*Reed* v. *Royal Exchange Co.*, Peake's Add. Cases, 70). Old law.

As to policies effected since 1st January, 1883, see the further provisions of sect. 11 of M. W. P. Act, 1882 (*post*, p. 332). The following cases have been decided under the above section:

Where the husband after the passing of this act substituted for a policy he already had a policy expressed to be for the benefit of his wife, the latter policy was held within this section (*Holt* v. *Everall*, 2 Ch. Div. 266). On an application under this section to appoint trustees there is no jurisdiction to declare the rights of the parties (*Re Adams*, 23 Ch. D. 525; but see *Re Mellor*, 6 Ch. D. 127). A policy for the benefit of wife and children is an executed, not an executory, trust (*Ib.*) Where a policy was expressed to be for the benefit of wife and children, it was said that the policy should be read in connection with this section, and should be construed as giving the wife a life interest, with remainder to the children (*Re Adams, sup.*) It has since been held that under a policy so worded the wife and children took as joint tenants (*Re Seyton, Seyton* v. *Satterthwaite*, 34 Ch. D. 511; *Re Davies*, 1892, 1 Ch. 90). Where the trust in the policy was for the wife and children as the husband should appoint, but no appointment was made, the wife and children took in equal shares (*Re Edwards*, 41 L. T. 434). When the husband became of unsound mind, trustees were appointed and authorized to surrender the policy for a fully paid one of less amount (*Schultze* v. *Schultze*, 56 L. T. 231). A single trustee will not be appointed (*Ib.; Re Howson*, 1885, W. N. 213). As to a policy effected by a husband for the benefit of his wife who was subsequently convicted of murdering him, see *Cleaver* v. *Mutual Association* (1892, 1 Q. B. 147). As to the title of the petition, see *Re Soutar* (26 Ch. D. 236). Cases under this section.

[*Sect.* 11 *contained provisions as to a married woman suing. See now the M. W. P. Act*, 1882, *s.* 1, *sub-s.* (2), and note, p. 326, *post.*]

33 & 34 Vict. c. 93, s. 12.

Husband not to be liable on his wife's contracts before marriage.

12. A husband shall not, by reason of any marriage which shall take place after this act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried (*g*).

Old law.

(*g*) According to the old law a husband was liable at law for the debts of his wife contracted before marriage (2 Bright, Husband and Wife, 2). And in equity her separate property was liable to satisfy such debts (*Biscoe* v. *Kennedy*, 1 Bro. C. C. 17, n.; *Chubb* v. *Stretch*, 9 Eq. 555).

Cases under this section.

Having regard to sects. 22 and 13 of the M. W. P. Act, 1882, this section and the decisions thereunder remain of importance with respect to women married before the last-mentioned act. Under this section such a married woman's separate property was made liable at law to satisfy debts contracted by her before marriage. The section extends to property settled to her separate use without power of anticipation (*Sanger* v. *Sanger*, 11 Eq. 470; *London Bank* v. *Bogle*, 7 Ch. D. 773; *Re Hedgely*, *Small* v. *Hedgely*, 34 Ch. D. 379; *Axford* v. *Reid*, 22 Q. B. Div. 548). An order under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, may be made upon such a married woman (*Dillon* v. *Cunningham*, L. R. 8 Ex. 23). As to her arrest in execution for a debt contracted *dum sola*, see *Nagle* v. *O'Donnell* (I. R. 7 C. L. 79). A judgment may also be given against a married woman under R. S. C. Ord. 14, r. 1, without proof of the existence of separate estate (*Downe* v. *Fletcher*, 21 Q. B. D. 11). But this section does not make her liable to the bankruptcy law (*Re Grissell*, 12 Ch. Div. 484; *Ex p. Holland*, *Re Heneage*, 9 Ch. 307; see *Day* v. *Freunel*, 35 L. T. 551; *R.* v. *Robinson*, L. R. 1 C. C. 80). Where a woman joined with a surety in making a promissory note which fell due and on which judgment was recovered before her marriage, the surety who had paid the full amount after her marriage could not recover against the husband (*Conlon* v. *Moore*, I. R. 9 C. L. 190). As to the liability of the husband in the case of marriages from 1874 to 1883, see M. W. P. Act, 1874, (*post*, p. 323). And in the case of marriages after 1882, see M. W. P. Act, 1882, s. 14 (*post*, p. 334).

[*Sects.* 13 *and* 14 *rendered a married woman liable for the maintenance of her husband and children. See now sects.* 20 *and* 21 *of the M. W. P. Act*, 1882, *post*, p. 338.]

Commencement of act.

15. This act shall come into operation at the time of the passing of this act.

Act not to extend to Scotland.

16. This act shall not extend to Scotland.

Short title.

17. This act may be cited as the Married Women's Property Act, 1870 (*h*).

(*h*) This act was intended to protect married women in the enjoyment of the rights of property, and has not by a side wind given them political or municipal rights (*R.* v. *Harrald*, L. R. 7 Q. B. 361).

37 & 38 Victoriæ, cap. 50.

An Act to amend the Married Women's Property Act (1870). [30th July, 1874.]

37 & 38 Vict. c. 50, s. 1.

Whereas it is not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and the law as to the recovery of such debts requires amendment:

Be it enacted as follows:

Husband and wife may be jointly sued for her debts before marriage.

1. So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed so far as respects marriages which shall take place after the passing of this act, and a husband and wife married after the passing of this act may be jointly sued for any such debt.

Extent to which husband liable.

2. The husband shall, in such action and in any action brought for damages sustained by reason of any tort committed by the wife before marriage or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; and in addition to any other plea or pleas may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or, confessing his liability to some amount, that he is not liable beyond what he so confesses; and if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned (*a*).

(*a*) The liability of the husband under this act ceases on the death of his wife (*Bell* v. *Stocker*, 10 Q. B. D. 129). An Englishman marrying a native of Jersey, where a husband is liable for his wife's antenuptial debts, is protected in England by this act (*De Greuchy* v. *Wills*, 4 C. P. D. 363). Notwithstanding this act a husband is, under sect. 78 of the Companies Act, 1862, liable as a contributory in his own right on shares registered in the name of his wife, though acquired by her before her marriage (*Ex p. Hatcher*, 12 Ch. D. 284). See the cases collected, Buckley, 78, 6th ed.

Under this section it is sufficient to allege in the statement of claim that the husband is liable for the debts, without alleging that he has received assets from his wife (*Matthews* v. *Whittle*, 13 Ch. D. 811).

If husband without assets he shall have judgment for costs.

3. If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife (*b*).

(*b*) Creditors were allowed to add to their debt and recover against the wife costs which they had to pay to the husband under this section (*London Bank* v. *Bogle*, 7 Ch. D. 773).

37 & 38 Vict. c. 50, s. 4.

Joint and separate judgment against husband and wife for debt.

4. When a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife.

Assets for which husband liable.

5. The assets in respect of and to the extent of which the husband shall in any such action be liable are as follows:

(1.) The value of the personal estate in possession of the wife which shall have vested in the husband:

(2.) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession:

(3.) The value of the chattels real of the wife which shall have vested in the husband and wife:

(4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received:

(5.) The value of the husband's estate or interest in any property real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or to any other person:

(6.) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors:

Provided that when the husband after marriage pays any debt of his wife or has a judgment *bonâ fide* recovered against him in any such action as is in this act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable.

Extent of act.

6. This act shall not extend to Scotland.

Short title.

7. This act may be cited as the Married Women's Property Act (1870) Amendment Act, 1874.

45 & 46 Victoriæ, cap. 75.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

45 & 46 Vict. c. 75, s. 1.

Whereas it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled the Married Women's Property Act, 1870, and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act (1870)":

Be it enacted as follows:

Married woman to be capable of holding property and of contracting as a *feme sole*.

1. (1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee (*a*).

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise (*b*).

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown (*c*).

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire (*c*).

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole* (*d*).

Sub-sect. (1).

(*a*) Sub-sect. (1) is to be construed along with sects. 2 and 5 (*Re Cuno*, *Mansfield* v. *Mansfield*, 43 Ch. Div. 12). Accordingly, in the case of a woman married before 1883, sub-sect. (1) applies only to property acquired since 1882 (*ib.*; sect. 5, *post*; *Re Harris*, 28 Ch. D. 171). Similarly, it has been held to apply only to what is done by the married woman during coverture in relation to property of which she is then possessed (*Re Price*, *Stafford* v. *Stafford*, 28 Ch. D. 712). The capacity of a married woman is only altered as between herself and her husband; so in

I (1) This enabling section does not apply to property of which a married woman is not beneficially entitled, but which she holds as trustee for another.
Re Harkness & Allsopp's Contract (1896) 2 Ch. 358.
But the proviso does apply to that distinct case of a married woman who is a mortgagee & not a trustee.

45 & 46 Vict. c. 75, s. 1.

the case of a gift to a husband and wife and a third person, the construction is not altered by the act (*Re Jupp*, *Jupp* v. *Buckwell*, 39 Ch. D. 148; *Re March*, *Mander* v. *Harris*, 27 Ch. Div. 166, 170; see *Re Dixon*, *Byram* v. *Tull*, 42 Ch. D. 306).

Sub-sect. (1).

Sub-sect. (1) does not enable a married woman to make a gift for a church under 43 Geo. 3, c. 108, the words of such statute excluding "woman covert without their husbands" (*Re Smith*, *Clements* v. *Ward*, 35 Ch. D. 589).

Wills and intestacy.

The provisions of this act relating to the wills of married women are sect. 1, sub-sect. (1), sect. 4, and see sect. 23. Sect. 1, sub-sect. (1), does not enable a married woman by a will made during coverture to dispose of property acquired after coverture (*Re Price*, *Stafford* v. *Stafford*, 28 Ch. D. 709; see *Re Cuno*, *Mansfield* v. *Mansfield*, 43 Ch. Div. 12). As to the effect of this act on a will dated prior to its passing, see *Re Bowen*, *James* v. *James* (1892, 2 Ch. 291); and as to the wills of married women independently of this act, and the present form of probate of wills of married women, see note to sect. 8 of the Wills Act, *post*, p. 405. As regards the beneficial title to a married woman's property after her death, it has been decided that, notwithstanding this act, a husband is entitled to recover from his wife's executor separate personalty undisposed of by her (*Re Lambert*, *Stanton* v. *Lambert*, 39 Ch. D. 626), and also non-separate choses in action not reduced into possession during the coverture (*Smart* v. *Tranter*, 43 Ch. Div. 587). On the death intestate of a married woman, her separate leaseholds may be taken by her husband, without taking out administration, subject, however, to any contracts binding them (*Surman* v. *Wharton*, 1891, 1 Q. B. 491; see *Re Bellamy*, *Elder* v. *Pearson*, 25 Ch. D. 620). A husband is still entitled to curtesy in real estate as to which his wife has died intestate (*Hope* v. *Hope*, 1892, 2 Ch. 336).

Sub-sect. (2).

(*b*) As to contracts of a married woman, see note to sect. 1, sub-sects. (3) and (4), *post*, p. 327.

Married woman suing.

A married woman may present a petition under the Trustee Acts, 1850, 1852 (*Re Outwin*, 48 L. T. 410; 31 W. R. 374). She may also consent to a petition under the S. E. Act, 1877 (*post*), see *Riddell* v. *Errington* (26 Ch. D. 220). In the latter case she need not, if she was married since 1882, be examined as regards any property whenever acquired (*Ib.*); nor, if she was married previously, as regards property acquired since 1882 (*Re Harris*, 28 Ch. D. 171), She may sue alone in respect of a trespass on a house which is her separate property under the M. W. P. Act, 1870 (*Weldon* v. *De Bathe*, 14 Q. B. Div. 339; see *Symonds* v. *Hallett*, 24 Ch. Div. 346); or in respect of a tort committed before the present act (*Weldon* v. *Winslow*, 13 Q. B. Div. 784; *Lowe* v. *Fox*, 15 Q. B. Div. 667; *James* v. *Barraud*, 31 W. R. 786; *Severance* v. *Civil Service Association*, 48 L. T. 485). For the purpose of such an action she became discovert within the meaning of 21 Jac. 1, c. 16, s. 7 (*ante*, p. 216), upon the commencement of the present act (*Lowe* v. *Fox*, *sup.*; *Weldon* v. *Neal*, 51 L. T. 289; 32 W. R. 828). A married woman cannot act as guardian *ad litem* or next friend (*Re Somerset*, *Thynne* v. *St. Maur*, 34 Ch. D. 465). Damages for personal injuries awarded to a wife are her separate property, notwithstanding that her husband was co-plaintiff (*Beasley* v. *Roney*, 1891, 1 Q. B. 509). A plaintiff who is a married woman should be so described (*Re Poinons*, *Sutton* v. *Martin*, 1891, W. N. 139).

Married woman being sued.

The effect of sub-sect. (2) is to allow a married woman to be sued in respect of anything in respect of which a man could be sued, subject to this, that her power to contract is limited, and the remedy is confined to her separate estate (*Whittaker* v. *Kershaw*, 45 Ch. Div. 329); and the fact that she has no separate estate except subject to a restraint on anticipation does not prevent her being sued (*Ib.*; see *Braunstein* v. *Lewis*, 64 L. T. 265). She may be sued by an executor to refund a legacy (*Ib.*) She may be sued by her husband for money lent after marriage (*Butler* v. *Butler*, 16 Q. B. Div. 374), but not for money lent before marriage (*S. C.*, 14 Q. B. D. 831). She may be sued for torts committed after marriage, either alone or jointly with her husband (*Seroka* v. *Kattenburg*, 17 Q. B. D. 177). Judgment may be ordered against her,

R. to husband's liability for torts
v. Kingscote (1900) 2 Ch. 585.

45 & 46 Vict. c. 75, s. 1.

under R. S. C. Ord. 14 (*Downe* v. *Fletcher*, 21 Q. B. D. 11; *Perks* v. *Mylrea*, 1884, W. N. 64), or under R. S. C. Ord. 16, r. 52, as a third party, and in respect of a liability created before this act (*Gloucestershire Co.* v. *Phillipps*, 12 Q. B. D. 533).

Judgments against married women.

For the law before this act as to judgment in common law actions against married women, see *Scott* v. *Morley* (20 Q. B. Div. 123, 124); and for the judgments in Chancery actions as regards her separate estate, see *McHenry* v. *Davies* (10 Eq. 92); *Picard* v. *Hine* (5 Ch. 278). Under this section, a judgment against a married woman is a judgment against her personally, but is only payable out of her separate property (*Holtby* v. *Hodgson*, 24 Q. B. Div. 103; *Pelton* v. *Harrison*, 1892, 1 Q. B. 118).† She cannot, however, be committed under sect. 5 of the Debtors Act, 1869, for default in payment (*Scott* v. *Morley*, *sup.*; *Draycott* v. *Harrison*, 17 Q. B. D. 147; see *Johnstone* v. *Browne*, 20 L. R. Ir. 443, where a married woman was committed). And such a judgment is not a "final judgment" against her on which bankruptcy proceedings can be founded (*Ex p. Coulson*, 20 Q. B. D. 251). The proper form of judgment against a married woman was settled by the Court of Appeal in *Scott* v. *Morley* (20 Q. B. Div. 120). It directs that the sum recovered be payable out of her separate property, and not otherwise; and that execution be limited to her separate property not subject to restriction against anticipation, unless by reason of sect. 19 the property is liable to execution notwithstanding such restriction (See *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Downe* v. *Fletcher*, 21 Q. B. D. 11; *Nichols* v. *Morgan*, 16 L. R. Ir. 409; *Brown* v. *Morgan*, 12 L. R. Ir. 122). On a judgment in this form, a garnishee order may be obtained under R. S. C. Ord. 45, r. 1 (*Holtby* v. *Hodgson*, 24 Q. B. Div. 103); and an order to set off costs may be made under Ord. 65, r. 27, sub-sect. 21 (*Pelton* v. *Harrison*, 1892, 1 Q. B. 118). A writ of sequestration in a divorce action is not limited in its terms, but will not affect property subject to a restraint until after decree absolute (*Hyde* v. *Hyde*, 13 P. Div. 173).

† She may be ordered to attend for examination as to her means (Ho. Hy v. Hodgson Q.B.D.); & to find ... [illegible]

A creditor's right of attaching property which has once become bound by a married woman's contract does not cease because it is no longer separate property by reason of the husband's death (*Pelton* v. *Harrison*, 1891, 2 Q. B. 426). But the removal by such death of a restraint on anticipation does not make the property liable (*Ib.* 422). Where an action was brought on a married woman's covenant, and the defendant paid money into court on the condition of her being allowed to defend, the successful plaintiff was held in any event entitled to the money (*Bird* v. *Barstow*, 1892, 1 Q. B. 94).

Orders have been enforced against separate property by an inquiry and a receiver (*Re Peace and Waller*, 24 Ch. Div. 405; *Perks* v. *Mylrea*, 1884, W. N. 64).

Costs.

Costs ordered to be paid by a married woman can be recovered out of any unrestrained separate property to which she is entitled at the date of the order for payment (*Cox* v. *Bennett*, 1891, 1 Ch. 617). As to actions before this act, see *Re Glanvill*, *Ellis* v. *Johnson* (31 Ch. Div. 532). A married woman need not give security for costs (*Threlfall* v. *Wilson*, 8 P. D. 18; *Severance* v. *Civil Service Association*, 48 L. T. 485), even if she has no separate estate (*Re Isaac*, *Jacob* v. *Isaac*, 30 Ch. Div. 418; see *Re Robinson*, *Pindar* v. *Robinson*, 1885, W. N. 147), except in the case of an appeal (*Whittaker* v. *Kershaw*, 44 Ch. Div. 296; *Weldhen* v. *Scattergood*, 1887, W. N. 69). But if she sues by a next friend, the next friend may be ordered to give security (*Re Thompson*, *Stevens* v. *Thompson*, 38 Ch. Div. 317). If an undertaking as to damages is required, her sole undertaking must be accepted (*Re Prynne*, 53 L. T. 465). Such an undertaking by a wife can be enforced by her husband (*Hunt* v. *Hunt*, 54 L. J. Ch. 289).

Sub-sects. (3) and (4).

(*c*) As to the power of a married woman, independently of this act, to deal by way of contract with her non-separate real estate, and with her separate estate, real and personal, see *ante*, pp. 293, 297. As to the meaning of the word "contract" in the M. W. P. Act, 1882,

Contracts.

45 & 46 Vict. c. 75, s. 1.

Contracts.

see sect. 24 (*post*, p. 338). Sub-sects. 2, 3 and 4, do not apply to a contract made before 1883 (*Conolan* v. *Leyland*, 27 Ch. D. 632; *Turnbull* v. *Forman*, 15 Q. B. Div. 234; *Roper* v. *Doncaster*, 39 Ch. D. 482; *contra*, *Bursill* v. *Tanner*, 13 Q. B. D. 691). The words of sub-sect. (2) do not mean that a married woman is to be capable by contract of rendering herself liable personally, but only in respect of her separate property (*Draycott* v. *Harrison*, 17 Q. B. D. 153; but see *Pelton* v. *Harrison*, 1892, 1 Q. B. 118). In order to bind her separate property by contract, a married woman must have some free separate property at the date of the contract, otherwise she cannot contract (*Palliser* v. *Gurney*, 19 Q. B. Div. 521; *Braunstein* v. *Lewis*, 64 L. T. 265; *Re Shakespear*, *Deakin* v. *Lakin*, 30 Ch. D. 169; *Stogdon* v. *Lee*, 1891, 1 Q. B. 661). The onus is on the person suing on the contract to prove that she had separate property at that date (*Palliser* v. *Gurney*, *sup.*) And the statement of claim should contain an allegation to that effect (*Tetley* v. *Griffith*, 57 L. T. 673).

The test of liability is whether at the date of the contract the married woman had separate property with respect to which she could reasonably be deemed to have contracted (*Leak* v. *Driffield*, 24 Q. B. D. 101; see *Bonner* v. *Lyon*, 38 W. R. 541; *Everett* v. *Paxton*, 65 L. T. 383). It has been held not sufficient that she was then possessed of clothes (*Ib.*), or of inalienable property (*Harrison* v. *Harrison*, 13 P. Div. 180), in which last case it was said that the inalienability of the property showed "the contrary" within sub-sect. 3 (See *Draycott* v. *Harrison*, 17 Q. B. D. 147; *Myles* v. *Burton*, 14 L. R. Ir. 259). As to property over which a married woman has an unexercised power of appointment, see *Ex p. Gilchrist*, *Re Armstrong* (17 Q. B. Div. 521); *Roper* v. *Doncaster* (39 Ch. D. 482).

Separate property of a married woman having once become bound by her contract during coverture is not freed by ceasing to be "separate" on her husband's death (*Pelton* v. *Harrison*, 1891, 2 Q. B. 426). And where the separate property is subject to a restraint on anticipation it is not brought within sub-sect. (4) by reason of the subsequent death of the husband (*Beckett* v. *Tasker*, 19 Q. B. D. 7; *Pelton* v. *Harrison*, 1891, 2 Q. B. 422). The property referred to in this sub-section must be acquired during coverture (*Ib.*); but it is sufficient if it be acquired during a second coverture (*Jay* v. *Robinson*, 25 Q. B. Div. 467). A married woman can under this section enter into a joint contract, and if judgment be obtained against her joint contractor she cannot afterwards be sued (*Hoare* v. *Niblett*, 1891, 1 Q. B. 781).

As regards her husband the rule before the act was that a married woman could during coverture contract with him so as to bind her separate estate (*Vansittart* v. *Vansittart*, 4 K. & J. 70); and this has not been altered by the act (*Butler* v. *Butler*, 16 Q. B. Div. 374).

Sub-sect. (5). Bankruptcy.

(*d*) As to the meaning of trading separately, see note to sect. 1 of the M. W. P. Act, 1870 (*ante*, p. 318). A married woman with separate property, not trading separate from her husband, is not subject to the bankruptcy laws (*Ex p. Coulson*, 20 Q. B. D. 249). "Separate property" in this sub-section includes a life estate under a settlement where there is no restraint on anticipation (*Ex p. Boyd*, 21 Q. B. Div. 264); but not property over which she has an unexercised general power of appointment (*Ex p. Gilchrist*, 17 Q. B. Div. 521); and she cannot be compelled to exercise such a power for the benefit of creditors (*Ib.*)

Property of a woman married after the act to be held by her as a *feme sole*.

2. Every woman who marries after the commencement of this act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from

her husband, or by the exercise of any literary, artistic, or scientific skill (*e*). 45 & 46 Vict. c. 75, s. 2.

(*e*) The effect of this section is to add the incident of separate use to the interest of the married woman in any property which belongs to her at the time of marriage (*Re Onslow, Plowden* v. *Gayford*, 39 Ch. D. 622). It also renders separate examination unnecessary (*Riddell* v. *Errington*, 26 Ch. D. 220). This section extends to the enlarging by a married woman after her marriage of a base fee which had been disposed of by her to a purchaser before her marriage (*Re Drummond and Davie*, 1891, 1 Ch. 524).

Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied (*f*).

(*f*) The onus is on the wife to prove that money lent to the husband was not lent for the purpose of his trade (*Re Genese*, 16 Q. B. D. 700). She may prove in competition with creditors for money lent to a partnership of which her husband is a member (*Re Tuff*, 19 Q. B. D. 88); or for money lent to the husband for private purposes (*Re Tideswell*, 35 W. R. 666; see, however, *Alexander* v. *Barnhill*, 21 L. R. Ir. 511). Property mortgaged by a wife to secure a debt owing by her husband to a third party, and subsequently applied in discharge of it, is not lent or entrusted to him within this section (*Alexander* v. *Barnhill*, *sup.*) Where a husband who had borrowed his wife's separate estate for the purposes of his business, died insolvent, having appointed his wife executrix, she could retain the debt (*Re May, Crawford* v. *May*, 45 Ch. D. 499).

As to how far the act is retrospective, see *Re Horne* (54 L. T. 301). As to the rights of a husband lending money to a wife for her business, see *Butler* v. *Butler* (14 Q. B. D. 831; 16 Q. B. D. 374).

Execution of general power.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this act (*g*).

(*g*) See in connection with this section, the note to 3 & 4 Will. 4, c. 104, *post*, and *Roper* v. *Doncaster* (39 Ch. D. 482); *Ex p. Gilchrist, Re Armstrong* (17 Q. B. D. 521).

Property acquired after the act by a woman married before the act to be held by her as a *feme sole*.

5. Every woman married before the commencement of this act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid (*h*).

(*h*) The words "her title" mean the title which first accrued to her, whether vested, contingent, in possession, in remainder, or in reversion

45 & 46 Vict. c. 75, s. 5.

(*Reid* v. *Reid*, 31 Ch. Div. 411; *Re Tucker*, *Emmanuel* v. *Parfitt*, 52 L. T. 923; 33 W. R. 932; *Re Adames*, 53 L. T. 198; 33 W. R. 834; *Re Hobson*, *Webster* v. *Rickards*, 55 L. J. Ch. 300; 34 W. R. 195; *Re Tench*, *Ex p. McCormack*, 15 L. R. Ir. 406). Where, accordingly, the title in reversion accrued before the act, but the property fell into possession after the act, the section did not apply (*Reid* v. *Reid*, *sup.*)

A mere *spes successionis* claimed by A. as one of a possible class of next of kin, is not a contingent title within this section (*Re Parsons*, *Stockley* v. *Parsons*, 45 Ch. D. 51; *contra Re Beaupré*, 21 L. R. Ir. 397). As to how far this section affects settlements, see sect. 19 (*post*, p. 337).

This section applies to money recovered by the verdict of a jury, even in an action in which the husband is co-plaintiff (*Beasley* v. *Roney*, 1891, 1 Q. B. 509).

As to the power of a woman married before this act over separate property acquired before this act, see *ante*, p. 297.

As to stock, &c., to which a married woman is entitled.

6. All deposits in any post-office or other savings-bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster-General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof (*i*).

(*i*) As to the probate of the will of a married woman having money standing in her name in the savings bank, see *Harding* v. *Sutton* (59 L. T. 839). As to investments held by a married woman as trustee, see sect. 18 (*post*, p. 336).

As to stock, &c., to be transferred, &c., to a married woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and

annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not. 45 & 46 Vict. c. 75, s. 7.

Provided always, that nothing in this act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any act of parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company.

8. All the provisions hereinbefore contained as to deposits in any post-office or other savings-bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband. Investments in joint names of married women and others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint As to stock, &c., standing in the joint names of a married woman and others.

45 & 46 Vict. c. 75, s. 9.

names of such married woman and any other person or persons not being her husband.

Fraudulent investments with money of husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the court may, upon an application under section seventeen of this act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Moneys payable under policy of assurance not to form part of estate of the insured.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death

of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part (*k*).

45 & 46 Vict. c. 75, s. 11.

13 & 14 Vict. c. 60.

(*k*) See the note to sect. 10 of the M. W. P. Act, 1870 (*ante*, p. 321); *Re Soutar* (26 Ch. D. 236).

Where a wife was convicted of murdering her husband, neither she nor anyone claiming under her could claim the amount of a policy effected by the husband for her benefit, but there was a resulting trust in favour of the husband's estate (*Cleaver* v. *Mutual Association*, 1892, 1 Q. B. 147).

Remedies of married woman for protection and security of separate property.

12. Every woman, whether married before or after this act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section, it shall be sufficient to allege such property to be her property: and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife (*l*).

(*l*) Under this section a married woman can bring an action for the wrongful entry of a house which is her separate property (*Weldon* v. *De Bathe*, 14 Q. B. Div. 344). She cannot criminally prosecute her husband for personal libel on herself (*R.* v. *London*, 16 Q. B. D. 772). See also as to the proviso in the section, *Lemon* v. *Simmons* (36 W. R. 350; 57 L. J. Q. B. 260). See further as to actions by a married woman the note to sect. 1, sub-sect. (2), *ante*, p. 326.

Wife's ante-nuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has

45 & 46 Vict. c. 75, s. 13.

been placed on the list of contributories, under and by virtue of the acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this act shall operate to increase or diminish the liability of any woman married before the commencement of this act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this act, and to which she would not have been entitled for her separate use under the acts hereby repealed or otherwise, if this act had not passed (*m*).

(*m*) The words "before the marriage" mean before the existing marriage, including the period of any previous marriage and the interval between the two marriages (*Jay* v. *Robinson*, 25 Q. B. Div. 472); and the word "debt" includes both common law debts contracted by a woman whilst she is a *feme sole*, and debts contracted under the act in respect of her separate property (*Ib.* p. 474). A husband cannot under this section sue his wife in respect of loans made by him to her before marriage (*Butler* v. *Butler*, 14 Q. B. D. 836).

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this act contained shall operate to increase or diminish the liability of any husband married before the commencement of this act for or in respect of any such debt or other liability of his wife as aforesaid (*n*).

(*n*) The husband is still liable for the wrongs committed by his wife after marriage (*Seroka* v. *Kattenburg*, 17 Q. B. D. 177). Judgment recovered against a wife, who has no separate property, in respect of an antenuptial debt, is no defence to an action against the husband for the

same debt (*Beck* v. *Pierce*, 23 Q. B. Div. 316). A husband married since 1882 may be sued alone for his wife's antenuptial debts, whether she be alive or dead (*Ib.* p. 321). If the wife is sued alone she cannot require her husband to be joined, and if he is sued alone, he cannot require her to be joined (*Ib.*) 45 & 46 Vict. c. 75, s. 14.

Under the Statutes of Limitation time runs in favour of the husband in respect of an antenuptial debt of the wife from the time of the cause of action arising, not from the marriage; and no acknowledgment or part payment by the wife after marriage will alter the husband's liability (*Ib.* p. 322).

Suits for antenuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property (*o*); and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

(*o*) As to this joint judgment, see *Beck* v. *Pierce* (23 Q. B. Div. 321).

Act of wife liable to criminal proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this act, shall in like manner be liable to criminal proceedings by her husband (*p*).

(*p*) As to a husband or wife giving evidence, see M. W. P. Act, 1884, s. 1 (*post*, p. 339); *R.* v. *Brittledon* (12 Q. B. Div. 266).

Questions between husband and wife as to property to be decided in a summary way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the

45 & 46 Vict. c. 75, s. 17.

judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only (*q*).

(*q*) An application under this section was made by motion in a divorce action (*Phillips* v. *Phillips*, 13 P. D. 220). In such an action the registrar cannot under this section make an order to hand over property (*Wood* v. *Wood*, 14 P. D. 157). Where there is no action the application should be by originating summons (See the form Dan. C. F. p. 1011, and Table of Titles in the Annual Practice).

Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole* (*r*).

(*r*) When a trust is being administered by the court and the trustee is

a married woman, she can convey land under the direction of the court as a "bare trustee" within sect. 6 of the V. & P. Act, 1874 (*post*), without any acknowledgment or the concurrence of her husband (*Re Docwra*, *Docwra* v. *Faith*, 29 Ch. D. 693). As to the form of order directing payment to a married woman trustee, see *Re Hawksworth* (1887, W. N. 113).

Before this act a married woman could not by contract bind herself to convey land devised to her in trust for sale (*Avery* v. *Griffin*, 6 Eq. 606).

45 & 46 Vict. c. 75, s. 18.

Saving of existing settlements, and the power to make future settlements.

19. Nothing in this act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation (*s*) at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument (*t*); but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors (*u*).

(*s*) As to the creation and effect of a restriction against anticipation, see *ante*, p. 298.

(*t*) The earlier part of this section applies to all settlements, whether made before or after marriage, not only to what are popularly called marriage settlements (*Re Armstrong*, *Ex p. Boyd*, 21 Q. B. Div. 271).

The words "interfere with or affect" mean "invalidate or render inoperative" (*Re Armstrong*, *Ex p. Boyd*, 21 Q. B. Div. 270, 273). The effect of the settlement is to be determined as it would have been under the old law. And no one who under that law could have taken any interest is to be deprived of such interest (*Re Onslow*, *Plowden* v. *Gayford*, 39 Ch. D. 625). Sect. 19 prevents the act from interfering with any settlement which would have bound the property if the act had not been passed (*Hancock* v. *Hancock*, 38 Ch. Div. 90). So, notwithstanding sect. 5 (*ante*, p. 329), a husband's covenant in a settlement made in 1870, to settle property coming to him in right of his wife, bound property bequeathed to her in 1883 (*Ib.*; disapproving *Re Queade*, 53 L. T. 74; 33 W. R. 816). And a covenant by the husband and wife, in a settlement prior to 1882, to settle property not limited to the wife's separate use, bound property acquired by her after 1882 (*Re Stonor*, 24 Ch. D. 195; *Re Whitaker*, *Christian* v. *Whitaker*, 34 Ch. Div. 227). But where a married woman was entitled to separate property under a settlement made before the act, the incidents annexed by the act to separate property (*e. g.*, the liability to alienation on bankruptcy) attached to it (*Re Armstrong*, *Ex p. Boyd*, 21 Q. B. Div. 264). And where a woman, entitled under a settlement made in 1878 to a life interest, with remainder (in default of her testamentary appointment) to herself absolutely, re-married since 1882, she held all her interest as *feme sole* (*Re Onslow*, *Plowden* v. *Gayford*, 39 Ch. D. 622).

(*u*) The latter part of the section has no operation on settlements made before the act (*Beckett* v. *Tasker*, 19 Q. B. D. 12; *Smith* v. *Whitlock*, 34 W. R. 414; 55 L. J. Q. B. 286). The words "before marriage" mean before her existing marriage, and include the period of a previous marriage and the interval between the two marriages (*Jay* v. *Robinson*, 25 Q. B. Div. 472). The word "debts" includes both common law debts contracted by a woman whilst a *feme sole*, and debts contracted under the act in respect of her separate property (*Ib.* 474).

45 & 46 Vict. c. 75, s. 20.

Married woman to be liable to the parish for the maintenance of her husband.

31 & 32 Vict. c. 122.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by the same actions and proceedings as money lent.

Married woman to be liable to the parish for the maintenance of her children.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren (*x*).

(*x*) See *Peters* v. *Cowie* (2 Q. B. D. 131); *Coleman* v. *Birmingham* (6 Q. B. D. 615).

Repeal of 33 & 34 Vict. c. 93.

37 & 38 Vict. c. 50.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such acts was in force, or any right or liability of any husband or wife, married before the commencement of this act, to sue or be sued under the provisions of the said repealed acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this act.

Legal representative of married woman.

23. For the purposes of this act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living (*y*).

(*y*) A husband who takes separate property *jure mariti* is a "legal personal representative" within this section, and liable thereunder to the extent of the property so taken (*Surman* v. *Wharton*, 1891, 1 Q. B. 491).

Interpretation of terms.

24. The word "contract" in this act shall include the acceptance of any trust, or of the office of executrix or administratrix,

and the provisions of this act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this act includes a thing in action. 45 & 46 Vict. c. 75, s. 24.

25. The date of the commencement of this act shall be the first of January one thousand eight hundred and eighty-three. Commencement of act.

26. This act shall not extend to Scotland. Extent of act.

27. This act may be cited as the Married Women's Property Act, 1882. Short title.

---

47 & 48 Victoriæ, c. 14.

An Act to Amend the sixteenth section of the Married Women's Property Act, 1882. [23rd June, 1884.]

Whereas by section sixteen of the Married Women's Property Act, 1882, a wife is, under the circumstances therein mentioned, declared to be liable to criminal proceedings by her husband, and a doubt has arisen as to whether the husband is admissible as a witness against his wife in such criminal proceedings, while section twelve of the same act declares that in any proceeding under that section a husband or wife shall be competent to give evidence against each other; and it is desirable that the said doubt should be removed, and the said act otherwise amended; 47 & 48 Vict. c. 14.

Be it therefore enacted as follows:

1. In any such criminal proceeding against a husband or a wife as is authorized by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence (*a*). Husband or wife competent witness in criminal proceedings under 45 & 46 Vict. c. 75.

(*a*) See *Re Brittledon* (12 Q. B. Div. 266).

2. This act may be cited as the Married Women's Property Act, 1884, and this act, and the Married Women's Property Act, 1882, may be cited together as the Married Women's Property Acts, 1882 and 1884. Short title.

LAW OF DOWER.

3 & 4 William IV. cap. 105.

An Act for the Amendment of the Law relating to Dower.
[29th August, 1833.]

Interpretation Clause.

3 & 4 Will. 4, c. 105, s. 1.

Meaning of the words in the act.

"Land."

Number.

Be it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing.

The objects of this act.

The principal objects of this statute are,

1st. To make *equitable* estates in possession liable to dower, and to dispense with the necessity of the actual seisin of the husband.

2nd. To take away the right of dower out of lands disposed of by the husband in his lifetime or by his will, and to give partial charges created by the husband priority over the right of dower.

3rd. To enable the husband to bar the right of dower by a declaration in a deed or in a will. The act does not extend to widows married on or before the 1st of January, 1834.

Old law of dower.

The old law of dower gave to a surviving wife a right to have assigned to her for her life one-third of all the lands and hereditaments of which her husband was seised in law (that is, had the legal property by descent, there being at the same time no possession), or, in fact, for an estate of inheritance in possession at any time during the marriage, with a few exceptions such as common *sans nombre* and personal annuities (See the statement of the old law of dower in the first Report of the R. P. Commrs. 16—19; Co. Litt. 32 a; *Lyster* v. *Mahony*, 1 Dru. & War. 236).

Out of what property a woman is entitled to dower.

The widow of a man to whom an estate was devised in fee, with a limitation over to the testator's heir, in case the devisee had no children or issue, was held to be entitled to dower (*Moody* v. *King*, 2 Bing. 447; *Smith* v. *Spencer*, 4 W. R. 729). She was not entitled to dower out of an estate *pur autre vie* (*Low* v. *Burron*, 3 P. W. 262; *Re Michell*, *Moore* v. *Moore*, 1892, 2 Ch. 99).

Mines.

Dower is due of mines wrought during coverture, but not of mines or strata unopened. If lands assigned for dower contain an open mine, tenant in dower may work it for her own benefit (*Stoughton* v. *Leigh*, 1 Taunt. 401; *Dickin* v. *Hamer*, 1 Dr. & Sm. 284).

Timber.

And a dowress may claim one-third of the income of the proceeds arising from the royalties of mines opened after her husband's decease (*Dickin* v. *Hamer*, *sup.*), or of proceeds of timber cut after her husband's decease (*Bishop* v. *Bishop*, 5 Jur. 931; *Dickin* v. *Hamer*, *sup.*) Where

land subject to dower was taken by a railway company, the dowress had the value of her dower paid to her out of the purchase-money (*Re Hall*, 9 Eq. 179). In another case one-third of the purchase-money was carried over to a separate account, the dividends being payable to the dowress for life (*Harrop* v. *Wilson*, 34 Beav. 166). See, further, as to the property out of which a woman is entitled to dower, and the requisites to dower, the note to sect. 2, *post*; Tudor's L. C. Conv. 68 *et seq.*, 3rd. ed. 3 & 4 Will. 4, c. 105, s. 1.

In consequence of two maxims of the common law—first, that no right can be barred until it accrues; and, secondly, that no right or title to an estate of freehold can be barred by a collateral satisfaction—it was impossible to bar a woman of her dower by any assignment or assurance of lands, either before or during the marriage (*Vernon's case*, 4 Rep. 1; Co. Litt. 36 b). Barring dower.

Dower, however, might be barred by a legal jointure. Before the passing of the Statute of Uses (27 Hen. 8, c. 10), the greater part of the lands in England having been conveyed to uses which were not liable to dower (Dyer, 266, pl. 7; 4 Rep. 1 b), it was usual to make a provision for the wife before marriage out of the husband's lands (3 Rep. 58 b; 4 Rep. 1 b; Wilmot's Notes, 184, 185). The Statute of Uses having transferred the legal estate to the *cestui que use*, all women then married would have become dowable of lands held to the use of their husbands, and retained their title to lands settled on them in jointure. To prevent that injustice, it is by the 6th section of the Statute of Uses declared, that a woman having an estate in jointure with her husband (five species of which are enumerated) shall not be entitled to dower; and the 9th section reserves to the wife a right to refuse a jointure or to claim her dower (See Wilmot's Notes, 184, &c.) It was decided that the species of estates enumerated are proposed only as examples, and the courts have in construction extended the operation of the statute to other instances within its principle, though not within its words (4 Rep. 2 a). By the effect of that statute, therefore, no widow can claim both jointure and dower. A jointure within that statute is defined to be a competent livelihood of freehold to the wife of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least, if she herself be not the cause of its determination or forfeiture (Co. Litt. 36 b, 37). Legal jointures.

According to Lord Coke (Co. Litt. 36 b), there are six requisites to a strict legal jointure, viz., 1st. The provision for the wife must by original limitation take effect in possession or profit immediately after the husband's death (*Wood* v. *Shirly*, Cro. Jac. 488). 2nd. It must be for the term of her own life or greater estate (Dyer, 97 b). 3rd. It must be made to herself, and no other for her. 4th. It must be made in satisfaction of the *whole*, and not of part, of her dower. 5th. It must be either expressed or averred to be in satisfaction of her dower (See 9 Mod. 152; 3 Atk. 8; 1 Ves. sen. 54; 4 Ves. 391). And 6th. It may be made either before or after marriage (4 Rep. 3).

Jointure before marriage is a peremptory bar of dower; jointure after marriage she has an option to renounce (1 Swanst. 429, n.); but a *feme covert* was held not competent during the coverture to elect between a jointure made to her after marriage and her dower at common law (*Frank* v. *Frank*, 3 M. & C. 171).

A jointure settled on a wife by articles, to which she was not a party, will not deprive her of dower (*Buckingham* v. *Drury*, 3 Br. P. C. 497; *Daly* v. *Lynch*, *Ib.* 48); but an infant having before her marriage a jointure made to her in bar of dower, is thereby bound and barred by the stat. 27 Hen. 8, c. 10 (*Ib.*)

In equity, a trust estate, an agreement to settle lands as a jointure, or a covenant from the husband that his heirs, executors, or administrators would pay an annuity to his wife, for her life, in case she survived him, in full for her jointure and in bar of dower, without expressing that it should be charged on lands, or, in short, any provision, however precarious, and whether secured out of realty or personalty, which an adult before marriage Equitable jointures.

3 & 4 Will. 4, c. 105, s. 1.

accepts in lieu of dower, is a good jointure (*Buckingham* v. *Drury*, 5 Br. P. C. 570; 4 Br. C. C. 506; Wilmot's Notes, 177; *Charles* v. *Andrews*, 9 Mod. 152; *Williams* v. *Chitty*, 3 Ves. jun. 545; *Tinney* v. *Tinney*, 3 Atk. 8; *Carruthers* v. *Carruthers*, 4 Br. C. C. 500; *Estcourt* v. *Estcourt*, 1 Cox, 20; *Simpson* v. *Gutteridge*, 1 Madd. R. 613; 4 Rep. 2 a, n. by Thomas; Harg. Co. Litt. 36 b, n. (5); Sugd. V. & P. 543, 544, 11th ed.; *Dyke* v. *Rendall*, 2 D. M. & G. 209). A future contingent provision, accepted by an adult female upon her marriage in lieu of dower, is in equity a valid bar to dower (*Re Herons*, 1 Flan. & K. 330; see *Power* v. *Sheil*, 1 Moll. 312; *Williams* v. *Chitty*, 3 Ves. 545; *Corbet* v. *Corbet*, 1 Sim. & St. 612; 5 Russ. 254).

A wife had a jointure secured on her husband's estate X. In 1844, the husband contracted to purchase an estate Y., and to enable him to sell the estate X., the wife, in 1845, released her jointure, and he then covenanted to secure it out of "estates he should thereafter acquire." Before the estate Y. had been conveyed, the husband contracted to sell it: it was held, that in equity the estate Y. was charged with the jointure (*Warde* v. *Warde*, 16 Beav. 103; *Wellesley* v. *Wellesley*, 4 M. & C. 554).

By a settlement made on the marriage of an adult female, it was declared that "for providing a competent jointure" for the wife, the father of the husband had paid him 3,000*l*., and that the husband had given a bond for the payment of 2,000*l*. six months after the marriage, to be settled on trusts for the benefit of himself, his wife, and the issue of the marriage On a bill by the wife for dower out of land subsequently acquired by the husband, it was held that her right was barred by the settlement (*Dyke* v. *Rendall*, 2 D. M. & G. 209). Marriage articles executed by a tenant in tail in remainder, whereby he agreed to execute a legal post-nuptial settlement, to secure a jointure, were held a bar in equity to the wife's right of dower (*Pennefather* v. *Pennefather*, I. R. 6 Eq. 171). So in the case of marriage articles, whereby the intended husband covenanted that in case he should die in the lifetime of his intended wife, without issue by her, she should be entitled to one-half of what property, real or personal, he should die seised or possessed of (*Hamilton* v. *Jackson*, 2 J. & Lat. 295).

It has been said that in order to exclude the right to dower, there must be either an express declaration or a plain intention (*Hamilton* v. *Jackson*, 2 J. & Lat. 299; *O'Rorke* v. *O'Rorke*. 17 L. R. Ir. 153). A mere grant by a marriage settlement of an annuity to the wife surviving, has been held not to bar dower, even out of the lands charged with the annuity (*Cody* v. *Cody*, 5 L. R. Ir. 620).

Where widow barred of distributive share in husband's personalty.

The word "thirds" is not confined to real estate, but is a general expression which may signify, according to the context and scope of the instrument, the interest of a widow in any property, whether personal or real, of her deceased husband. So a stipulation in a marriage settlement, that the provision thereby made for the wife was to be "in lieu of dower or thirds," was held, on the husband dying intestate, to bar the claim of his widow to a distributive share in his personal estate (*Thompson* v. *Watts*, 2 J. & H. 291; see *Sambourne* v. *Barry*, I. R. 6 Eq. 28; *Gurly* v. *Gurly*, 8 Cl. & Fin. 743; *Re Burgess*, 11 Ir. Ch. R. N. S. 164; *Colleton* v. *Garth*, 6 Sim. 19).

As to the law of jointures, see 1 Rop. on Husband and Wife, by Bright, c. 10; Cruise's Dig. tit. 7; Bac. Abr. Dower and Jointure (G.); Gilb. on Uses, by Sugd. p. 321, &c.

Attendant terms.

As to how far attendant terms could have been used to bar a right to dower, see *Mole* v. *Smith*, Jac. R. 496; *Radnor* v. *Vandebendy*, Show. P. C. 69; Pr. Ch. 65; *Swannock* v. *Lifford*, 2 Atk. 208; Ambl. 6; Co. Litt. 208 a, n.; *Willoughby* v. *Willoughby*, 1 T. R. 763; *Maundrell* v. *Maundrell*, 10 Ves. 246; *Wynn* v. *Williams*, 5 Ves. 130; Butl. Co. Litt. 290 b, n. 1. s. 13; *Re Sleeman*, 4 Ir. Ch. R. 563; 8 & 9 Vict. c. 112, *post*; *Corry* v. *Cremorne*, 12 Ir. Ch. R. 136; *Anderson* v. *Pignet*, 8 Ch. 180, *post*.

Uses to bar dower.

As to the form of limitation to uses to bar dower, see Gilb. on Uses, by

Sugd. 321—325, n.; Fearne, 347, n. by Butl. 7th ed.; 2 Dav. Conv. 210; 3 Dav. Conv. 249, n. (*o*); *Collard* v. *Roe* (4 De G. & J. 525). A limitation to the old uses to bar dower will not deprive of her dower a woman married since the passing of the act (*Fry* v. *Noble*, 7 D. M. & G. 687). 3 & 4 Will. 4, c. 105, s. 1.

Under 13 Edw. 1, c. 34, a woman forfeits her dower by adultery, even though brought about by her husband's cruelty (*Hetherington* v. *Graham*, 6 Bing. 139; *Woodward* v. *Dowse*, 10 C. B. N. S. 722; *Bostock* v. *Smith*, 34 Beav. 57). Under the old law a divorce *à vinculo matrimonii* was a bar to dower (*Frampton* v. *Stephens*, 21 Ch. D. 164), and so now is a decree for dissolution of marriage (*Ib.*) But divorce of a wife *à mensâ et thoro* by the Ecclesiastical Court, before 20 & 21 Vict. c. 85, for adultery, did not preclude her from obtaining her distributive share in the personal estate of her intestate husband (*Rolfe* v. *Perry*, 11 W. R. 357). Forfeiture of dower by adultery.

Dower was extinguished by a deed duly acknowledged by the wife, even where her name was not inserted as a co-grantor (*Dent* v. *Clayton*, 12 W. R. 903). Bar by acknowledged deed.

The usual remedy for the recovery of dower is by action in the Chancery Division. For instances of such actions, see *Sheaf* v. *Cave* (24 Beav. 259); *Bamford* v. *Bamford* (5 Hare, 203); *Marshall* v. *Smith* (5 Giff. 37); *Dawson* v. *Bank of Whitehaven* (6 Ch. Div. 218); *Meek* v. *Chamberlain* (8 Q. B. Div. 31); see also the forms of orders, Seton, 681; *Kernaghan* v. *M'Nally* (11 Ir. Ch. Rep. N. S. 52). As to costs, see *Harris* v. *Harris* (11 W. R. 62); *Stormont* v. *Wickens* (14 W. R. 192). Remedies for the recovery of dower.

As to the period in which the right to sue for dower is barred, see *Marshall* v. *Smith* (5 Giff. 37). As to the arrears of dower which may be recovered, see *ante*, p. 185. Limitation.

The Dower Act does not apply to freebench (*Smith* v. *Adams*, 5 D. M. & G. 712). Freebench, in the absence of any custom to the contrary, does not attach even in right until the husband's death (*Benson* v. *Scott*, 12 Mod. 49; 2 Ves. sen. 633; *Godwin* v. *Winsmore*, 2 Atk. 526; *R.* v. *Lopen*, 2 T. R. 580; *Brown* v. *Raindle*, 3 Ves. jun. 256). And therefore any alienation by him *alone*, even by contract (*Hinton* v. *Hinton*, 2 Ves. sen. 631), to take effect in his lifetime, defeated the widow's claim (*Benson* v. *Scott*, 3 Lev. 385; *Goodwin* v. *Windmore*, 2 Atk. 526; *Farley's case*, Cro. Jac. 36; Moor, 758; *Dagworth* v. *Radford*, Sir W. Jones, 462; 1 Freem. 516; Gilb. Ten. 321; see 2 Watk. on Cop. 73—79; Shelford on Copyholds, pp. 68—72). And if a man surrendered his copyhold estate to the use of his will, and then devised it, the widow did not take freebench (*Lacy* v. *Hill*, 19 Eq. 350). Now under sect. 3 of the Wills Act a devise without a surrender has the same effect (*Ib.*; see *Powdrell* v. *Jones*, 2 Sm. & G. 407, where it was held that a devise did not bar freebench, the special custom of the manor being that the title of the wife could only be destroyed by her voluntary surrender; *Riddell* v. *Jenner*, 10 Bing. 29; *Doe* v. *Gwinnell*, 1 Q. B. 682). Freebench.

Where a purchaser of a copyhold took a surrender, but died before admittance; held, that his widow was not entitled to freebench (*Smith* v. *Adams*, 5 D. M. & G. 712). *Secus*, where the heir of the purchaser had been admitted (*Vaughan* v. *Atkins*, 5 Burr. 2764). A widow was held not entitled to freebench out of a moiety of copyholds to which her husband was entitled in remainder after a life estate (*Smith* v. *Adams*, 18 Beav. 499). Nor out of trust estates (*Forder* v. *Wade*, 4 Bro. C. C. 520).

The widow of a tenant in tail is entitled to freebench, though there is no custom as to the freebench of widows of tenants in tail, but only as to widows of tenants in fee (*Doe* v. *Sanders*, 3 Dougl. 303).

A marriage settlement "in order to make some provision for" the intended wife in case she should survive her husband, settled some of the husband's copyholds, after his death, on her for life: held, that she was not thereby barred of her freebench in other copyholds, as to which the husband died intestate (*Willis* v. *Willis*, 34 Beav. 340).

See further Scriven on Copyholds, 65 *et seq.*, 6th ed.

The Dower Act extends to lands of gavelkind tenure (*Farley* v. *Bonham*, 2 J. & H. 177). By the custom of gavelkind, the wife, after the death Gavelkind.

3 & 4 Will. 4, c. 105, s. 1.

of her husband, shall have for her dower a moiety of all lands of her husband so long as she continues chaste (Rob. on Gav. by Wilson, pp. 205—236).

Dower of Equitable Estates.

Widows to be entitled to dower out of equitable estates.

2. When a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable (*m*), shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy) (*n*), then his widow shall be entitled in equity to dower out of the same land.

(*m*) For examples of interests to which this act would apply, see *Re Michell, Moore* v. *Moore*, 1892, 2 Ch. 99.

Old law.

Before this act there was no dower out of equitable estates (*Dawson* v. *Bank of Whitehaven*, 6 Ch. Div. 221; *D'Arcy* v. *Blake*, 2 Sch. & Lef. 388; *Re Michell, Moore* v. *Moore*, 1892, 2 Ch. 93).

Mortgages.

Where an estate was subject to a mortgage *in fee* at the time of the marriage, and continued so during the coverture, the widow was not entitled to dower (*Dixon* v. *Saville*, 1 Br. C. C. 326). Where the husband was seised merely as a mortgagee or trustee, the wife was entitled to dower at law, but subject in equity to the same right of redemption or trust as her husband was liable to; but a court of equity would interfere to prevent a widow from taking advantage of her legal right (*Hinton* v. *Hinton*, 2 Ves. sen. 634; see 2 Freem. 43, 71; 1 Burr. 117; Butl. Co. Litt. 205 a, n. (1), 11th ed.; *Lyster* v. *Mahony*, 1 Dru. & War. 242; *Flack* v. *Longmate*, 8 Beav. 420; *Knight* v. *Frampton*, 4 Beav. 10). Where a wife, married before the act, joined in a mortgage in fee in her husband's land, to release her dower, she had no right to redeem (*Dawson* v. *Bank of Whitehaven*, 6 Ch. Div. 221). But where the husband died seised in fee, a subsequent mortgage by the heir in which the widow joined did not extinguish her right to dower or reconveyance (*Meek* v. *Chanberlain*, 8 Q. B. D. 31).

Reversions and remainders.

So a woman is not entitled to dower of estates of which the husband was seised in fee, subject at the time of his marriage to leases for lives, which did not expire during the coverture (*D'Arcy* v. *Blake*, 2 Sch. & Lef. 387; Fitz. Abr. Dower, pl. 184; Br. Abr. Dower, pl. 44; Co. Litt. 32 a; Co. Litt. 203 a, Harg. note; Perk. 333, 348; *Forder* v. *Wade*, 4 Br. C. C. 520). There was no right of dower in land subject to a contract for sale at the time of the marriage. It was the same in the case of a contract made after marriage, but before the legal estate was vested in the husband. So if the husband conveyed a legal estate in remainder, not subject to dower at the time of the conveyance, dower would not afterwards attach on that estate in favour of the wife, merely because, if he had not conveyed the estate, it would have fallen into possession, and become liable to dower (*Lloyd* v. *Lloyd*, 4 Dru. & War. 370). On the surrender in deed or in law of the life estate to the husband the right of dower will attach (1 Roll. Abr. 676, pl. 40). But if a rent be reserved on a lease for years, made before marriage, the wife will be entitled to recover dower of the third part of the rent immediately, and also of the land, with a *cesset executio* during the term (Prec. Ch. 250). And the wife of a man entitled to lands under a devise to him in fee or in tail, subject to a chattel interest for raising the testator's debts, is dowable after payment of them (Co. Litt. 41 a; 8 Rep. 96 a; 2 Vern. 404). Where a husband was seised in fee subject to a trust term to secure life annuities and to pay himself half the surplus rents, his

widow was entitled to have her dower set out (*Sheaf* v. *Cave*, 24 Beav. 259). Where a husband was entitled to an equitable estate in fee simple in certain land determinable in the event, which took place, of his dying without leaving issue living at his decease, his widow was, notwithstanding the operation of the executory devise over, entitled under this section to dower out of the land (*Smith* v. *Spencer*, 4 W. R. 729). 3 & 4 Will. 4, c. 105, s. 2.

(*n*) The widow of a joint tenant in fee or in tail is not entitled to dower, because, upon the death of one of the joint tenants, the estate goes to the survivor, who is then in from the first grantor, and may plead the deed creating the estate as originally made to him, without naming his companion (Litt. s. 45; Co. Litt. 37 b, 30 a, 183 a). And if a joint tenant aliens his share, his wife shall not be endowed (Fitz. N. B. 150; Br. Dow. pl. 30; Cro. Jac. 615). Joint tenants.

A widow concurred in a partition of her husband's estate, and released a moiety allotted to the other tenant in common from her dower; the other moiety was conveyed to the trustees of her husband's will: it was held, that she was entitled to dower out of the entirety of the latter moiety (*Reynard* v. *Spence*, 4 Beav. 103).

Seisin of Husband.

3. When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same, if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof: provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced (*o*). Seisin shall not be necessary to give title to dower.

(*o*) A right of entry is where a man, who has the possession of lands, is disseised or ousted, or, having a right to the possession, is kept out of it; in which case he may peaceably make an entry upon the lands, or bring an action of ejectment to recover possession (See Rosc. on Real Actions, 79, &c.; 1 Real Prop. Rep. 493). The time within which a right of entry must be prosecuted is now prescribed by statute 3 & 4 Will. 4, c. 27 (See *ante*, p. 112 *et seq.*) Right of entry.

Seisin is a technical term, to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass (1 Burr. 107). One of the circumstances required to give a title of dower before this act was, that the husband should be seised during the coverture of the estate whereof the wife is to be endowed. A seisin in law was sufficient, without a seisin in deed. A seisin in law, in its usual acceptation, is where the inheritance in lands and hereditaments, of which a man died seised or possessed, descends upon his heir, who dies before entry or possession (Litt. s. 448). In such a case, if the heir leave a widow, she will be entitled to dower (Litt. s. 681). On conveyances under the Statute of Uses, the bargainee or *cestui que use* is seised in law immediately on the delivery of the deed, and therefore his wife was dowable, although no entry had been made by him, or other act done to acquire an actual seisin. As if lands were bargained and sold, and a stranger entered, and then the deed was inrolled and the bargainee died, his wife would be endowed (2 And. 161; Gilb. Uses by Sugd. 213; see Cro. Jac. 604), but if the husband had died before inrolment, she would not have been endowed (Gilb. Uses, 213). Seisin.

But wherever an actual entry was necessary to give effect to a convey-

3 & 4 Will. 4, c. 105, s. 3.

ance, as in the case of an exchange at common law, the wife was not entitled to dower, unless the husband had entered (Perk. s. 368; Park on Dower, 34).

Alienation, &c. by Husband.

No dower out of estate disposed of.

4. No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will (*p*).

(*p*) A devise of "all my real estate" to trustees on trust for sale will bar dower under sect. 4 (*Lacey* v. *Hill*, 19 Eq. 346; see *Rowland* v. *Cuthbertson*, 8 Eq. 466).

Priority to partial estates, charges, and specialty debts.

5. All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower (*q*).

By old law the husband alone could not defeat dower.

(*q*) Before this act, after a title of dower had once attached, it was not in the power of the husband alone to defeat it by any act in the nature of alienation or charge (3 Lev. 386; Co. Litt. 32; F. N. B. 147 (E)). The alienation of the husband, whether voluntarily, as by deed or will, or involuntarily, as by bankruptcy, &c., would not defeat the wife's right of dower against the husband's alienee (Shep. T. 275; *Stoughton* v. *Leigh*, 1 Taunt. 410; Co. Litt. 46 a; 7 Rep. 8, 72; Jenk. Cent. p. 36; see Park on Dower, 237, 238).

Old rule that a devise of lands liable to dower was *primâ facie* a devise of them subject to the right of dower.

In the case of women married before this act, where a benefit was given by the will to the testator's widow, a question was often raised whether she was not thereby precluded from claiming dower out of lands devised by that will. The rule was that a devise of lands liable to dower was *primâ facie* a devise of them subject to the right to dower; and a widow was accordingly entitled to claim both her dower and the benefit given by the will (*Birmingham* v. *Kirwan*, 2 Sch. & Lef. 444; *Ellis* v. *Lewis*, 3 Hare, 313; *Gibson* v. *Gibson*, 1 Drew. 42). But certain provisions were considered as inconsistent with the right to dower, and where a will contained such provisions, the widow was put to her election. Thus she was put to her election where a testator provided that his daughter should have the personal use, occupation and enjoyment of a house (*Miall* v. *Brain*, 4 Mad. 119; see *Butcher* v. *Kemp*, 5 Mad. 61; *Roadley* v. *Dixon*, 3 Russ. 192). Also, where a testator gave to trustees an express power to lease, and also the general power to manage and to cut timber for repairs at their discretion (*Parker* v. *Sowerby*, 4 D. M. & G. 321; overruling *Warbutton* v. *Warbutton*, 2 Sm. & G. 163; see *Linley* v. *Taylor*, 1 Giff. 67). But powers of, or trusts for, sale were held not inconsistent with a widow's right to dower; nor was a direction as to the distribution of the proceeds (*Bending* v. *Bending*, 3 K. & J. 57; see further, 1 Jarm. Wils. 458 *et seq.*; Hawk. Wills. 275; 1 L. C. Eq. 523 *et seq.*

Widow put to her election where will contained provisions inconsistent with right to dower.

Powers of or trusts for sale.

New law.

By the above sections all dispositions by the husband are made effectual as against the right of his widow to dower. Thus a mortgage by a husband is a bar *pro tanto* of dower (*Jones* v. *Jones*, 4 K. & J. 361).

Notwithstanding the statute 3 & 4 Will. 4, c. 104 (*post*, p. 377), and the 5th section of this act, the widow's right to dower or freebench has still priority over mere creditors of a deceased husband (*Spyer* v. *Hyatt*, 20 Beav. 621).

3 & 4 Will. 4, c. 105, s. 6.

Dower may be barred by a declaration in a deed;

6. A widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land (*r*).

(*r*) A declaration contained in the deed of conveyance is sufficient under this section, although the deed was not executed by the husband (*Fairley* v. *Tuck*, 27 L. J. Ch. 28; 6 W. R. 9). A declaration in bar of dower in a conveyance of real estate, prior to this act, will not deprive a wife, married after this act, of her dower (*Fry* v. *Noble*, 20 Beav. 598; 7 D. M. & G. 687; *Clarke* v. *Franklin*, 4 K. & J. 266).

or by a declaration in the husband's will.

7. A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

Dower shall be subject to restrictions.

8. A right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband duly executed as aforesaid.

Devise of real estate to the widow shall bar her dower.

9. Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will (*s*).

Old rule as to when widow was put to election.

(*s*) According to the law before this act a devise by a husband for the benefit of his wife, who was entitled to dower, did not operate as a satisfaction of such right, unless an intention was expressed, or could be inferred, that the gift by the husband was in lieu of dower, in which case the wife could not claim both, but was put to her election (*Thompson* v. *Burra*, 16 Eq. 601; see the cases collected in Rop. on Husb. and Wife, by Bright, c. 11, s. 3; and see 1 Jarman on Wills, 458 *et seq.*; *Lawrence* v. *Lawrence*, 2 Vern. 365; Freem. 244; 3 Br. P. C. 484; 1 Swanst. 398, n.; 1 Br. C. C. 292, n. by Belt; *Hall* v. *Hill*, 1 Dru. & War. 102; *Holdich* v. *Holdich*, 2 Y. & C. C. C. 18; *Goodfellow* v. *Goodfellow*, 18 Beav. 356); even where the devise was *only for the life* of the widow (*Chalmers* v. *Storil*, 2 Ves. & B. 224; *Dickson* v. *Robinson*, Jac. R. 503; *Roberts* v. *Smith*, 1 S. & St. 513). For cases where the gift of an annuity did not put the widow to her election, see *Dowson* v. *Bell* (1 Keen, 761); *Harrison* v. *Harrison* (1 Keen, 765); *Wetherell* v. *Wetherell* (10 W. R. 818).

Effect of receiving provision given in lieu of dower.

As to how far a widow was prevented from exercising her election, by receiving a provision given in lieu of dower, see *Parker* v. *Downing* (2 Jur. 28); *Eland* v. *Eland* (2 Jur. 852); *Reynard* v. *Spence* (4 Beav. 103); *Sopwith* v. *Maughan* (30 Beav. 235). As to the right of election in such a case possessed by the next of kin of a widow who had not elected, see *Fytche* v. *Fytche* (7 Eq. 494).

New law.

This act has given the husband complete power to defeat the right of dower, either by deed or will (sects. 4 and 5); and where any interest in the land otherwise liable to dower is given to the wife, in order to preserve the right of dower, an intention to that effect must be declared (sect 9), although no gift to the wife out of personal estate is to defeat the right of dower, unless an intention to do so be declared by the will (sect. 10).

Where a testator devised his real and personal estate to trustees upon trust for sale and conversion and payment of an annuity out of the income of the proceeds to his widow, she was deprived of her right to dower by

3 & 4 Will. 4, c. 105, s. 9.

sect. 9 (*Rowland* v. *Cuthbertson*, 8 Eq. 466; *Lacey* v. *Hill*, 19 Eq. 346; *Re Thomas*, *Thomas* v. *Howell*, 34 Ch. D. 166).

Bequest of personal estate to the widow shall not bar her dower.

10. No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will (*t*).

(*t*) A bequest of personalty never operated in bar of dower unless an intention to that effect clearly appeared (*Ayres* v. *Willis*, 1 Ves. sen. 230).

Agreement not to bar Dower.

Agreement not to bar dower may be enforced.

11. Provided always, and be it further enacted, that nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them (*u*).

(*u*) In purchasing an estate free from dower by force of this act, it should be ascertained that the vendor has not bound himself by agreement not to bar his wife's dower (Sugd. V. & P. 548, pl. 24, 11th ed.)

Priority of Legacies in lieu of Dower.

Legacies in bar of dower still entitled to preference.

12. Nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies (*x*).

Preference of legacies in lieu of dower.

(*x*) When a general legacy is given in consideration of a debt owing to the legatee, or of his relinquishing any right or interest, it will be entitled to a preference of payment on the other general legacies (See 1 Rop. on Leg. 372, 2nd ed.; Wms. on Executors, 1265; 1 Fonbl. on Eq. 372). Upon this principle, when a legacy is given to a wife in lieu or satisfaction of dower, she is not, in case the assets should prove deficient, to abate in proportion to the other legatees (*Burridge* v. *Bradyl*, 1 P. Wms. 127; *Blower* v. *Morrett*, 2 Ves. sen. 420; *Davenhill* v. *Fletcher*, Ambl. 244). It seems that the principle of these cases applies only where at the death of the testator the widow is entitled to dower (*Heath* v. *Dendy*, 1 Russ. 545; *Acey* v. *Simpson*, 5 Beav. 35; *Roper* v. *Roper*, 3 Ch. D. 714). A widow, dowable out of her husband's lands, having elected to take an annuity given by his will in lieu of dower, was held to be entitled to priority over the other legacies (*Stahlschmidt* v. *Lett*, 1 Sm. & G. 421; see however *Re Greenwood*, *Greenwood* v. *Greenwood*, 1892, 2 Ch. 295). A legacy to a wife in lieu of dower carries interest only for one year from the death (*Re Bignold*, *Bignold* v. *Bignold*, 45 Ch. D. 496).

Dower ad Ostium, &c. abolished.

3 & 4 Will. 4, c. 105, s. 13.

Certain dowers abolished.

13. No widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris (*y*).

(*y*) An account of this species of dower, which had long become obsolete, will be found in Litt. ss. 38, 39, 40; Co. Litt. 34 a; 2 Bl. Comm. 132, 133.

Saving and Restraining Clause.

Act not to take effect before the 1st January, 1834.

14. This act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower (*z*).

(*z*) See *Fry* v. *Noble* (20 Beav. 598; 7 D. M. & G. 687); and *Clarke* v. *Franklin* (4 K. & J. 266).

TENANT BY THE CURTESY.

Tenant by the curtesy of England is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case the husband shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England (Litt. ss. 35, 52; 2 Bl. Comm. 126). And it seems that a husband may become tenant by the curtesy to an estate which his wife has inherited (Williams, Real Prop., App. E. 572, 14th ed.) A husband may be tenant by the curtesy to money which is to be considered as land (*Cunningham* v. *Moody*, 1 Ves. sen. 174). A husband is still entitled to curtesy in real estate as to which his wife, married since 1882, has died intestate (*Hope* v. *Hope*, 1892, 2 Ch. 336).

Requisites of a tenancy by the curtesy.

Four circumstances are requisite for enabling the husband to be tenant by the curtesy:—1st. A legal marriage; but if the marriage be *voidable* only, the husband will be tenant by the curtesy, unless the marriage be actually avoided during the lives of *both* parties (*Hicks* v. *Harris*, Carth. 271; 2 Salk. 548; 4 Mod. 182; see 2 Ves. sen. 245; 7 Rep. 43 b).

2nd. The wife must have a seisin in deed of *corporeal* hereditaments (Co. Litt. 29 a), either before or after issue born (*Id.* 30 a). The receipt of rent reserved on a lease for years, amounts to an actual seisin (*De Grey* v. *Richardson*, 3 Atk. 469); but the husband cannot acquire such a seisin of an estate let on a lease for life before marriage as will entitle him to be tenant by the curtesy, unless the lease determine during the coverture (Co. Litt. 29 a, 32 a). A husband will not be tenant by the curtesy of an estate tail of which the wife was not seised during the coverture (Co. Litt. 29 a). Therefore, where a wife by an antenuptial settlement conveyed land of which she was tenant in tail to her husband during her life, he took no estate by the curtesy (*Doe* v. *Rivers*, 7 T. R. 276). But where a father devised land to a daughter, a married woman, who predeceased him, her husband was held entitled to an estate by the curtesy, by virtue of sect. 33 of the Wills Act (*Eagar* v. *Furnivall*, 17 Ch. D. 115). Where

Tenant by the curtesy.

a wife's real estate did not fall into possession till after the husband's bankruptcy and discharge, it was held that, though there had been issue of the marriage, the husband had not at the time of his bankruptcy any such contingent interest in the estate, as tenant by the curtesy, as would pass to his assignees (*Gibbins* v. *Eyden*, 7 Eq. 371).

As to *incorporeal* hereditaments, a seisin in law is sufficient (Co. Litt. 29 a, and notes by Harg.)

Where there is a devise in fee simple, with an executory devise over, the husband's right to curtesy attaches on the first estate, and is not defeated by its determination. As where there was a devise to trustees in fee, in trust for A. and her heirs, with a devise over, in case she died under the age of twenty-one, and without leaving issue. A. had a child which died, and then died under twenty-one; when it was held that her husband was entitled to be tenant by the curtesy (*Buckworth* v. *Thirkel*, 10 Moore, 235, n.; 2 Bing. 447; 3 Bos. & P. 652, n.; 4 Dougl. 323; see 2 Sim. 251; 2 Rop. on Husband and Wife, Jac. ed. Addenda, No. 2; Butl. Co. Litt. 241 a, n. (4); *Boothby* v. *Vernon*, 9 Mod. 147). But where an estate was devised to A. and her heirs, but if she died, leaving issue, then to such issue and their heirs, and A. died, leaving issue, her husband was not entitled to be tenant by the curtesy, because the estate of the wife had determined on her death leaving issue, by which the children took as purchasers by force of the gift, and not by descent from her (*Barker* v. *Barker*, 2 Sim. 249).

An estate by the curtesy must arise out of an inheritance, and no such estate can issue out of an estate *pur autre vie* (*Stead* v. *Platt*, 18 Beav. 54).

If a husband is possessed of a term of years, and the owner of the reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the two estates in different rights, without having acquired the freehold by his own act, and consequently there is no merger (*Jones* v. *Davies*, 7 H. & N. 507; 31 L. J. Ex. 116).

As to the effect of the wife's election on the husband's estate by the curtesy, see *Griggs* v. *Gibson* (1 Eq. 685).

3rd. The wife must have issue born alive in her lifetime, and capable of inheriting the estate (Co. Litt. 29 b; 8 Rep. 34 b; Dyer, 25 b; see *Jones* v. *Ricketts*, 31 L. J. Ch. 753; 10 W. R. 576).

4th. The last circumstance required to consummate the right of the husband is the death of the wife (Co. Litt. 20 a).

Copyholds.

Copyholds are not subject to curtesy, except by custom (4 Rep. 22 a, 30 b; *Paulter* v. *Cornhill*, Cro. Eliz. 361), to which resort must be had for determining what portion of the lands of a feme copyholder a husband will take. It is generally an estate for the life of the husband, if there be issue, as at common law; but in gavelkind lands, a moiety only, so long as he continues unmarried, whether there be issue or not (Co. Litt. 30 a, 111 a; 2 Sid. 153; Rob. on Gav. by Wilson, pp. 177—204; Scriven on Cop. 70, 6th ed.; Shelford on copyholds, pp. 72—74).

Equitable estates.

Equity follows the law in the quality of estates, and therefore a husband will become tenant by the curtesy of an equitable estate of inheritance of the wife, and this notwithstanding a direction to pay the rents to her separate use (*Morgan* v. *Morgan*, 5 Madd. 408; *Hearle* v. *Greenbank*, 3 Atk. 715; *Pitt* v. *Jackson*, 2 Br. C. C. 51; *Follett* v. *Tyrer*, 14 Sim. 125). So where there was a devise of freeholds to trustees upon trust to stand possessed thereof unto and to the use of a married woman, her heirs and assigns for ever, for her separate use (*Appleton* v. *Rowley*, 8 Eq. 139; *contra*, *Moore* v. *Webster*, 3 Eq. 267). But a disposition by a wife of her separate property, either by deed or will prevents an estate by the curtesy (*Cooper* v. *Macdonald*, 7 Ch. Div. 288).

Where an equitable estate in fee descended on a married woman, the court, by virtue of her equity to a settlement, settled the estate on her during her life, but held that the possible estate, by the curtesy of her husband, could not be interfered with (*Smith* v. *Matthews*, 3 D. F. & J. 139).

Tenant by the curtesy.

Adverse possession, commenced before the equitable estate of the wife begins, by a party claiming by a title paramount to the trust, who retains possession until after the death of the wife, will prevent any title by the curtesy (*Parker* v. *Carter*, 4 Hare, 400).

The husband may be excluded in equity by an express declaration, that, upon the death of the wife, the inheritance shall descend to the heir of the wife, and that the husband shall not be tenant by the curtesy (*Bennett* v. *Davis*, 2 P. Wms. 316); although a *partial* exclusion from the enjoyment of the property will not have that effect (5 Madd. 412).

By stat. 3 & 4 Will. 4, c. 74, s. 22 (*ante*, p. 261), an estate by the curtesy qualifies a person to be protector of a settlement. As to the statutory powers of leasing and sale, given to a tenant by the curtesy, see S. E. Act, 1877, sect. 46; S. L. Act, 1882, sect. 58, sub-s. 1 (viii.), *post*.

LAW OF INHERITANCE.

3 & 4 WILLIAM IV. c. 106.

An Act for the Amendment of the Law of Inheritance (*a*).

[29th August, 1833.]

INTERPRETATION CLAUSE.

3 & 4 Will. 4, c. 106, s. 1.

Meaning of words in the act.

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows (that is to say), the

"Land." word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency;

"The purchaser." and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as

"Descent." other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression

"Descendants." "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the ex-

"Persons last entitled." pression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits

"Assurance." thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be con-

veyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

3 & 4 Will. 4, c. 106, s. 1.

Number and gender.

(*a*) The leading objects of this act are:

The objects of the act.

1st. To alter the root of descent by tracing the descent from the person last entitled, unless it be proved that he took by descent, thus superseding the rule that the descent should be traced from the person who last died actually seised (Sect. 2).

2nd. To declare that the heir of a testator taking under his will shall be considered as taking as *devisee*, and that, under a limitation to a grantor or his heirs, such person shall be considered as a *purchaser* (Sects. 3 and 4).

3rd. To declare that brothers and sisters shall not inherit immediately from each other, but that every descent from them shall be traced through the parent (Sect. 5).

4th. To enable the lineal ancestor to inherit from his issue in preference to collateral relations. Thus, on failure of lineal descendants of the last owner, inquiry is to be made for the father, and not for the brother or sister, nephew or niece; for the grandfather, and not for the uncle, aunt, or cousin, ascending in the first instance to the immediate parent, and then again descending to his issue, and in a course of transmission from him; and so, as to every more remote lineal ancestor and his issue, in each degree. But preference is given to the male ancestral line throughout (Sects. 6, 7, 8).

5th. To make the half-blood capable of inheriting next after any relation in the same degree of the whole blood and his issue (Sect. 9).

6th. To allow descents to be traced through persons who have been attainted (Sect. 10).

Report of R. P. Commissioners.

The report of the Commissioners of Real Property will explain the general object of the alterations made by this act; and for further information on the important subject of the law of descents, the reader is referred to 2 Bl. Comm. 200, 240; Bl. on the Law of Descents; Watkins and H. Chitty on Descents; Bac. Abr. and Com. Dig. Descents; Hale's Hist. C. L. 206—248.

State of the law of descents before the new act.

"The rules which govern the transmission of freehold estates of inheritance at common law, on the decease of an absolute proprietor, in the absence of express disposition by him, are (for the most part) well understood, and appear to be well suited to the habits and feelings of the people.

"By these rules an estate descends to the eldest or only son, or his descendants, if he should be dead, leaving issue, and next to the second and other sons according to priority of birth, and their descendants; in default of sons and their descendants, it descends to daughters in equal shares, if more than one, and to the descendants of any deceased daughters, such descendants taking the share which would have gone to the parent if living.

"When there is no lineal descendant, the estate goes to the eldest or only brother of the whole blood, that is, who was born of the same father and mother as the deceased proprietor, and to his descendants, if he should be dead, leaving issue, and to the other brothers in succession, and their descendants. If there be no brother or descendants of a brother, the sisters of the whole blood succeed in equal shares, and the descendants of deceased sisters, such descendants taking their parent's share as before.

"In case of the failure of brothers and sisters and their descendants, it becomes necessary to inquire whether the deceased proprietor took the estate himself by inheritance, or whether he acquired it immediately by a deed or will, or, in technical language, was a purchaser.

"In the former case, the heir is to be sought in the family from which

3 & 4 Will. 4, c. 106, s. 1.

the estate descended to the deceased proprietor, that is, either on the father's side or on the mother's side, as it happened; in the latter case the law gives the preference to the relations on the paternal side, but if there be none such, then it directs the inheritance to go to the relations on the maternal side.

Exclusion of the ascending line.

"Here occurs a rule, drawn from feudal principles, which is at variance with ordinary feelings and notions, and has been long considered unjust; every lineal ancestor of the deceased proprietor, whether near or remote, is excluded from immediately inheriting. An estate may pass to the younger brother of the father, and upon his death it may pass to the father as his heir; but rather than go at once to the father or the mother of the deceased proprietor, the law directs it to escheat, that is, to fall, as for want of an heir, to the lord of whom the land was holden, that is, in most cases, to the crown. [By the 6th section of the act 3 & 4 Will. 4, c. 106, *post*, the lineal ancestors are admitted.]

"In default, however, of lineal and immediate collateral heirs and their descendants, the inheritance is to be traced through the nearest ancestor, that is, the father, unless it be a maternal inheritance, and if it be a maternal inheritance, the mother, and it will pass to his or her eldest brother of the whole blood or his descendants, and the other brothers in succession and their descendants: and if none such, to sisters of the whole blood and their descendants in equal shares as before. In failure of this line, the next more remote ancestor on the same side is made the stock in the same manner, and then the next more remote, and so on; the rule being still observed, that the paternal line has the preference in ascending from the first purchaser, and that up to the first purchaser the inheritance must be traced back through the line of ancestors by which it descended.

Preference of the paternal line.

"If heirs in the pure male line ascending from the first purchaser should fail, then, in compliance with a rule above stated, a female ancestor, or some ancestor of a female ancestor, is to be made the stock; and first, it is a rule that such female ancestor is to be taken on the paternal side, if any such can be found; and therefore the brother of the paternal grandmother (the father's mother) is preferred to the brother of the mother of the deceased proprietor, he having been the first purchaser.

"Here sometimes, though rarely, occurs a point about which a difference of opinion has existed for a long series of years.

Question with respect to female stocks on the paternal side.

"According to some authorities, when a female stock on the paternal side is to be introduced, proximity of blood is to have the preference, and consequently collateral relations of the paternal grandmother are to be preferred to collateral relations of the paternal great grandmother. According to other authorities (and this is the doctrine maintained by Mr. Justice *Blackstone* in his Commentaries), the pedigree is still to be traced up as far as possible on the paternal side through males, and the female ancestor of the remotest male ancestor is to be preferred as a stock to the female ancestor of a less remote male ancestor, the paternal great grandmother to the paternal grandmother.

Heirs must be of the blood of the first purchaser.

"On failure of relations on the paternal side of the first purchaser, the maternal line is let in, that is, the mother of the first purchaser is considered as the stock, and her ancestors, first on the paternal and then on the maternal side, as before. It is to be observed, that on failure of heirs of the last proprietor on the side of the first purchaser, the estate does not pass to the heirs of the last proprietor on the other side, but escheats as before, so that an estate descended to the deceased proprietor from his mother can never pass to his collateral relations on the father's side.

Exclusion of the half-blood.

"It has been laid down, in the above statement, that collateral relations, in order to be let in to inherit, must be of the whole blood of the person from or through whom they are to derive their claim.

"Thus a brother of the deceased proprietor by the same father, but a different mother, cannot inherit to the deceased proprietor, whether he took by purchase or descent. The estate will rather escheat, and the same is the case with an uncle, half-brother of the father, and so on. This rule,

like that which excludes the lineal ancestor, has long been felt to rest on no sound principle, and to be hard in its operation." 3 & 4 Will. 4, c. 106, s. 1.

Equitable estates are subject to the same rules of descent as *legal* (2 P. Wms. 668; 1 Rep. 121 b; 4 Rep. 22; 2 Eden, 258; 1 Sand. Uses, 217, 3rd ed.; *Trash* v. *Wood*, 4 M. & C. 324). Equitable estates.

Root of Descent.

2. In every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same (*b*). Descent shall always be traced from the purchaser, but the last owner shall be considered to be the purchaser, unless the contrary be proved.

Where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend, and the descent shall thenceforth be traced, from the person last entitled to the land, as if he had been the purchaser thereof (22 & 23 Vict. c. 35, s. 19) (*c*). 22 & 23 Vict. c. 35, s. 19.

The last preceding section shall be read as part of the 3 & 4 Will. 4, c. 106 (*Ib.* s. 20).

(*b*) The law was different in those cases in which there was a seisin of property, and in those cases in which there was no seisin. The new statute has endeavoured to assimilate the law both with regard to matters capable of seisin and the law as applied to matters incapable of seisin. Accordingly it enacts that if an estate in possession descend on the heir of a purchaser, and he does not deal with it in any manner whatsoever, and then dies intestate, it will descend not upon his heir, but upon the heir of the purchaser. The old rule was *seisina facit stipitem;* but that is put an end to by the statute, because in all cases, whether there is seisin or not, it makes it go to the heir at law of the last purchaser (*Ingilby* v. *Amcotts*, 21 Beav. 593). For the old law as to the seisin of the ancestor, see the cases quoted *post*, p. 362. Effect of this section.

A vendor making title as heir is not bound to produce affirmative evidence in his possession that the ancestor from whom he traces descent took as purchaser, but may rely on the statutory presumption contained in this section until some proof to the contrary is adduced. But he is bound to disclose any matters within his knowledge tending to rebut the presumption that his ancestor took by purchase (*Dorling* v. *Claydon*, 1 H. & M. 402). Where an action to try the validity of a will was compromised on the terms that the rights of the plaintiff to certain lands should be the same as if there had been an intestacy, it was held that she took that land by descent, not by purchase (*Blake* v. *Hynes*, 11 L. R. Ir. 284). Effect of this section in the case of purchase from an heir.

3 & 4 Will. 4, c. 106, s. 2.

Purchaser dying before seisin.

A., being seised in fee of copyhold property, devised the same to B. for life, remainder to her issue as tenants in common; and if but one child, then to such one, his or her heirs, &c., absolutely. On the death of A., B. was admitted, and afterwards married C. B. subsequently died, leaving one child, who afterwards died, aged eight months. C. was held entitled as heir of the child, who took as devisee, and therefore as purchaser (*Doe* v. *Thomas*, 3 M. & G. 815; see *Doe* v. *Lawes*, 7 Ad. & Ell. 213).

Estates in remainder or reversion, or by executory devise.

The descent of an estate in remainder or reversion, or by executory devise, is analogous to the descent of an estate taken by descent from a purchasing ancestor. Estate X. was devised to A. in fee, with an executory shifting limitation to B. and her heirs in the event of A. becoming entitled to another estate, Y. B. died first, and her estate descended on C., her heir, who by his will in 1851 made a general devise of his real estate. Some months after his death the event took place on which the X. estate was to shift from A. to B. Held, that the estate X. passed by C.'s will, and did not descend either to the heir of B. or of C. (*Ingilby* v. *Amcotts*, 21 Beav. 585).

Whole share of coparcener dying intestate, leaving a son, descends on the son.

Where a coparcener dies intestate leaving a son, the whole of her share descends on her son (*Cooper* v. *France*, 19 L. J. Ch. 315). See the previous discussions of descent among coparceners in 5 Jur. 641, 763; 23 Law Mag. 279; 1 Hayes's Convey. 314, 5th ed.; 1 Jarm. & Byth. Convey. by Sweet, 139, 140; 10 Jur. 71—75, 112, 132, 160, 173. So where real estate stood limited to A. B. for life, with remainder to C. D. in fee simple. C. D. died, living A. B., leaving two aunts, a cousin, the son and heir of another aunt, and two cousins, the daughters and co-heiresses of another aunt, her co-heirs at law. The property became thus divisible into eights, two to one aunt, two to another, two to the son of another, and one eighth to each daughter of the other aunt. One of the daughters, E. F., died, leaving I. K., her son and heir at law. The other, G. H., died in 1832, leaving I. K. her nephew and heir. None of these persons had in any way dealt with the property. Subsequently A. B., the tenant for life, died: it was held that I. K. ought to be considered as standing in his mother's place in respect of her share (*Paterson* v. *Mills*, 19 L. J. Ch. 310).

Customs.

The rule as to tracing the descent from the purchaser applies where there is a customary descent (sect. 1, *ante*). If the custom is found applicable by reason of the parties being within the requisite degree of consanguinity, the customary mode of descent is to be applied, and the descent traced according to the directions of the act. If the parties are not within the requisite degree, the directions of the act are to be followed, the descent being traced according to common law (*Per Crompton*, J.; *Muggleton* v. *Barnett*, 2 H. & N. 653; see Williams, Real Prop. App. A.) All the ordinary rules of descent, *e.g.*, the right of representation, are applicable on points not provided for by the custom (*Hook* v. *Hook*, 1 H. & M. 43).

When the custom was that copyholds for the first descent after a surrender descend to the eldest son, and if no surrender to the youngest, it was held that the word "descent" was not used in its strict legal sense, but meant "a single step in the scale of genealogy" (*Bickley* v. *Bickley*, 4 Eq. 216). See further Scriven, pp. 61, 271, 6th ed.

Right of posthumous heir.

Although lands have actually descended in the first instance to the person who was heir of the party last seised at the time of his decease, yet, if a nearer heir is afterwards born, property will shift to the nearest heir who subsequently comes into being (See *Rider* v. *Wood*, 1 K. & J. 644; Cru. Dig. Descent, Ch. III. s. 14). A posthumous heir is entitled to the rents of a descended estate only from the date of his birth, and the qualified heir is entitled to the rents which accrue before the birth of the posthumous heir, whether actually received before that time or not (*Richards* v. *Richards*, Johns. 754; see, however, *Goodale* v. *Gawthorne*, 2 Sm. & Giff. 375).

(*c*) For the law before 22 & 23 Vict. c. 35, see *Doe* v. *Blackburn* (1 Mood. & Rob. 457, *Parke*, B.)

Devise to Heir—Limitation to Grantor.

3 & 4 Will. 4, c. 106, s. 3.

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

3. That when any land shall have been devised, by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent (*d*); and when any land shall have been limited, by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof (*e*).

Descent and purchase.

(*d*) This section of the act is in direct contravention of two old-established rules of law, and renders it necessary to bear in mind the distinction between *descent* and *purchase*, the two modes of acquiring property. A title by *descent* is vested in a man by the single operation of law, and by *purchase* by his own act or agreement (Co. Litt. 18 b; 2 Bl. Comm. 200, 201). The latter is thus defined by Littleton, s. 12: "Purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors or cousins, but by his own deed." Lord *Coke* states that a purchaser is a law term, and imports any estate which is *not* cast upon a man by act of law, (as descent or escheat,) but which he takes or accepts by conveyance for money or other consideration, *vel aliâ quâvis fortunâ*, or freely by gift (Co. Litt. 18 a). The difference between the acquisition of an estate by descent and by purchase consists principally in two points: 1st. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity. 2nd. An estate taken by purchase will not make the person who acquires it answerable for the acts of his ancestors, as an estate by descent (Cruise's Dig., tit. 30, s. 4).

Devise to heir.

Law before this act.

It was a positive rule of law, that a man could not make his right heirs take by purchase, neither by conveyance at common law, nor by a limitation to uses, nor by devise (*Counden and Clerk's Case*, Hob. 30; *Pybus* v. *Mitford*, 1 Ventr. 372; Co. Litt. 22 b). The same rule applied to equitable as legal estates (Watk. Desc. 169), and to copyholds as to freeholds (*Roe* d. *Noden* v. *Griffith*, 4 Burr. 1952; *Thrustout* v. *Cunningham*, 2 Bl. R. 1048; Fearne, 68). Therefore, if a person devised his lands to his heir at law in fee, it was inoperative, and the heir took by descent, as his better title (*Reading* v. *Royston*, 1 Salk. 242; *S. P.*, 2 Leon. 11; Dyer, 124 a; Plowd. 545; 2 Ves. & B. 190); and this notwithstanding the will imposed some pecuniary charges on the estate (*Clarke* v. *Smith*, Com. 72; *Allen* v. *Heber*, 1 Bl. R. 22; *Emerson* v. *Inchbird*, 1 Ld. Raym. 728; *Plunket* v. *Penson*, 2 Atk. 292; *Hedger* v. *Rowe*, 3 Lev. 127; see Wms. Saund. 8 d; *Chaplin* v. *Leroux*, 5 M. & S. 14). So under a devise to one for life, or in tail, with remainder to the right heirs of the testator, immediately upon his death the heir took the reversion by descent, and not under the will (Hob. 30; 10 Rep. 41; Ventr. 372; *O'Keefe* v. *Jones*, 13 Ves. 413). So under a devise to the heir at law in fee, with an executory devise over in case he did not attain the age of twenty-one years, the heir took by descent, and not by purchase (*Doe* v. *Timins*, 1 B. & Ald. 530; see 1 Jarman on Wills, 75; *Langley* v. *Sneyd*, 7 Moore, 165; *Manbridge* v. *Plummer*, 2 M. & K. 93). But where a different estate was devised than would have descended to the heir, the disposition by will prevailed, as where the estate

3 & 4 Will. 4, c. 106, s. 3.

was devised to the heir in tail (Plowd. 545). So where a man having issue two daughters, who were his heirs, devised to them and their heirs, they took under the will, for by law they would have taken as coparceners, but by the will the estate was given to them as joint tenants (Cro. Eliz. 451; Com. R. 123; 2 Ld. Raym. 829; *Scott* v. *Scott*, Ambl. 388; see 6 Sim. 185; *Swaine* v. *Burton*, 15 Ves. 371; *Buchanan* v. *Harrison*, 1 J. & H. 662).

Effect of this section upon devise to heir.

Under this section an heir to whom lands are devised by the ancestor takes them as devisee to all purposes; and therefore the pecuniary legatees are not entitled to have the assets marshalled as against him (*Strickland* v. *Strickland*, 10 Sim. 374). And as between him and the devisees of other parts of the testator's estates, the estates devised to the former are not to be applied in payment of the debts in priority to the estates devised to the latter (*Biederman* v. *Seymour*, 3 Beav. 368).

It does not seem certain whether this section applies to the case of a devise of copyholds to an heir who disclaims all interest under the will, and enters as heir of the testator (*Bickley* v. *Bickley*, 4 Eq. 216).

Under a devise of customary lands to the testator's heir, his heir at law took and not his customary heir (*Thorp* v. *Owen*, 2 Sm. & Giff. 90; *Polly* v. *Polly*, 31 Beav. 363; *Sladen* v. *Sladen*, 2 J. & H. 369).

Limitation to heirs in an assurance.

(*e*) By a well-known rule, called the rule in *Shelley's case* (1 Rep. 93; see *Parker* v. *Clarke*, 3 Sm. & G. 161, 165), it was established, that where the ancestor, by any gift or conveyance, takes an estate for life, and in the same conveyance an estate is limited either immediately or mediately to his heirs in fee or in tail, the word *heirs* is a word of limitation of the estate, and not of purchase. Where the subsequent limitation to the heirs follows immediately the estate for life, it then becomes executed in the ancestor, forming, by its union with the estate for life, one estate of inheritance in possession; but where such limitation is mediate and another estate intervenes, it is then a remainder vested in the ancestor who takes the freehold, not to be executed until after the determination of the preceding mesne estate (1 B. & C. 243). For the decisions on this rule see Tudor's L. C. Conv. 3rd ed. 599; Fearne, Cont. Rem. 10th ed. pp. 28—201; *Evans* v. *Evans* (1892, 2 Ch. 173).

Rule in *Shelley's Case.*

Reversions.

In order to understand this section of the act, it is necessary to observe that when a person has an interest in lands and grants a portion of that interest, or, in other terms, a less estate than he has in himself, the possession of these lands will, on the determination of the granted interest or estate, return or revert to the grantor (Com. Dig. Estate (B. 10, 11, 12, 31); 2 Bl. Com. 175; Co. Litt. 22 b; Plowd. 151; Watk. on Conv. 120). An estate in *reversion* is therefore the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted by him (Co. Litt. 22), or the returning of the land to the grantor or his heirs after the grant is over (*Ib.* 142). A reversion is never created by deed or writing, but arises from construction of law, whereas a remainder can only be limited by deed or some other assurance.

Limitation to heirs of grantor formerly construed as a reversion.

It was a rule that a grantor could not enable his heir general to take a remainder as purchaser, under a limitation to his *heirs*, but where the limitation is to the right heirs of the grantor, the use so limited was construed to be the old use, and was to be executed in him as the *reversion in fee*, and not as a remainder (1 Rep. 129 b, 130; *Godolphin* v. *Abingdon*, 2 Atk. 57). As where a man granted to A. B. with remainder to his own heirs male, such heirs took by descent (*Wills* v. *Palmer*, Bl. R. 687; 5 Burr. 2615; *Read* v. *Morpeth*, Cro. Eliz. 321; Moore, 284; *Bingham's case*, 2 Rep. 91; *Cholmondeley* v. *Clinton*, 2 Mer. 173; 2 B. & Ald. 625; 2 Jac. & W. 1; 4 Bligh. N. S. 1; *Locke* v. *Southwood*, 1 M. & C. 411).

Alteration of line of descent.

If a man, seised as heir on his mother's side, made a feoffment in fee to the use of himself and his heirs, the use, being a thing in confidence, would have followed the nature of the lands, and would have descended to the heir on the part of the mother (Co. Litt. 13 a; *Godbold* v. *Freestone*, 3 Lev. 406; *Nanson* v. *Barnes*, 7 Eq. 250; *Heywood* v. *Heywood*, 34 Beav. 317); and it was the same if the assurance had been by fine and recovery

(*Abbot* v. *Burton*, Salk. 590; see *Stringer* v. *New*, 9 Mod. 363). So where a settlor entitled *ex parte maternâ* limited lands (by an ultimate limitation in a settlement) to the right heirs of her mother, whose heir-at-law she then was, the estate descended on her intestacy to her own heir *ex parte maternâ* (*Moore* v. *Simpkin*, 31 Ch. D. 95). But the rule held only where the feoffor or settlor took by descent, and not by purchase (*Martin* v. *Strachan*, Str. 1179, Nolan's ed.; 1 Wils. 66; 6 Br. P. C. 319; 5 Term Rep. 104). As to copyholds, see *Roe* v. *Baldwin* (5 Term Rep. 104). But if a tenant in tail by purchase, with the reversion in fee *ex parte maternâ*, levied a fine, the land descended to his maternal heirs (*Symonds* v. *Cudmore*, Salk. 338; 1 Show. 370); for the tenant in tail, by levying a fine, acquired a base fee, which merged in the reversion, of which the tenant was seised *ex parte maternâ*, and descended in the same line.

3 & 4 Will. 4, c. 106, s. 3.

Alteration of line of descent.

A deed of partition between parceners did not break the descent (Com. Dig. Parcener, C. 15); nor a deed of partition between one parcener and a purchaser from another (*Doe* v. *Dixon*, 5 Ad. & Ell. 834). Where a man has an *equitable* estate *ex parte paternâ* or *ex parte maternâ*, and afterwards, by descent or otherwise, acquires the *legal* estate, the equitable estate will merge in the legal, and the descent will be according to the legal title (*Goodright* v. *Wells*, Dougl. 771, 2nd ed.; *Wade* v. *Paget*, 1 Br. C. C. 363; *Selby* v. *Alston*, 3 Ves. 339; *Lyster* v. *Mahony*, 1 Drury & Warren, 243; and see *Goodright* v. *Searle*, 2 Wils. 29; *Goodtitle* v. *White*, 1 New. Rep. 383; 15 East, 174; 3 Prest. Conv. 325, 340). But where an infant died seised of an equitable estate which had descended *ex parte maternâ*, his incapacity to call for a conveyance of the legal estate (by which the course of the descent might have been broken) was held not a sufficient reason to induce the court to consider the case as if such a conveyance had actually been made; if not being, according to the terms of the trust, any part of the express duty of the trustees to execute such a conveyance (*Langley* v. *Sneyd*, 1 Sim. & Stu. 45).

A devise to trustees in fee upon trust to pay the rents to A. for life, and after his death to convey to such person as should answer the description of the testator's heir-at-law broke the descent of real estate which had descended to him *ex parte maternâ*, and vested it in his heir-at-law according to the common law as equitable devisee (*Davis* v. *Kirk*, 2 K. & J. 391; see pp. 393, 394).

Limitation to Heirs as Purchasers.

4. When any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land (*f*).

Where heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

(*f*) Before this act, under a limitation to special heirs of a person, to whom no estate was given, the descent would have been the same as if the estate had descended from him (See Fearne, Cont. Rem. 80). Thus, a limitation to the heirs male of the body of B. (where no estate is in or

3 & 4 Will. 4, c. 106, s. 4.

given to B. himself), not only gives such heir an estate in tail male, but such an estate tail as will, on failure of his issue male, go in succession to the other heirs male of the body of B., in the same course as if the estate tail had descended from B. himself (*Mandeville's case*, Co. Litt. 26; see *Vernon* v. *Wright*, 2 Drew. 439; *Southcot* v. *Stowell*, 1 Mod. 226, 237; 2 Mod. 207, 211; *Wills* v. *Palmer*, 5 Burr. 2615; *Wrightson* v. *Macauley*, 14 M. & W. 214; *Winter* v. *Perrott*, 9 Cl. & Fin. 606). But where the limitation was to the heirs general of a person, the rule in *Mandeville's case* did not apply (*Moore* v. *Simkin*, 31 Ch. D. 95). The above section lays down a rule of descent applicable as well to limitations to heirs general as to limitations to heirs special. A gift to the heirs of a person to whom no estate is given is a gift to them as *personæ designatæ*, and they take as joint tenants (*Berens* v. *Fellowes*, 56 L. T. 391; 35 W. R. 350).

Brothers and Sisters.

Brothers, &c., shall trace descent through their parent.

5. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent (*g*).

(*g*) Before this act the descent between brothers and sisters was considered as *immediate;* and in making out their title *to each other*, the common father need not have been named, though living, but the descent between them was exactly the same as if he had been dead (Watk. Desc. 111, n.; H. Chitty on Desc. 64, 354; *Collingwood* v. *Pace*, 1 Ventr. 413; Bridg. by Bann. 410). So under the old law, where A. had been attainted of treason, the descendants of one of A.'s children could inherit property from the descendants of another notwithstanding A.'s attainder (*Kynnaird* v. *Leslie*, L. R. 1 C. P. 389). As to the doctrine of *possessio fratris*, see note to sect. 9, *post*, p. 362.

Lineal Ancestors admitted.

Lineal ancestor may be heir in preference to collateral persons claiming through him.

6. Every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue (*h*).

(*h*) A son legitimate in Scotland by the subsequent marriage of his parents, both natives of and domiciled and married in Scotland, died intestate as to lands in England of which he was seised in fee and without issue: it was held, that the father did not inherit under this section (*Re Don*, 4 Drew. 194; see *Doe* v. *Vardill*, 7 Cl. & F. 895; and *Shaw* v. *Gould*, L. R. 3 H. L. 55).

Old rule excluding the ascending line.

It was an old maxim of law that an inheritance might lineally descend but not ascend (3 Rep. 40 a). The parent, therefore, could never take immediately by descent from the child, but the land would rather have escheated (*Cowper* v. *Cowper*, 2 P. Wms. 666). Yet a father or mother

before this act might have inherited as *cousin* to their child; as where a son died seised in fee of land without issue, brother, or sister, but leaving two cousins his heirs-at-law, one of whom was his own mother (*Eastwood* v. *Vincke*, 2 P. Wms. 613). So an uncle might have had land as heir though the father was alive (Litt. s. 3); but if in that case the uncle acquired actual seisin and died without issue, the father might have had the land as heir to the uncle (Crig. de Jur. Feud. 234; Wright's Ten. 182, n. (*z*)). So the father might have taken by *purchase* as the nearest of blood to his son, as if a lease were made to the son for life with remainder to his next of blood in fee (Co. Litt. 10 b; 3 Rep. 40 a). 3 & 4 Will. 4, c. 106, s. 6.

Male Line.

7. And be it further enacted and declared, that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed (*i*). The male line to be preferred.

(*i*) The true meaning of the section is that where, after due and sufficient investigation, there is no reasonable possibility of ascertaining that there are descendants from the paternal ancestors, then the descendants of the maternal ancestors must be sought for (*Greaves* v. *Greenwood*, 2 Ex. Div. 297). As to what is sufficient evidence of the extinction of superior lines of descent, see *Ib.*; *Lyell* v. *Kennedy* (18 Q. B. Div. 811); *Rawlinson* v. *Miller* (1 Ch. D. 52); *Jeakes* v. *White* (6 Exch. 880).

Mother of Male Paternal Ancestor.

8. And be it further enacted and declared, that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants (*j*). The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

(*j*) This statute has declared the law to be in accordance with the position laid down by Blackstone (2 Comm. 238; *Davies* v. *Lowndes*, 5

3 & 4 Will. 4, c. 106, s. 3.

Bing. N. C. 169). It was decided, that where a person seised of an estate *ex parte maternâ* died without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor could inherit, however nearly related to the *propositus ex parte maternâ* (*Hawkins* v. *Shewen*, 1 Sim. & Stu. 257; see Hale's Hist. C. L. by Runn. 2nd vol. 120). As to what is sufficient evidence of the extinction of a superior line of descent, see *Jeakes* v. *White* (6 Exch. 880), and the cases quoted under sect. 7.

Admission of Half Blood.

Half blood, if on the part of a male ancestor, to inherit after the whole blood of the same degree; if on the part of a female ancestor, after her.

9. Any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be the next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother (*k*).

Exceptions to the rule excluding the half blood.

(*k*) The old rule of law which excluded the half blood from taking by descent, was subject to some exceptions and qualifications, to which it will be proper to advert. As the descent from the parent to daughters was *immediate*, daughters by different venters might have inherited together as one heir to their common parent, although they could not inherit to each other (Harg. Co. Litt. 14 a, n. (5)). And the daughters by several husbands succeed in the same manner to the inheritance of their mother (See Watk. on Desc. 159, n. (b); H. Chitty on Desc. 78, 79). So, also, in the case of *estates tail*, the half blood coming within the description of the entail might inherit as effectually as the whole blood, for they do not claim as heirs of the person last seised, but of the original donee (Plowd. 57; 3 Rep. 42; *Goodtitle* v. *Newman*, 3 Wils. 526). In *titles of honour*, also, half blood is no impediment to the descent; but a title can only be transmitted to those who are descended from the first person ennobled, or the person who is made the stock of descent (Co. Litt. 15 b; 3 Rep. 42 a; Cruise's Dig. tit. 26, c. 3, ss. 8—11).

A brother or sister of the half blood is entitled to share the personal estate of an intestate equally with one of the whole blood, inasmuch as they are both equally near of kin to the intestate (1 Jac. 2, c. 17, s. 7; *Jessop* v. *Watson*, 1 M. & K. 665; *Burnett* v. *Mann*, 1 Ves. sen. 156).

Seisin of ancestor.

Before the above act, a man in order to qualify himself to take by descent, must have shown that he was heir of the person last seised of the actual freehold and inheritance (Co. Litt. 11 b, 15 d; 3 Bos. & P. 648; *Jenkins* v. *Pritchard*, 2 Wils. 45). Thus if A. died leaving a son and daughter by one venter, and a son by another, and the son by the first venter became actually seised and dies, his sister was heir to him; but if he died without having acquired the seisin, the son by the second venter would have taken as immediate heir of his father, to the exclusion of the sister (Co. Litt. 15; Sir W. Jones, 561; Co. Litt. 15 a; 3 Wils. 521; 7 T. R. 398, 399; *Id.* 213; *Bushby* v. *Dixon*, 3 B. & C. 304; 3 T. R. 211; Jenk. 242; *Goodtitle* v. *Newman*, 3 Wils. 516; *Doe* v. *Keen*, 7 T. R. 386; *Cunningham* v. *Moody*, 1 Ves. sen. 174; *Buchanan* v. *Harrison*, 1 J. & H. 662; *Doe*

Effect of rule requiring seisin of ancestor upon descent to half blood.

Rule of *possessio fratris*.

v. *Hutton*, 3 Bos. & P. 643; *Goodtitle* v. *White*, 15 East, 174; 2 Bos. & P. N. R. 388; Harg. Co. Litt. 14 a, n. 6). 3 & 4 Will. 4, c. 106, s. 9.

The descent of descendible freeholds to heirs was governed by the same rules as prevailed in cases of estates of inheritance (*Gravenor* v. *Brooke*, Poph. 32; *Long* v. *Myles*, Fox & Smith, Ir. Rep. 1; *Pierson* v. *Shore*, 1 Atk. 480). And the rule of *possessio fratris* was applicable to copyholds (4 Rep. 21). Descendible freeholds.

Attainted Blood.

10. That when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of January, one thousand eight hundred and thirty-four (*l*). After the death of a person attainted, his descendants may inherit.

(*l*) Persons attainted of high treason or felony were incapable of inheriting lands or of transmitting them by descent to their posterity (Co. Litt. 8 a; Cro. Car. 566). Another consequence of such an attainder was the corruption and extinction of all hereditary blood in the person attainted, by which he was rendered not only incapable of himself inheriting or of transmitting his own property by heirship, but he also obstructed the descent of lands to his posterity, in all cases where they were obliged to derive their title through him from any remote ancestor (11 Rep. 1 b; Co. Litt. 391 b; see Yorke's Law of Forfeiture, 72, 4th ed.; 2 Blac. Com. 251; 4 *Ib.* 388; Bl. Considerations on the Law of Forfeiture for High Treason; Bac. Abr. Forfeiture; Burn's J. Forfeiture). But as between two sons of an attainted father, there was nothing to hinder one brother from inheriting to the other (1 Ventr. 413; Yorke's Law of Forfeiture, 83, 4th ed.; *Kynniard* v. *Leslie*, L. R. 1 C. P. 389). The effect of attainder.

Freeholds of inheritance, which at the time of the death of a *felo de se* belonged to him, did not escheat to the crown, but passed to his heir-at-law (*Norris* v. *Chambers*, 29 Beav. 258; 3 Co. Inst. 55; 2 Bl. Com. 386; 2 Bac. Abr. tit. Felo de se; 4 Vin. Abr. 268, tit. Blood, corrupted, A. pl. 2; *Haley* v. *Petit*, Plowd. 253, 261; 7 Jur. N. S. 689). In the case of a fee tail, notwithstanding the forfeiture of lands entailed by an attainder, yet the blood of the attainted person was not corrupted so as to affect the issue in tail, for they claimed *per formam doni* (*Dowtie's case*, 3 Rep. 9 b; Yorke's Law of Forfeiture, 81, 82; Br. Descent, pl. 1; Bro. Forfeiture, pl. 37; *Mantell* v. *Mantell*, Cro. Eliz. 28; *Sheffield* v. *Ratcliffe*, Godb. 305; Hob. 347).

If a copyholder was attainted of treason or felony, his copyhold was immediately forfeited to the lord (Hawk. P. C. b. 2, c. 49, s. 7). But by the custom of some manors, the son might inherit from his father, notwithstanding the attainder of the latter (1 Watk. on Cop. 326; Scriven, 181).

By 33 & 34 Vict. c. 23, s. 1, it is enacted that, from and after the 4th July, 1870, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood or any forfeiture or escheat. But nothing in the act is to affect the law of forfeiture consequent upon outlawry (See also 54 Geo. 3, c. 145; Hansard, Parl. Debates, vol. 27, pp. 527—538; 13 & 14 Vict. c. 60, ss. 46, 47, *post*). Statutes as to attainder. 33 & 34 Vict. c. 23.

3 & 4 Will. 4, c. 106, s. 11.

COMMENCEMENT OF ACT.

Act not to extend to any descent before January, 1834.

11. This act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of January, one thousand eight hundred and thirty-four.

Limitations made before 1st January, 1834, to the heirs of a person then living, shall take effect as if this act had not been made.

12. Where any assurance executed before the said first day of January, one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January, one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made, shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January, one thousand eight hundred and thirty-four.

PAYMENT OF DEBTS OUT OF REAL ESTATES.

11 Geo. IV. & 1 Will. IV. cap. 47.

An Act for consolidating and amending the Laws for facilitating the Payment of Debts out of Real Estates.

[16th July, 1830.]

Repeal of former Acts.

11 Geo. 4 & 1 Will. 4, c. 47, s. 1.

Whereas an act was passed in the third and fourth years of King William and Queen Mary, intituled "An Act for the Relief of Creditors against fraudulent Devises," which was made perpetual by an act passed in the sixth and seventh years of King William the Third, intituled "An Act for continuing several Laws therein mentioned:" and whereas an act was passed by the Parliament of Ireland, in the fourth year of Queen Anne, intituled "An Act for Relief of Creditors against fraudulent Devises:" and whereas an act was passed in the forty-seventh year of his late Majesty King George the Third, intituled "An Act for more effectually securing the Payment of Debts of Traders:" and whereas it is expedient that the provisions of the said recited acts should be enlarged, and that the said recited acts should be repealed, in order that all the provisions relating to this matter should be consolidated in one act; be it therefore enacted, that the said several recited acts shall be and the same are hereby repealed, but so as not to affect any of the provisions and remedies of the said acts, or any of them, to the benefit of which any persons are entitled, as against any estate or interest in any lands, tenements, hereditaments or other real estate of any person or persons who died before the passing of this act (*a*).

3 & 4 Will. & M. c. 14.

6 & 7 Will. 3, c. 14.

4 Anne, c. 5 (I).

47 Geo. 3, c. 74.

Recited acts repealed.

(*a*) By the common law, freehold lands of inheritance which descended to the heir were assets for the payment of the ancestor's debts by specialty, as by bond or covenant in which the heirs were named (1 Str. 665; 4 East, 492). But the ancestor, by disposing of the land by will, could deprive his creditors of that means of payment, as the devisee was neither at law (4 East, 491; 7 East, 135; 2 Atk. 292. 432; 2 Anstr. 515), nor in equity (2 Atk. 432), liable to the payment of the testator's debts in respect of the land devised. The heir at law also to whom the land descended might have defeated the creditor of his ancestor by aliening the land before suit by the creditors (1 P. Wms. 777), although in equity he appears to have been responsible for the value of the land sold (*Id.* 777, 431; see 1 Fonbl. Eq. 283). To obviate those mischiefs the statute 3 & 4 Will. & Mary, c. 14 (made perpetual by 6 & 7 Will. 3, c. 14, and extended

Old rule as to liability of lands to debts.

11 Geo. 4 & 1 Will. 4, c. 47, s. 1.

to Ireland by 4 Anne, c. 5), was passed. And after that statute the course was to sue the heir, as being the person bound by and named in the specialty, and the devisee, because he had the land (*Re Hyatt, Bowles* v. *Hyatt*, 38 Ch. D. 619). The statute 3 & 4 Will. & Mary was repealed and re-enacted by the above act with additional provisions to supply some omissions in the former statute. For the old law as to proceedings against the heir upon the bond of his ancestor, as to alienation of assets by the heir, and the statutes of fraudulent devises, see further the notes to *Jeffreson* v. *Morton* (2 Wms. Saund. 12, ed. 1871).

Fraudulent conveyances.

It was not necessary under 3 & 4 Will. & Mary, c. 14, as it is under the act 13 Eliz. c. 5, against fraudulent conveyances, that the devise should have been made with the intent to delay, hinder, or defraud creditors (*Coope* v. *Cresswell*, 2 Eq. 106). Under 13 Eliz. c. 5, fraudulent conveyances may be set aside by creditors after the death of the debtor (*Lush* v. *Wilkinson*, 5 Ves. 384). The action should be brought by the plaintiff on behalf of himself and all other unsatisfied creditors of the deceased (*French* v. *French*, 6 D. M. & G. 95; *Richardson* v. *Smallwood*, Jac. 552). And it seems that the plaintiff need not have obtained judgment for his debt (*Rees River Co.* v. *Atwell*, 7 Eq. 347).

Devises to be void against Specialty Creditors.

For remedying frauds committed on creditors by wills.

2. And whereas it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having by bonds, covenants or other specialties, bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, and for the maintenance of just and upright dealing, be it therefore further enacted, that all wills and testamentary limitations, dispositions or appointments, already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements or hereditaments, or any rent, profit, term or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee simple, in possession, reversion or remainder, or have power to dispose of (*b*) the same by his, her or their last wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators and assigns, and every of them with whom the person or persons making any such wills or testaments, limitations, dispositions or appointments, shall have entered into any bond, covenant or other specialty, binding his, her, or their heirs) to be fraudulent and clearly, absolutely and utterly void, frustrate, and of none effect; any pretence,

colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding. 11 Geo. 4 & 1 Will. 4, c. 47, s. 2.

(*b*) The words "power to dispose of" were held to include leasehold estates *pur autre vie*, and therefore, that a devise of them was void against creditors (*Westfaling* v. *Westfaling*, 3 Atk. 460, 465). Sect. 2 of 3 & 4 Will. & Mary, c. 14, applied to devises of every description of estate legal or equitable. And by sect. 3, the devisee of an equitable estate seems to be made liable to an action of debt by the creditors of the devisor (*Coope* v. *Cresswell*, 2 Ch. 121).

Under sect. 59 of Conv. Act, 1881 (*post*), obligations under seal executed since 31st December, 1881, operate in the absence of a contrary intention to bind heirs and real estate, although not so expressed.

Devisees to be liable to Specialty Debts.

3. And, for the means that such creditors may be enabled to recover upon such bonds, covenants and other specialties, be it further enacted, that in the cases before mentioned every such creditor shall and may have and maintain his, her, and their action and actions of debt or covenant (*c*) upon the said bonds, covenants and specialties against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, *or the devisee or devisees of such first-mentioned devisee or devisees* (*d*) jointly, by virtue of this act (*e*); and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended (*f*). Enabling creditors to recover upon bonds, &c.

(*c*) By stat. 3 & 4 W. & M. c. 14, s. 3, the remedy was confined to actions of *debt;* and it was decided that an action of *covenant* would not lie against a devisee to recover damages for a breach of covenant entered into by the devisor (*Wilson* v. *Knubley*, 7 East, 128). 3 & 4 W. & M. c. 14, confined to actions of debt.

It has been held however that damages recovered in an action of covenant, brought in respect of breaches of covenant, happening after death of the testator, were a debt payable out of his real estate under a charge of debts in his will (*Morse* v. *Tucker*, 5 Hare, 79). Debts within 3 & 4 W. & M. c. 14.

The statute 3 & 4 W. & M. c. 14, only applied where debt in the ordinary sense of the word existed between the parties in the life-time of both (*Farley* v. *Briant*, 3 Ad. & El. 839). Liquidated damages for breach of covenant occurring after the covenantor's death, where the liability during his life was contingent, were not such a debt (*Ib.*; see *Morse* v. *Tucker*, 5 Hare, 83). But money due under an absolute covenant for the payment of sums certain, was such a debt even though not accruing until after the covenantor's death (*Jenkins* v. *Briant*, 6 Sim. 603). So, also, where a testator had covenanted in his son's marriage settlement for the payment of 3,000*l.* during his life, or three months after his decease (*Coope* v. *Cresswell*, 2 Ch. 112).

(*d*) The remedy is here extended to the devisees of devisees (*Westfaling* v. *Westfaling*, 3 Atk. 460).

(*e*) Equity followed the rule of law; and therefore, in a bill by a specialty creditor against a devisee under the 3 & 4 W. & M. c. 14, it was decided, that the heir at law (if any) of the testator was a necessary party (*Gawler* v. *Wade*, 1 P. Wms. 99; *Warren* v. *Stawell*, 2 Atk. 125). In

11 Geo. 4 & 1 Will. 4, c. 47, s. 3.

Application of assets as between heir and devisee.

arranging the funds in equity between the heir and devisee, it is settled that assets descended to the heir must be applied to pay debts before lands can be charged which are specifically devised (*Chaplin* v. *Chaplin*, 3 P. Wms. 367; *Powis* v. *Corbet*, 3 Atk. 556). See further, as to the order in which assets are applied in payment of debts, the note to 3 & 4 Will. 4, c. 104, *post*, p. 380.

(*f*) If in an action by a bond creditor against the heir of an intestate, the latter plead a false plea it was held that the Court of Chancery would after a decree obtained in a suit by another creditor for the administration of the intestate's assets, restrain the plaintiff at law from taking out execution against the assets, but not from proceeding against the heir personally (*Price* v. *Evans*, 4 Sim. 514).

In an action of debt against a devisee on a bond of his testator, in which the question was, whether the signature of the testator was a forgery or not, a party entitled, under the testator's will, to an annuity charged on his real estate, was not a competent witness for the defendant (*Bloor* v. *Davis*, 7 M. & W. 235).

Action against Devisee only.

If there is no heir at law, actions may be maintained against the devisee.

4. If in any case there shall not be any heir at law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case every creditor to whom by this act relief is so given shall and may have and maintain his, her and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid (*g*).

(*g*) Where the obligor of a bond, having devised his land, died before the passing of the stat. 11 Geo. 4 & 1 Will. 4, c. 47, it was held, that the specialty creditor could not under 3 & 4 W. & M. c. 14, s. 3, maintain an action against the devisee alone, there being no heir (*Hunting* v. *Sheldrake*, 9 M. & W. 256. See *Gawler* v. *Wade*, 1 P. Wms. 100).

Act not to extend to Provisions for Payment of Debts.

Not to affect limitations for just debts or portions for children.

5. Provided always, and be it further enacted, that where there hath been or shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, according to or in pursuance of any marriage contract or agreement in writing, *bonâ fide* made before such marriage, the same and every of them shall be in full force, and the same manors, messuages, lands, tenements and hereditaments shall and may be holden and enjoyed by every such person or persons, his, her and their heirs, executors, administrators and assigns, for whom the said limitation, appointment, devise or disposition was made, and by his, her and their trustee or trustees, his, her and their heirs, executors, administrators and assigns, for such estate or

interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be raised, paid and satisfied, anything in this act contained to the contrary notwithstanding (*h*). 11 Geo. 4 & 1 Will. 4, c. 47, s. 5.

(*h*) The uniform rule is, that an effectual provision by will for payment of creditors is not fraudulent within the statute, and it makes no difference whether the land be devised to trustees to sell, or descend to the heir charged with debts (*Matthews* v. *Jones*, 2 Anstr. 515; *Bailey* v. *Ekins*, 7 Ves. 323; *Bath* v. *Bradford*, 2 Ves. sen. 590; *Plunket* v. *Penson*, 2 Atk. 292; *Shiphard* v. *Lutwidge*, 8 Ves. 26; *Kidney* v. *Coussmaker*, 12 Ves. 154). But if the devise for payment of debts does not provide for it in a practicable manner, the case will not be taken out of the statute (*Hughes* v. *Doulben*, 2 Cox, 170; 2 Br. C. C. 614). A devisee of all the devisor's lands in trust to sell and pay all the testator's debts could not be sued under the stat. 3 & 4 W. & M. c. 14 (*Gott* v. *Atkinson*, Willes, 521). When land was devised on trust for sale, the proceeds to become part of the personal estate, and the personal estate was bequeathed subject to the payment thereout of the testator's debts, the devise was substantially a devise of the real estate for the payment of all debts, and by the 4th section of the stat. 3 & 4 W. & M. c. 14, good against the specialty creditors (*Soames* v. *Robinson*, 1 M. & K. 500; see *Barker* v. *May*, 9 B. & C. 489). Although a devise for payment of debts by rents and profits is out of the statute, the court would not be willing to adopt the limited construction of confining it to annual rents and profits, but would, upon a devise of a gross sum out of rents and profits for that purpose, hold that the testator intended the debts to be paid with all practicable speed (*Bootle* v. *Blundell*, 19 Ves. 528). And a direction in a will to pay simple contract before specialty creditors was held not to be void, as it was within the exception in the Statute of Fraudulent Devises (*Millar* v. *Horton*, Coop. C. C. 45); but a devise not for the payment of debts generally would not be within the exception (3 Barnard. 304). Though the Statute of Fraudulent Devises will prevent a devise for payment of legacies from disappointing creditors by specialty, it would not prevent a devise for payment of debts generally from letting in creditors by simple contract to the prejudice of creditors by specialty (*Kidney* v. *Coussmaker*, 12 Ves. 154; 2 Atk. 104). Provisions for payment of debts within this section.

Heir to be answerable for Value of Lands aliened.

6. In all cases where any heir-at-law shall be liable to pay the debts or perform the covenants of his ancestors, in regard to any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir-at-law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said lands, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments, *bonâ fide* Heir-at-law to be answerable for debts, although he may sell estate before action brought.

11 Geo. 4 & 1 Will. 4, c. 47, s. 6.

aliened before the action brought, shall not be liable to such execution (*i*).

Specialty debts no charge on the land.

(*i*) Debts by specialty in which the heirs are bound constitute no lien or charge upon the land, either in the hands of a debtor or of his heir (*Richardson* v. *Horton*, 7 Beav. 112; *Morley* v. *Morley*, 5 D. M. & G. 610). By taking proper proceedings the specialty creditors may obtain payment out of the descended or devised estates in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated (*Richardson* v. *Horton*, *sup.*) Upon a *bonâ fide* alienation the land ceases to be liable to the debts of the deceased, and the heir or devisee becomes personally liable for them to the extent of the value of the land aliened as if they were his own debts (*Re Hedgeley*, *Small* v. *Hedgeley*, 34 Ch. D. 384, where the devisee aliened by her marriage settlement, and her separate estate was subsequently made liable).

Extent of liability of heir to debts.

An heir taking lands by descent is liable for his ancestor's debts no further than the value of the land descended; therefore if the heir pay his ancestor's debts to the value of the land descended, he may hold the land discharged from the other debts of the ancestor (*Buckley* v. *Nightingale*, 1 Str. 655; *Horn* v. *Horn*, 2 Sim. & S. 448; see 8 Sim. 259). But a plea by an heir to an action on his ancestor's bond, that he claims to retain a certain sum for money laid out in *repairing* the premises descended, cannot be supported (*Shetelworth* v. *Neville*, 1 T. R. 454), although it may be otherwise if the repairs were *necessary* (*Ib.*; see *Hill* v. *Maurice*, 1 De G. & Sm. 214). The case of an heir-at-law is not like that of a trustee for the payment of debts; the latter cannot apply the rents and profits to his own use, which must go in diminution of the just debts; but an heir-at-law is entitled to the rents until judgment is given against him (1 T. R. 457). In this respect the effect of 3 & 4 Will. 4, c. 104, is different (*post*, p. 378).

Bonâ fide alienation.

Bankruptcy is not such an alienation as will defeat creditors under this section, so creditors may follow the real assets in the hands of the assignees (*Ex p. Morton*, 5 Ves. 449). The alienation must be one which carries with it the beneficial interest, and accordingly, when the devisee was a trustee, a conveyance by him to new trustees was not an alienation within this section (*Coope* v. *Cresswell*, 2 Ch. 112); nor, at law, was the mortgage by an equitable tenant for life of his life interest (*Ib.*); nor was a covenant in marriage articles to settle descended lands (*Pimm* v. *Insall*, 1 M. & G. 449); but an actual settlement by the devisee on marriage is such an alienation (*Spackman* v. *Timbrell*, 8 Sim. 253; *Re Hedgeley*, *Small* v. *Hedgeley*, 34 Ch. D. 379); and so is an equitable deposit with memorandum (*British Mutual Co.* v. *Smart*, 10 Ch. 567; disapproving *Carter* v. *Sanders*, 2 Drew. 248).

Plea by Heir.

Where an action of debt is brought against the heir, he may plead riens per descent.

7. Provided always, and be it further enacted, that where any action of debt or covenant upon any specialty is brought against the heir, he may plead riens per descent at the time of the original writ brought or the bill filed against him, anything herein contained to the contrary notwithstanding; and the plaintiff in such action may reply that he had lands, tenements, or hereditaments from his ancestor before the original writ brought or bill filed; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and there-

upon judgment shall be given and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or nihil dicit, it shall be for the debt and damage, without any writ to inquire of the lands, tenements, or hereditaments so descended (*j*). 11 Geo. 4 & 1 Will. 4, c. 47, s. 7.

(*j*) In an action against an heir or devisee (see Com. Dig. Pleader (2 E)), the defendant may not only plead any matter which might have been pleaded by the ancestor or devisor, but may also deny the character in which he is sued; or admitting it, may plead that he has *nothing by descent* or by *devise*, either generally (*Ib.*) or specially; viz. that he has nothing but a reversion after an estate for life or years (Com. Dig. Pleader (2 E 3)), or that he has paid debts of an equal or superior degree, to the amount of the assets descended or devised, or that he *retains* the assets to satisfy his own debt of equal or superior degree, or debts of a superior degree due to a third person (*Ib.*; 1 Chitty on Pleading, 4th ed. 431, 432; 2 *Ib.* 468—470; 3 *Ib.* 973, 974; Selw. N. P. Debt, s. 6; 2 Saund. R. 7, n. 4). To debt against heirs on the bond of their ancestors, the defendants pleaded *non est factum*, *per fraudem* and *riens per descent*; and the plaintiff replied, that after the death, &c., and before the commencement of the suit, the defendants had lands, &c., by descent, &c.: it was held, that this was a replication under the statute 3 & 4 Will. & Mary, c. 14, s. 6, and that the jury, having found that lands descended, ought to have assessed the value of those lands (*Brown* v. *Shuker*, 1 Cr. & Jer. 583).

For forms of statement of claim, defence, and replication in proceedings under this statute, see Bullen & Leake, 4th ed. vol. 1, p. 194; vol. 2, p. 205.

Devisees to be liable like Heirs.

8. Provided always, and be it further enacted, that all and every the devisee and devisees, made liable by this act, shall be liable and chargeable in the same manner as the heir-at-law by force of this act, notwithstanding the lands, tenements or hereditaments to him or them devised shall be aliened before the action brought. Devisees to be liable the same as heirs-at-law.

Traders' Estates liable to Simple Contract Debts.

9. From and after the passing of this act, where any person being, at the time of his death, a trader within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, or other real estate, which he shall not by his last will have charged with or devised subject to or for the payment of his debts, and which would be assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, devisee or devisees of such debtor, and the devisee or devisees of such first-mentioned devisee or devisees, shall be Traders' estates shall be assets to be administered in courts of equity.

11 Geo. 4 & 1 Will. 4, c. 47, s. 9.

liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors by specialty, in which the heirs were bound: provided always, that in the administration of assets by courts of equity, under and by virtue of this provision, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands (*k*).

(*k*) This section of the act corresponds *verbatim* with the statute 47 Geo. 3, sess. 2, c. 74. In the construction of that act it was held, that a party to come within it must have been a trader at his death (*Keene* v. *Riley*, 3 Mer. 436; *Hitchon* v. *Bennett*, 4 Mad. 180). See further as to this section, the note to 3 & 4 Will. 4, c. 104, *post*, p. 378.

Parol not to demur.

In actions by or against infant, the parol shall not demur.

10. From and after the passing of this act, where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur, but such action, suit, or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of this act be carried on or prosecuted by or against any infant, where according to law, the parol did not demur (*l*).

Demurrer of parol.

(*l*) Where an infant heir was sued by the specialty creditor of his ancestor, he might as a dilatory plea plead his non-age in stay of the creditor's action and claim to make the parol demur, that is, that the proceedings might be stayed, until he was of full age (see Gilbert's Hist. Com. Pl. 54, 56; 2 Bl. Com. 300; 2 Inst. 257, 291). The plea might be pleaded in equity as well as at law (*Chaplin* v. *Chaplin*, 3 P. W. 368; *Lechmere* v. *Brasier*, 2 Jac. & W. 290; *Scarth* v. *Cotton*, Jac. 635 n.) It was said by Lord *Cottenham* that the parol demurred in equity in those cases only in which it would have demurred at law (*Price* v. *Carver*, 3 M. & C. 162). In equity, however, the privilege seems to have been extended to an infant devisee (*Powell* v. *Robins*, 7 Ves. 211), but not at law (*Plaskett* v. *Beeby*, 4 East, 485). By the above section the demurrer of the parol has been abolished in all cases, both at law and equity.

Day to show cause.

In addition to and distinct from the demurrer of the parol (see *Price* v. *Carver*, 3 M. & C. 162), courts of equity adopted a further rule for the protection of infants, by which the infant was entitled, after attaining his majority, to a day to show cause against the decree. This rule was adopted in all cases of foreclosure and partition and in all cases in which a conveyance was required from an infant, except those cases in which the parol would demur at law (*Price* v. *Carver*, 3 M. & C. 162; *Walsh* v. *Trevanion*, 16 Sim. 178). This rule was not affected by the above section (*Ib.*), but in consequence of the power given by sect. 11, the provision giving an infant a day to show cause was omitted in decrees in equity by which, for the payment of debts, estates were directed to be sold (*Scholefield* v. *Heafield*, 7 Sim. 669; *Mahon* v. *Dawson*, 2 Dr. & W. 286) or mortgaged

(*Holme* v. *Williams*, 8 Sim. 557). And it seems now that in all cases where there is a judgment against an infant for an immediate conveyance, 13 & 14 Vict. c. 60, s. 30 (*post*) applies, and it is not necessary to insert in the decree the direction giving the infant a day to show cause after he shall have attained twenty-one (*Mellor* v. *Porter*, 25 Ch. D. 161; see *Bowra* v. *Wright*, 4 D. J. & S. 265). 11 Geo. 4 & 1 Will. 4, c. 47, s. 10.

In the case, however, of foreclosure of an equitable mortgage when there is no decree for sale, the decree must still be for the infant to convey at twenty-one, with a direction giving him a day to show cause (*Price* v. *Carver*, 3 M. & C. 163; *Scholefield* v. *Heafield*, 7 Sim. 669; *Mellor* v. *Porter*, 25 Ch. D. 158); but not where the infant is entitled only as trustee (*Foster* v. *Parker*, 8 Ch. D. 147). Where there is a decree for sale no day will be given (*Scholefield* v. *Heafield*, *sup.*; *Clinton* v. *Bernard*, Dru. 287). And the court may order a sale when it is for the benefit of the infant (*Davis* v. *Dowding*, 2 Keen, 245). Foreclosure of equitable mortgage.

Besides cases where a conveyance was required from an infant, a day to show cause was given in cases of foreclosure of a legal mortgage (*Williamson* v. *Gordon*, 19 Ves. 114); and this is still the rule (*Newbury* v. *Marten*, 15 Jur. 166; *Gray* v. *Bell*, 46 L. T. 521; 30 W. R. 606; see *Mellor* v. *Porter*, 25 Ch. D. 161). But where the value of the property was clearly less than the amount due to the mortgagee, and it was for the benefit of the infant, on the plaintiff paying the infant's costs a decree absolute was made, no day to show cause being given (*Croxon* v. *Lever*, 12 W. R. 237; *Bennett* v. *Harfoot*, 19 W. R. 428; *Wolverhampton, &c. Co.* v. *George*, 24 Ch. D. 707). Foreclosure of legal mortgage.

Where in a foreclosure action a day to show cause has been given, the infant on attaining twenty-one cannot travel into the account, or redeem, but only show error in the decree (*Mallack* v. *Galton*, 3 P. Wms. 352; *Williamson* v. *Gordon*, 19 Ves. 114; *Kelsall* v. *Kelsall*, 2 M. & K. 409).

Conveyances by Infants.

Infants to make conveyances under order of the court.

11. Where any suit hath been or shall be instituted in any court of equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years (*m*).

(*m*) Orders may still be made under sects. 11 and 12 of this act, see the forms, Seton 3rd ed. 826; but these provisions have been practically superseded by the Trustee Act, 1850, s. 29, and the Trustee Act, 1852, s. 1 (*post*). See *Wood* v. *Beetlestone* (1 K. & J. 213). The usual practice is for the decree or order directing the sale or mortgage to declare that the

11 Geo. 4 & 1 Will. 4, c. 47, s. 11.

infant heir, devisee, or tenant for life, is a trustee within the meaning of the Trustee Act, 1850, and then to obtain a vesting order (Daniell, Ch. Pr. 5th ed. 1444, n. (*h*)). See the notes to the Trustee Act, 1850, s. 29, and the Trustee Act, 1852, s. 1 (*post*). Before the last-mentioned acts an infant refusing to convey in pursuance of an order under sect. 11, was declared a trustee within 1 Will. 4, c. 60 (*Thomas* v. *Gwynne*, 9 Beav. 275). Under Jud. Act, 1884, s. 14, the court has now power to nominate a person to execute an instrument in place of a refusing party. As to sales by the court, see generally R. S. C. Ord. 51, r. 1.

With regard to the operation of sects. 11 and 12, the decisions were conflicting as to whether the court could direct a mortgage as well as a sale (*Holme* v. *Williams*, 8 Sim. 557; *Smethurst* v. *Longworth*, 7 L. J. Ch. 18); but by 2 & 3 Vict. c. 60 (*post*, p. 375), the sections were extended so as to include a mortgage.

Under sect. 11 an infant devisee in tail may be ordered to convey (*Penny* v. *Pretor*, 9 Sim. 135); and the conveyance must be made by the proper assurance which by law is now required for a tenant in tail (*Radcliffe* v. *Eccles*, 1 Keen, 130). In a creditor's suit, after a decree for sale of the estate, an infant heir was ordered to join in the conveyance to the purchaser under sect. 11 (*Brook* v. *Smith*, 2 R. & M. 73). A conveyance by an infant under this section passes only such interest as the infant, if of full age, might pass (*Heming* v. *Archer*, 8 Beav. 294). Orders under this section will be found, Seton, 3rd ed. 825 (See further the note to sect. 12).

Conveyances by Persons having Limited Interests.

Persons having a life interest may convey the fee, if the estate is ordered to be sold.

12. Where any lands, tenements, or hereditaments, hath been or shall be devised in settlement by any person or persons, whose estate under this act, or by law, or by his or their will or wills, shall be liable to the payment of any of his or their debts, and by such devise shall be vested in any person or persons for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person or persons from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise, and a decree shall be made for the sale thereof for the payment of such debts or any of them, it shall be lawful for the court by whom such decree shall be made, to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey, release, assign, surrender, or otherwise assure the fee simple, or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment, or other assurance, shall be as effectual as if the person who shall make and execute the same were seised or possessed of the fee simple or other whole estate so to be sold (*n*).

Section applies to copyholds.

(*n*) The above section applied to copyholds (*Branch* v. *Browne*, 2 De G. & Sm. 299). A testator devised real estates to trustees to pay debts, and to convey the real estate, subject to such debts, to his son upon marriage in strict settlement. The trustees conveyed to the son for life, with remainder in strict settlement: it was held that the son could convey the legal estate under this section (*Cheese* v. *Cheese*, 15 L. J. Ch. 28; see

Conveyances under this section

Walker v. *Aston*, 14 Sim. 87). This section does not apply to a case where an estate is devised to a trustee during the life of the *cestui que trust*, with remainder over, and by the disclaimer of the trustee the legal estate descended on the heir (*Heming* v. *Archer*, 7 Beav. 515; 8 Beav. 294). An estate by the disclaimer of a trustee was vested in the heir *pur autre vie*, with legal remainder to the children of A. (who was living) as tenants in common. It was held, that no effective conveyance could be made under the act until the class of children had been determined, by the death of A. (*Heming* v. *Archer*, 9 Beav. 366). The case of the devisee for life, or owner of the limited estate, or first executory devisee being an infant, is provided for by 2 & 3 Vict. c. 60 (*post*); and the case of the fee being vested, subject to an executory devise, in the heir by descent, or otherwise than by devise, is provided for by 11 & 12 Vict. c. 87 (*post*, p. 376). The lunatic tenant for life of estates, decreed in a creditor's suit to be sold for payment of debts, was a trustee for the purchaser within the meaning of 1 Will. 4, c. 60, s. 18 (*Re Milfield*, 2 Phill. 254).

11 Geo. 4 & 1 Will. 4, c. 47, s. 12.

IRELAND.

13. Nothing in this act shall extend or be deemed or construed to extend to repeal or alter an act made by the parliament of Ireland, in the thirty-third year of the reign of King George (*o*) the First, intituled "An Act for the better securing the Payment of Bankers' Notes, and for providing a more effectual Remedy for the Security and Payment of the Debts due by Bankers" (*p*).

Not to repeal act 33 Geo. 1 (I.) relating to debts due to bankers.

(*o*) The following words are here omitted by mistake: "the Second, intituled 'An Act for repealing an Act passed in this Kingdom in the eighth Year of the Reign of King George.'"

(*p*) By the third section of the Irish act, 33 Geo. 2, c. 14, all dispositions after 10th May, 1760, by bankers of real or leasehold estates, or any interest therein, to or for any children or grandchildren of any banker, are void against creditors, though for valuable consideration, and though not creditors at the time. As to the act 33 Geo. 2, c. 14, see *Copland* v. *Davies* (L. R. 5 H. L. 358).

The stat. 2 & 3 Vict. c. 60, after reciting the 11th and 12th sections of the stat. 11 Geo. 4 & 1 Will. 4, c. 47 (*ante*, pp. 373, 374), and that doubts were entertained whether the above sections authorized courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, or of lands, tenements or hereditaments so devised in settlement as aforesaid, and also to authorize such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest, or such first executory devisee as aforesaid, is an infant, enacts, "that the said hereinbefore recited provisions of the said act shall extend and the same are hereby extended to authorize courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, and also of lands, tenements or hereditaments so devised in settlement as aforesaid, and to authorize such sales and mortgages to be made in cases where such tenant for life,

2 & 3 Vict. c. 60.

Recited provisions of 11 Geo. 4 & 1 Will. 4, c. 47, extended to authorize mortgages as well as sales of estates.

2 & 3 Vict. c. 60.

or other person having a limited interest, or such first executory devisee as aforesaid, is an infant (*q*).

(*q*) A mortgage under this section was directed in *National Bank* v. *Gourley* (17 L. R. Ir. 357). But the court has no jurisdiction under these statutes to extend the sum to be raised by way of mortgage so as to include money required for repairs, even where such repairs are necessary in order to obtain an advance on mortgage, and where a mortgage is much more beneficial to the infant than a sale would be (*Hill* v. *Maurice*, 1 De G. & S. 214; see *Garmstone* v. *Gaunt*, 1 Coll. 577). For forms of orders under the act, see Seton, 3rd ed. 826.

Surplus of money arising from such sale or mortgage to descend in the same manner as the estates so sold or mortgaged would have done.

The second section enacts, "That when any sale or mortgage shall be made in pursuance of the said recited act or this act, the surplus (if any) of the money raised by such sale or mortgage which shall remain after answering the purposes for which the same shall have been raised, and defraying all reasonable costs and expenses, shall be considered in all respects of the same nature and descend or devolve in the same manner as the estate, or the lands, tenements or hereditaments so sold or mortgaged, and shall belong to the same persons, be subject to the same limitations and provisions, and be applicable to the same purposes as such estate or such lands, tenements or hereditaments would have belonged and been subject and applicable to in case no such sale or mortgage had been made.

Recited provision to extend to lands, &c., of a deceased debtor, in certain cases.

The stat. 11 & 12 Vict. c. 87, after reciting the 12th section of the 11 Geo. 4 & 1 Will. 4, c. 47 (*ante*, p. 374), "And that such provision did not extend to the case of lands, tenements or hereditaments of a deceased debtor which are by descent or otherwise than by devise vested in the heir or co-heirs of such debtor, subject to an executory devise over in favour of a person or persons not existing or not ascertained, and that it was expedient that the said provision of the said act should be extended to such case:" enacted, that in cases in other respects falling within the said thereinbefore recited provisions of the said act the same act shall extend and is hereby extended to any case in which any lands, tenements or hereditaments of any deceased person shall by descent or otherwise than by devise be vested in the heir or co-heirs of such person, subject to an executory devise over in favour of a person or persons not existing or not ascertained; and in any such case it shall be lawful for the court mentioned in the said recited provision to direct such heir or co-heirs, notwithstanding such heir or such co-heirs, or any of them, may be an infant or infants, to convey, release, assign, surrender or otherwise assure the fee simple or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment or other assurance shall be as effectual as if the heir or co-heirs who shall make and execute the same was or were seised or possessed of the fee simple or other whole estate so to be sold, and, if an infant or infants, was or were of full age.

3 & 4 William IV. cap. 104.

*An Act to render Freehold and Copyhold Estates Assets for the Payment of simple and * Contract Debts.*

* Sic.

[29th August, 1833.]

3 & 4 Will. 4, c. 104.

WHEREAS it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force: be it therefore enacted, that from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound; provided always, that in the administration of assets by courts of equity under and by virtue of this act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands (*a*).

Freehold and copyhold estates in all cases to be assets for the payment of simple contract or specialty debts.

(*a*) The debts of a deceased are now payable out of all his assets, including both legal assets and equitable assets. Legal assets consist of the assets with which a court of law would charge an executor in an action brought against him by a creditor, and include all assets which *virtute officii* he can recover, whether in a court of law or of equity (*Cook* v. *Gregson*, 3 Dr. 549; *A. G.* v. *Brunning*, 8 H. L. C. 243). Equitable assets are such assets as can only be made available for the payment of debts through a court of equity (*Cook* v. *Gregson*, *sup.*), and include (1) land charged or devised for payment of debts (*Silk* v. *Prime*, 1 Br. C. C. 138); (2) personal estate over which the deceased had a general power of appointment by will which he has exercised (*Pardoe* v. *Bingham*, 6 Eq. 485); and (3) separate estate to which, before the M. W. P. Act, 1870, a married woman was entitled (*Anon.*, 18 Ves. 258), and also earnings which by that act were made separate estate (*Thompson* v. *Bennett*, 6 Ch. D. 739). Under the M. W. P. Act, 1882, separate estate of a married woman, including property appointed by will under a general power (sect. 4), appears to be legal assets (See sect. 1, sub-sect. (2), and sect. 23). The principal distinctions between these two classes of assets are:—(1) Out of legal assets an executor has a right of retainer for his own debt (See *post*,

Legal assets.

Equitable assets.

Distinction between.

2 & 3 Vict. c. 60.

(x) In the case of persons dying [illegible] were payable in priority to [illegible] but not out of equitable assets. [illegible] Will. 4, c. 104, lands devised or charged [illegible] assets, but lands not so charged were [illegible] debts, except that freehold lands were [illegible] where the heirs were bound, and were also [illegible] owing from traders (11 Geo. 4, c. 47, s. 9; [illegible] Ch. Div. 480, 483). The act 3 & 4 Will. 4, [illegible] freeholds of all persons the provisions of 11 Geo. [illegible] freeholds of traders, and also subjected copyholds [illegible] To enforce this statutory liability it is necessary [illegible] of equity (*Ball* v. *Harris*, 4 M. & C. 268). It should [illegible] ever, that all specialties executed after 31st December, [illegible] hough not so expressed (Conv. Act, 1881, s. 59), and [illegible] entitle the holder to an action under 11 Geo. 4, c. 47, [illegible] ce of 3 & 4 Will. 4, c. 104, is that the land itself [illegible] *Bowles* v. *Hyatt*, 36 Ch. D. 619); and the remedies given against the heir and devisee do not control the larger effect of the previous words, which make the land assets generally (*Downes* v. *Morris*, 3 Hare, 399). Accordingly, where a person died without heirs, it was held that as against the lord claiming by escheat the lands of the deceased were assets for payment of his debts (*Evans* v. *Brown*, 5 Beav. 114; *Hughes* v. *Wells*, 9 Hare, 749). Under this act freehold estates over which a testator has a general power of appointment, and which he appoints by will, are available for payment of his debts (*Fleming* v. *Buchanan*, 3 D. M. & G. 976). So also are all rents arising from the real estate of a deceased person after his death, whether received by his heir (*Davidson* v. *Illidge*, 27 Ch. Div. 478), or by a person appointed a trustee of his will after his death (*Bowles* v. *Hyatt*, 38 Ch. D. 621), the creditor being entitled to an account (*Ib.*; see Seton, 851). So an equity of redemption of freeholds is assets (*Foster* v. *Handley*, 1 Sim. N. S. 200; *Beale* v. *Symonds*, 16 Beav. 406) or copyholds (*Burrell* v. *Smith*, 9 Eq. 443), and consequently a mortgagee may tack his simple contract debt as against the heir or devisee (*Rolfe* v. *Chester*, 20 Beav. 610; *Thomas* v. *Thomas*, 22 Beav. 341). The act has not affected a widow's right to dower or freebench, which still has priority over mere creditors of the deceased (*Spyer* v. *Hyatt*, 20 Beav. 621). Although the effect of the act (subject to the proviso) is to place simple contract and specialty creditors on the same footing, it did not confer on simple contract creditors the benefit of the same Statute of Limitations as relates to specialties (*Hollingshead* v. *Webster*, 37 Ch. D. 656).

Equity of redemption.

Lands are equitable assets under this act.

Real estate which can be reached only by this act is equitable assets (*Davidson* v. *Illidge*, 27 Ch. Div. 484; *Walters* v. *Walters*, 18 Ch. D. 182; see Haddan's Administrative Jurisdiction, 78). Thus, in the administration of assets under this act, it was held that creditors by specialty, in which the heirs were not bound, were not entitled to any priority over simple contract creditors (*Cummins* v. *Cummins*, 3 J. & Lat. 64); and an executor had no right of retainer (*Walters* v. *Walters*, *sup.*; *Dring* v. *Gresham*, 23 L. J. Ch. 156).

Proviso in act.

Under the proviso (which was said to be anomalous (*Bain* v. *Sadler*, 12 Eq. 573)), creditors by bond, in which the heirs were named, took priority over creditors by specialty in which the heirs were not named (*Richardson* v. *Jenkins*, 1 Drew. 477). Also over simple contract creditors in the case of an equity of redemption of freeholds (*Foster* v. *Handley*, 1 Sim. N. S. 200; better reported, 15 Jur. 73) or of copyholds (*Burrell* v. *Smith*, 9 Eq. 443). In the case, however, of debtors dying on or after the 1st January, 1870, specialty and simple contract creditors are to be treated as standing in equal degree and paid accordingly (32 & 33 Vict. c. 46, *post*, p. 383); and in the case of persons dying insolvent on or after the 1st November, 1875, the bankruptcy rules as to the respective rights of secured and unsecured creditors apply (Jud. Act, 1875, s. 10).

3 & 4 Will. 4, c. 104.

This act charges the real estates of any person dying seised of such estates, not only with the debts of every description actually due at his death, but also with all liabilities which may result out of obligations entered into during his life (*Hamer's Devisees' case*, 2 D. M. & G. 366), but the costs of probate litigation cannot be paid out of real estate (*Charter* v. *Charter*, 3 Ch. D. 218; *Williams* v. *Jenkins*, 31 Ch. D. 485).

Debts payable under this act.

Judgments against the heir.

The rights of simple contract creditors of an ancestor, as against the descended estates, are not defeated by judgments entered up against the heir for his personal debts before suit (*Kinderley* v. *Jervis*, 22 Beav. 1).

Purchaser from heir.

With regard, however, to purchasers from an heir, or devisee, it has been decided that it was not the object, nor is it the operation, of the 3 & 4 Will. 4, c. 104, to make the simple contract debts of a deceased person in the nature of mortgages or specific charges on his real estate; but, as the statute makes the land assets for the payment of his debts, these debts constitute a general charge upon them, but not so that a *bonâ fide* purchaser of the lands from the heir or devisee is bound to see to the application of the purchase-money, as he would be in the case of a particular mortgage on any portion of the lands themselves (*Kinderley* v. *Jervis*, 22 Beav. 1; *Price* v. *Price*, 35 Ch. D. 305). See for the older law as to real estate, *Matthews* v. *Jones* (2 Anstr. 506). And the same rule applies even where the purchaser has notice of the debt (*Jones* v. *Noyes*, 4 Jur. N. S. 1033; 7 W. R. 21). It was said by *Kay*, J., that the statute makes debts rather an inchoate than an actual charge; the creditor has no actual charge until decree (*Price* v. *Price*, 35 Ch. D. 305). Where a devisee, before creditor's bill filed, effected an equitable charge, such charge had priority over the statutory charge in favour of the creditors (*British Mutual Co.* v. *Smart*, 10 Ch. 567; compare *Ex p. Baine*, 1 Mont. D. & G. 492, under 11 Geo. 4, c. 47, s. 9). But where a creditor commences an action against the devisee, sufficiently indicating the real estate sought to be charged, and registers the action as a *lis pendens*, the plaintiff will after such registration have priority over a purchaser or mortgagee from the devisee (*Price* v. *Price*, 35 Ch. D. 305). In one case where a creditor commenced proceedings before the completion of a purchase from the heir, an injunction was granted restraining the purchaser from paying the purchase money to the heir (*Green* v. *Lowes*, 3 Br. C. C. 217).

Action to administer real assets.

Under 47 Geo. 3, c. 74, persons having prior incumbrances on freehold and copyhold estates, of which a trader, who died intestate, was seised at the time of his death, were not proper parties to a bill for payment of his debts out of his real estates (*Parker* v. *Fuller*, 1 R. & M. 656).

Parties.

The legal personal representative is a necessary party to an action for the administration of real and personal estate (*Rowsell* v. *Morris*, 17 Eq. 20); an executor *de son tort* and the trustees of the real estate are not sufficient (*Ib.*) nor an administrator *ad litem* (*Dowdeswell* v. *Dowdeswell*, 9 Ch. Div. 294). But the charge of debts arising under this act does not render an executor a necessary party to an action for the sale of a testator's realty and distribution of the proceeds (*Curtis* v. *Fulbrook*, 8 Hare, 25).

In an action by a creditor to obtain payment out of his debtor's real estate, the devisee or heir, as well as the executor, is a necessary party (Dan. Ch. Pr. 246, 6th ed.; see *Willson* v. *Leonard*, 3 Beav. 373; *Morse* v. *Tucker*, 5 Hare. 79; *Harvey* v. *Wilde*, 14 Eq. 438). After 3 & 4 Will. & M. c. 14, the course was to sue the heir as being the person bound by and named in the specialty, and the devisee because he had the land (*Bowles* v. *Hyatt*, 38 Ch. D. 619). Under 3 & 4 Will. 4, c. 104, the heir-at-law is not a necessary party as well as the devisee (*Bridges* v. *Hinxman*, 16 Sim. 71; overruling *Brown* v. *Weatherby*, 10 Sim. 125; see *Weeks* v. *Evans*, 7 Sim. 546). Nor is the heir a necessary party in respect of Indian realty (*Story* v. *Fry*, 1 Y. & C. C. 603). And it is not necessary to establish the will against the testator's heir (*Goodchild* v. *Terrett*, 5 Beav. 398). In a creditor's suit, seeking the application of real estate in payment of debts, both the heir-at-law and devisees of the debtors being parties, and the will not being admitted by the heir,

2 & 3 Vict. c. 60.

or other person having a limited interest, or such first executory devisee as aforesaid, is an infant (*q*).

(*q*) A mortgage under this section was directed in *National Bank* v. *Gourley* (17 L. R. Ir. 357). But the court has no jurisdiction under these statutes to extend the sum to be raised by way of mortgage so as to include money required for repairs, even where such repairs are necessary in order to obtain an advance on mortgage, and where a mortgage is much more beneficial to the infant than a sale would be (*Hill* v. *Maurice*, 1 De G. & S. 214; see *Garmstone* v. *Gaunt*, 1 Coll. 577). For forms of orders under the act, see Seton, 3rd ed. 826.

Surplus of money arising from such sale or mortgage to descend in the same manner as the estates so sold or mortgaged would have done.

The second section enacts, "That when any sale or mortgage shall be made in pursuance of the said recited act or this act, the surplus (if any) of the money raised by such sale or mortgage which shall remain after answering the purposes for which the same shall have been raised, and defraying all reasonable costs and expenses, shall be considered in all respects of the same nature and descend or devolve in the same manner as the estate, or the lands, tenements or hereditaments so sold or mortgaged, and shall belong to the same persons, be subject to the same limitations and provisions, and be applicable to the same purposes as such estate or such lands, tenements or hereditaments would have belonged and been subject and applicable to in case no such sale or mortgage had been made.

Recited provision to extend to lands, &c., of a deceased debtor, in certain cases.

The stat. 11 & 12 Vict. c. 87, after reciting the 12th section of the 11 Geo. 4 & 1 Will. 4, c. 47 (*ante*, p. 374), "And that such provision did not extend to the case of lands, tenements or hereditaments of a deceased debtor which are by descent or otherwise than by devise vested in the heir or co-heirs of such debtor, subject to an executory devise over in favour of a person or persons not existing or not ascertained, and that it was expedient that the said provision of the said act should be extended to such case:" enacted, that in cases in other respects falling within the said thereinbefore recited provisions of the said act the same act shall extend and is hereby extended to any case in which any lands, tenements or hereditaments of any deceased person shall by descent or otherwise than by devise be vested in the heir or co-heirs of such person, subject to an executory devise over in favour of a person or persons not existing or not ascertained; and in any such case it shall be lawful for the court mentioned in the said recited provision to direct such heir or co-heirs, notwithstanding such heir or such co-heirs, or any of them, may be an infant or infants, to convey, release, assign, surrender or otherwise assure the fee simple or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment or other assurance shall be as effectual as if the heir or co-heirs who shall make and execute the same was or were seised or possessed of the fee simple or other whole estate so to be sold, and, if an infant or infants, was or were of full age.

3 & 4 William IV. cap. 104.

An Act to render Freehold and Copyhold Estates Assets for the Payment of simple and Contract Debts.* * *Sic.*

[29th August, 1833.]

3 & 4 Will. 4, c. 104.

WHEREAS it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force: be it therefore enacted, that from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound; provided always, that in the administration of assets by courts of equity under and by virtue of this act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands (*a*).

Freehold and copyhold estates in all cases to be assets for the payment of simple contract or specialty debts.

(*a*) The debts of a deceased are now payable out of all his assets, including both legal assets and equitable assets. Legal assets consist of the assets with which a court of law would charge an executor in an action brought against him by a creditor, and include all assets which *virtute officii* he can recover, whether in a court of law or of equity (*Cook* v. *Gregson*, 3 Dr. 549; *A. G.* v. *Brunning*, 8 H. L. C. 243). Equitable assets are such assets as can only be made available for the payment of debts through a court of equity (*Cook* v. *Gregson*, *sup.*), and include (1) land charged or devised for payment of debts (*Silk* v. *Prime*, 1 Br. C. C. 138); (2) personal estate over which the deceased had a general power of appointment by will which he has exercised (*Pardoe* v. *Bingham*, 6 Eq. 485); and (3) separate estate to which, before the M. W. P. Act, 1870, a married woman was entitled (*Anon.*, 18 Ves. 258), and also earnings which by that act were made separate estate (*Thompson* v. *Bennett*, 6 Ch. D. 739). Under the M. W. P. Act, 1882, separate estate of a married woman, including property appointed by will under a general power (sect. 4), appears to be legal assets (See sect. 1, sub-sect. (2), and sect. 23). The principal distinctions between these two classes of assets are:—(1) Out of legal assets an executor has a right of retainer for his own debt (See *post*,

Legal assets.

Equitable assets.

Distinction between.

2 & 3 Vict. c. 60.

or other person having a limited interest, or such first executory devisee as aforesaid, is an infant (*q*).

(*q*) A mortgage under this section was directed in *National Bank* v. *Gourley* (17 L. R. Ir. 357). But the court has no jurisdiction under these statutes to extend the sum to be raised by way of mortgage so as to include money required for repairs, even where such repairs are necessary in order to obtain an advance on mortgage, and where a mortgage is much more beneficial to the infant than a sale would be (*Hill* v. *Maurice*, 1 De G. & S. 214; see *Garmstone* v. *Gaunt*, 1 Coll. 577). For forms of orders under the act, see Seton, 3rd ed. 826.

Surplus of money arising from such sale or mortgage to descend in the same manner as the estates so sold or mortgaged would have done.

The second section enacts, "That when any sale or mortgage shall be made in pursuance of the said recited act or this act, the surplus (if any) of the money raised by such sale or mortgage which shall remain after answering the purposes for which the same shall have been raised, and defraying all reasonable costs and expenses, shall be considered in all respects of the same nature and descend or devolve in the same manner as the estate, or the lands, tenements or hereditaments so sold or mortgaged, and shall belong to the same persons, be subject to the same limitations and provisions, and be applicable to the same purposes as such estate or such lands, tenements or hereditaments would have belonged and been subject and applicable to in case no such sale or mortgage had been made.

Recited provision to extend to lands, &c., of a deceased debtor, in certain cases.

The stat. 11 & 12 Vict. c. 87, after reciting the 12th section of the 11 Geo. 4 & 1 Will. 4, c. 47 (*ante*, p. 374), "And that such provision did not extend to the case of lands, tenements or hereditaments of a deceased debtor which are by descent or otherwise than by devise vested in the heir or co-heirs of such debtor, subject to an executory devise over in favour of a person or persons not existing or not ascertained, and that it was expedient that the said provision of the said act should be extended to such case:" enacted, that in cases in other respects falling within the said thereinbefore recited provisions of the said act the same act shall extend and is hereby extended to any case in which any lands, tenements or hereditaments of any deceased person shall by descent or otherwise than by devise be vested in the heir or co-heirs of such person, subject to an executory devise over in favour of a person or persons not existing or not ascertained; and in any such case it shall be lawful for the court mentioned in the said recited provision to direct such heir or co-heirs, notwithstanding such heir or such co-heirs, or any of them, may be an infant or infants, to convey, release, assign, surrender or otherwise assure the fee simple or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment or other assurance shall be as effectual as if the heir or co-heirs who shall make and execute the same was or were seised or possessed of the fee simple or other whole estate so to be sold, and, if an infant or infants, was or were of full age.

3 & 4 William IV. cap. 104.

An Act to render Freehold and Copyhold Estates Assets for the Payment of simple and Contract Debts.* * *Sic.*

[29th August, 1833.]

3 & 4 Will. 4, c. 104.

WHEREAS it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force: be it therefore enacted, that from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound; provided always, that in the administration of assets by courts of equity under and by virtue of this act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands (*a*).

Freehold and copyhold estates in all cases to be assets for the payment of simple contract or specialty debts.

(*a*) The debts of a deceased are now payable out of all his assets, including both legal assets and equitable assets. Legal assets consist of the assets with which a court of law would charge an executor in an action brought against him by a creditor, and include all assets which *virtute officii* he can recover, whether in a court of law or of equity (*Cook* v. *Gregson*, 3 Dr. 549; *A. G.* v. *Brunning*, 8 H. L. C. 243). Equitable assets are such assets as can only be made available for the payment of debts through a court of equity (*Cook* v. *Gregson*, *sup.*), and include (1) land charged or devised for payment of debts (*Silk* v. *Prime*, 1 Br. C. C. 138); (2) personal estate over which the deceased had a general power of appointment by will which he has exercised (*Pardoe* v. *Bingham*, 6 Eq. 485); and (3) separate estate to which, before the M. W. P. Act, 1870, a married woman was entitled (*Anon.*, 18 Ves. 258), and also earnings which by that act were made separate estate (*Thompson* v. *Bennett*, 6 Ch. D. 739). Under the M. W. P. Act, 1882, separate estate of a married woman, including property appointed by will under a general power (sect. 4), appears to be legal assets (See sect. 1, sub-sect. (2), and sect. 23). The principal distinctions between these two classes of assets are:—(1) Out of legal assets an executor has a right of retainer for his own debt (See *post*,

Legal assets.

Equitable assets.

Distinction between.

2 & 3 Vict. c. 60.

or other person having a limited interest, or such first executory devisee as aforesaid, is an infant (*q*).

(*q*) A mortgage under this section was directed in *National Bank* v. *Gourley* (17 L. R. Ir. 357). But the court has no jurisdiction under these statutes to extend the sum to be raised by way of mortgage so as to include money required for repairs, even where such repairs are necessary in order to obtain an advance on mortgage, and where a mortgage is much more beneficial to the infant than a sale would be (*Hill* v. *Maurice*, 1 De G. & S. 214; see *Garmstone* v. *Gaunt*, 1 Coll. 577). For forms of orders under the act, see Seton, 3rd ed. 826.

Surplus of money arising from such sale or mortgage to descend in the same manner as the estates so sold or mortgaged would have done.

The second section enacts, "That when any sale or mortgage shall be made in pursuance of the said recited act or this act, the surplus (if any) of the money raised by such sale or mortgage which shall remain after answering the purposes for which the same shall have been raised, and defraying all reasonable costs and expenses, shall be considered in all respects of the same nature and descend or devolve in the same manner as the estate, or the lands, tenements or hereditaments so sold or mortgaged, and shall belong to the same persons, be subject to the same limitations and provisions, and be applicable to the same purposes as such estate or such lands, tenements or hereditaments would have belonged and been subject and applicable to in case no such sale or mortgage had been made.

Recited provision to extend to lands, &c., of a deceased debtor, in certain cases.

The stat. 11 & 12 Vict. c. 87, after reciting the 12th section of the 11 Geo. 4 & 1 Will. 4, c. 47 (*ante*, p. 374), "And that such provision did not extend to the case of lands, tenements or hereditaments of a deceased debtor which are by descent or otherwise than by devise vested in the heir or co-heirs of such debtor, subject to an executory devise over in favour of a person or persons not existing or not ascertained, and that it was expedient that the said provision of the said act should be extended to such case:" enacted, that in cases in other respects falling within the said thereinbefore recited provisions of the said act the same act shall extend and is hereby extended to any case in which any lands, tenements or hereditaments of any deceased person shall by descent or otherwise than by devise be vested in the heir or co-heirs of such person, subject to an executory devise over in favour of a person or persons not existing or not ascertained; and in any such case it shall be lawful for the court mentioned in the said recited provision to direct such heir or co-heirs, notwithstanding such heir or such co-heirs, or any of them, may be an infant or infants, to convey, release, assign, surrender or otherwise assure the fee simple or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment or other assurance shall be as effectual as if the heir or co-heirs who shall make and execute the same was or were seised or possessed of the fee simple or other whole estate so to be sold, and, if an infant or infants, was or were of full age.

3 & 4 William IV. cap. 104.

*An Act to render Freehold and Copyhold Estates Assets for the Payment of simple and * Contract Debts.*

* *Sic.*

[29th August, 1833.]

3 & 4 Will. 4, c. 104.

WHEREAS it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force: be it therefore enacted, that from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound; provided always, that in the administration of assets by courts of equity under and by virtue of this act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands (*a*).

Freehold and copyhold estates in all cases to be assets for the payment of simple contract or specialty debts.

(*a*) The debts of a deceased are now payable out of all his assets, including both legal assets and equitable assets. Legal assets consist of the assets with which a court of law would charge an executor in an action brought against him by a creditor, and include all assets which *virtute officii* he can recover, whether in a court of law or of equity (*Cook* v. *Gregson*, 3 Dr. 549; *A. G.* v. *Brunning*, 8 H. L. C. 243). Equitable assets are such assets as can only be made available for the payment of debts through a court of equity (*Cook* v. *Gregson*, *sup.*), and include (1) land charged or devised for payment of debts (*Silk* v. *Prime*, 1 Br. C. C. 138); (2) personal estate over which the deceased had a general power of appointment by will which he has exercised (*Pardoe* v. *Bingham*, 6 Eq. 485); and (3) separate estate to which, before the M. W. P. Act, 1870, a married woman was entitled (*Anon.*, 18 Ves. 258), and also earnings which by that act were made separate estate (*Thompson* v. *Bennett*, 6 Ch. D. 739). Under the M. W. P. Act, 1882, separate estate of a married woman, including property appointed by will under a general power (sect. 4), appears to be legal assets (See sect. 1, sub-sect. (2), and sect. 23). The principal distinctions between these two classes of assets are:—(1) Out of legal assets an executor has a right of retainer for his own debt (See *post*,

Legal assets.

Equitable assets.

Distinction between.

3 & 4 Will. 4, c. 104.

take copyhold tenements held in fee or for lives in execution (8 Ves. 394), yet it was said that leases for years of copyhold tenements, granted by virtue of a licence from the lord, may be taken in execution, that being a common law interest (3 Prest. Abstr. 351). Before the stat. 1 & 2 Vict. c. 110 (*post*), copyhold lands could not be taken in execution upon a judgment (*Cannon* v. *Pack*, Vin. Abr. Copyhold (O. e), pl. 6; 2 Eq. Cas. Abr. 226, pl. 6); nor be seized upon an outlawry, because it would have been prejudicial to the lord of the manor (*R.* v. *Budd*, Park. R. 190). But it seems that they may be sequestered (*Dunkley* v. *Scribnor*, 2 Madd. 443; *Carmarthen* v. *Hawson*, 3 Swanst. 294); although the sequestration will not be revived against the heir of the party who was sequestered (*Whitehead* v. *Harrison*, 1 Barn. K. B. 431); and they are within the rules as to marshalling assets (*Aldrich* v. *Cooper*, 8 Ves. 388; 2 Pow. on Mort. 263, n). But a trust of copyholds, which descended according to the rules of the common law, was assets in the hands of the heir of the *cestui que trust*, as the customary descent is in that case broken (*Kelly* v. *Kelly*, 2 Eq. Cas. Abr. 509, pl. 4).

Copyholds now liable to be taken in execution.

By stat. 1 & 2 Vict. c. 110, s. 11 (*post*), all real estates, including lands and hereditaments of copyhold or customary tenure, of which the person against whom execution is sued, was seised at the time of entering up such judgment, or at any time afterwards, or over which he had alone a power, may be taken in execution; but the person taking such lands in execution, is liable to the performance of the services due to the lord of manor.

DEVISE OF REAL ESTATES CHARGED WITH DEBTS.

22 & 23 Victoriæ, cap. 35, sects. 14—18, and 23.

An Act to further amend the Law of Property and to relieve Trustees. [13th August, 1859 (*a*).]

22 & 23 Vict. c. 35, s. 14.

Devisee in trust may raise money by sale, notwithstanding want of express power in the will.

14. Where by any will which shall come into operation after the passing of this act the testator shall have charged his real estate or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money as aforesaid, by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper (*b*).

(*a*) The other sections of this act will be found under different heads in this work (See *ante*, p. 355, and *post*).

(*b*) On the question, what amounts to a charge of debts upon real estate, a mere authority to trustees to pay claims on the estate is not such a charge (*Re Head's Trustees*, 45 Ch. D. 310). A general direction, however, in a will to pay debts, charges them ordinarily on all the testator's real estate (*Graves* v. *Graves*, 8 Sim. 55; *Cook* v. *Dawson*, 29 B. 126; *Corser* v. *Cartwright*, L. R. 7 H. L. 735); unless a contrary intention appears in the will (*Thomas* v. *Britnell*, 2 Ves. Sen. 313). Such contrary intention may appear (1) by reason of there being a specific charge of debts on part of the real estate (*Palmer* v. *Graves*, 1 Keen, 545; *Corser* v. *Cartwright*, *sup.*), in which case the words must be clear (*Taylor* v. *Taylor*, 6 Sim. 246; *Jones* v. *Williams*, 1 Coll. 156; see *Wrigley* v. *Sykes*, 21 Beav. 337; *Marshall* v. *Gingell*, 21 Ch. D. 790); or (2) by reason of the direction being a direction to executors to pay, in which case the presumed intention is that the debts are to be paid only out of the property which passes to the executors as such (*Wasse* v. *Heslington*, 3 M. & K. 495; *Bailey* v. *Bailey*, 12 Ch. D. 272). Where, however, in addition to the direction to the executors to pay debts the will contains a devise of real estate to them, such real estate may be charged, whether under the devise they take beneficially for life or otherwise (*Henvell* v. *Whitaker*, 3 Russ. 343; *Finch* v. *Hattersley*, *ib.* 345), or merely on trust (*Hartland* v. *Murrell*, 27 Beav. 204; *Re Tanqueray-Willaume*, 20 Ch. Div. 465; see *De Burgh Lawson* v. *De Burgh Lawson*, 41 Ch. D. 568, the will of a married woman in exercise of a power). But it is a question of intention (*Bailey* v. *Bailey*, 12 Ch. D. 272; *Wasse* v. *Heslington*, 3 M. & K. 495). And such real estate will not be charged, either where the executors take unequal benefits (*Harris* v. *Watkins*, Kay, 438; see *Re Tanqueray-Willaume*, 20 Ch. Div. 465); or where the devise is to one executor only (*Warren* v. *Davis*, 2 M. & K. 49; see *Marshall* v. *Gingell*, 21 Ch. D. 790). Real estates made assets by means of such a charge are equitable assets (*Silke* v. *Prime*, 1 Br. C. C. 138; *Shiphard* v. *Lutwidge*, 8 Ves. 26); as to equitable assets, see *ante*, p. 337.

22 & 23 Vict. c. 35, s. 14.

Charge of debts on real estate.

With regard to legacies, where there is only a general gift of them, they are not charged on the testator's real estate (*Kightley* v. *Kightley*, 2 Ves. Jun. 328). To charge them a clear intention must be shown (*Bench* v. *Biles*, 4 Mad. 188); clearer, it would seem, than in the case of debts (*Kightley* v. *Kightley*, *sup.*) Where there is a direction that the real estate be sold, the proceeds to form part of the personal estate, the realty is charged (*Bright* v. *Larcher*, 3 De G. & J. 148; *Field* v. *Peckett*, 29 B. 568). A direction to the executor to pay legacies would seem to charge real estate devised to him (*Alcock* v. *Sparhawk*, 2 Vern. 228; *Elliot* v. *Handcock*, *ib.* 143; *Cross* v. *Kennington*, 9 Beav. 150); but a direction to executors to realise for the payment of legacies such part of the testator's estate as they thought right, did not charge the real estate (*Re Cameron Nixon* v. *Cameron*, 26 Ch. D. 19). A general charge of legacies on the real estate will not charge specifically devised realty (*Spong* v. *Spong*, 3 Bli. N. S. 84; *Conron* v. *Conron*, 7 H. L. C. 168), unless the legacies are coupled with debts (*Maskell* v. *Farrington*, 3 D. J. & S. 338).

Charge of legacies on real estate.

Where a will gives legacies generally, and also gives the residue of the real and personal estate in one mass, the result is to make the residue a mixed fund, and to charge the legacies rateably upon the mixed fund (*Greville* v. *Browne*, 7 H. L. C. 689; *Re Bellis*, 5 Ch. D. 504). The rule applies whether the legacies are given before or after the gift of residue (*Elliott* v. *Dearsley*, 16 Ch. D. 327); and is not affected by a direction that debts and legacies are to be paid by the executors (*Re Brooke*, *Brooke* v. *Rooke*, 3 Ch. D. 630). As to its application in the case of property subject to a special power of appointment, see *Gainsford* v. *Dunn* (17 Eq. 405). The rule applies even where the will contains a specific devise of real estate by means of which the word "residue" might have been explained (*Francis* v. *Clemow*, Kay, 435); but in such case, the specifically devised estate is not charged (See *Bray* v. *Stephens*, 12 Ch. D. 169). Where, after bequeathing legacies, a testator devised his real estate in B. and the residue of his real and personal estate, the legacies were charged on the real estate in B. as

22 & 23 Vict. c. 35, s. 14.

well as the testator's other real estate (*Bray* v. *Stephens*, 12 Ch. D. 162; not following *Castle* v. *Gillett*, 16 Eq. 530). But where, after bequeathing legacies, a testator devised all his real estate and bequeathed the residue of his personal estate, the rule in *Greville* v. *Browne* did not apply (*Wells* v. *Rowe*, 40 L. T. 715; 48 L. J. Ch. 476). The rule was not applied to legacies expressly directed to be paid out of personal estate (*Gyett* v. *Williams*, 2 J. & H. 429).

Wills before 1859 containing charge of debts; who took power of sale.

In the case of wills coming into operation before 13th August, 1859, the law is doubtful as to the legal operation of a will creating merely a charge of debts, where no machinery is provided for giving effect to the charge. With regard to such cases it was laid down that a charge of debts was equivalent to a trust for sale for the payment of them (*Ball* v. *Harris*, 4 M. & C. 267). And that a general charge of debts enabled an executor to

Executor, &c.

sell land and make a good title (*Greetham* v. *Colton*, 34 Beav. 619; and see *Gosling* v. *Carter*, 1 Coll. 650; *Story* v. *Walsh*, 18 Beav. 568; *Wrigley* v. *Sykes*, 21 Beav. 337; *Hodkinson* v. *Quin*, 1 J. & H. 309; *Cook* v. *Dawson*, 29 Beav. 126; *Hamilton* v. *Buckmaster*, 3 Eq. 323; *Colyer* v. *Finch*, 5 H. L. C. 922). No power of sale however was ever implied in an administrator with the will annexed (*Re Clay and Tetley*, 16 Ch. Div. 7). *Wood*, V.-C., observed that a testator having charged his real estate with a sum of money, must be taken to have given an implied power to some one to raise the sum required, and that the donee of the power must in each case be ascertained from the whole will (*Eidsforth* v. *Armstead*, 2 K. & J. 333; see *Robinson* v. *Lowater*, 5 D. M. & G. 272; *Gosling* v. *Carter*, 1 Coll. 650).

Devise on trust.

Where the land was devised to trustees, it was held that they could sell or mortgage (*Hodkinson* v. *Quin*, 1 J. & H. 303; *Eidsforth* v. *Armstead*, 2 K. & J. 333; *Ball* v. *Harris*, 4 M. & C. 264): certainly with the consent of the executors (*Shaw* v. *Borrer*, 1 Keen, 559); or where the trustee was also executor (*Sabin* v. *Heape*, 27 Beav. 553). But it seems that the executors might also have had a concurrent power of sale (*Hodkinson* v.

Devise beneficially.

Quin, 1 J. & H. 303). Lord *Cranworth* observed that, where the estate was devised beneficially to a person other than the executor, charged with certain payments of debts or legacies, then the money was to be raised through the instrumentality of a sale by the devisee, and that devisee was the person, and the only person, who could make a legal title (*Colyer* v. *Finch*, 5 H. L. C. 922; see *Corser* v. *Cartwright*, 8 Ch. 971). A devisee who was also one of the executors, was the only person to sell or mortgage (*Corser* v. *Cartwright*, L. R. 7 H. L. 731). A devisee subject to debts and annuities, who was also an executor, could make a good title without the annuitants (*Page* v. *Adams*, 4 Beav. 269; *Elliot* v. *Merryman*, 1 Wh. & Tu. L. C. Eq. 72, 6th ed.; see *Re Tanqueray-Willaume*, 20 Ch. D. 465). But

Devise for life with remainders over.

where a testator devised lands for life with contingent remainders over, and charged them with his debts generally, but gave no express power of sale, the executor could sell (*Robinson* v. *Lowater*, 5 D. M. & G. 272; see

Heir-at-law.

Bolton v. *Stannard*, 6 W. R. 570). Where a testator charged his real estate with the payment of his debts, and the real estate was not devised, but descended to the heir, it was held, at law, that the executor had no legal power of sale (*Doe* v. *Hughes*, 6 Exch. 223); but probably he had an equitable power (*Colyer* v. *Finch*, 5 H. L. C. 922). Where real estate was being sold for payment of debts, and the legal estate was in the heir, who was out of the jurisdiction, and the charge of debts was not clear, the court declared the heir to be a trustee for the purposes of the will, and made a vesting order under the Trustee Act, 1850, s. 9 (*Hooper* v. *Strutton*,

Disclaimer.

12 W. R. 367). Where a sole executor, who was devisee of real estate in trust to sell and pay debts, renounced and disclaimed, the heir-at-law who had taken out administration could sell the estate and give valid receipts (*Austin* v. *Martin*, 29 Beav. 523).

Executor's power of sale, whether legal or equitable.

In the case of wills before this act, it seems that the implied power of sale which executors took under a charge of debts, was merely an equitable power; and the concurrence of the heir or devisee was necessary to pass the legal estate (Dart, V. & P. 694, 6th ed.)

Wills after 1859.

In the case of wills coming into operation after the 13th of August, 1859,

sect. 14 of this act gives to trustees taking by devise the whole of the testator's interest in real estate charged with debts or legacies, an absolute power to sell or mortgage the same to raise such debts or legacies. By sect. 18, the case of a beneficial devise in fee is excepted from the operation of the act. In such a case it would seem that, having regard to the then state of the law (see last words of section 18), the beneficial devisee, and not the executor, is the person in whom all power to sell is vested (*Colyer* v. *Finch*, 5 H. L. C. 922; see *Re Wilson*, *Pennington* v. *Payne*, 54 L. T. 600). By sect. 16, it was apparently intended to give the executor an absolute legal power to sell or mortgage in all cases not falling within sects. 14 and 18 (See *Pennington* v. *Payne*, 54 L. T. 600; *Re Sankey*, *Sankey* v. *Clarke*, 1889, W. N. 79). Where land was devised subject to debts and legacies to A. for life with remainder over, B., C., and D., who were appointed executors, had power to mortgage (*Re Wilson*, *Pennington* v. *Payne*, 54 L. T. 600). It is at present doubtful how far (if at all) the provisions of the S. L. A., 1882, as to the consent of the tenant for life are applicable to sales for the payment of debts (See 2 Dart V. & P. 700, 6th ed.; Lewin on Trusts, 519, 9th ed.)

22 & 23 Vict. c. 35, s. 14.

Cases under this act.

The power implied under a charge of debts in wills before this act has been held to exist notwithstanding the lapse of a considerable time. Thus, in *Greetham* v. *Colton* (34 Beav. 615), thirteen years; in *Forbes* v. *Peacock* (Phill. 717), twenty-five years; in *Sabin* v. *Heape* (27 Beav. 353), twenty-seven years; and in *Wrigley* v. *Sykes* (21 Beav. 337), thirty-three years, had elapsed between the testator's death and the sale. But it has been recently laid down by the Court of Appeal that after the lapse of twenty years there is a presumption that the debts have been paid, and that in such case a purchaser from the executor is bound to inquire as to this; but that when the sale is within that period the purchaser is not entitled to make any inquiry (*Re Tanqueray-Willaume*, 20 Ch. Div. 480). This rule does not apply to an executor selling leaseholds (*Re Whistler*, 35 Ch. D. 561).

Effect of lapse of time upon executor's power of sale.

A power of sale out and out does not authorize a mortgage (*Stroughill* v. *Anstey*, 1 D. M. & G. 645; *Page* v. *Cooper*, 16 Beav. 400); but a power of sale for raising a particular charge does (*ib.*): so a power of sale to pay debts implies power to mortgage (*Ball* v. *Harris*, 4 M. & C. 267; see *Colyer* v. *Finch*, 5 H. L. C. 905; *Corser* v. *Cartwright*, L. R. 7 H. L. 731). A power to mortgage does not give a power to sell (*Cook* v. *Dawson*, 29 Beav. 128); but it has been held that a power to mortgage authorizes a mortgage with a power of sale (*Bridges* v. *Longman*, 24 Beav. 29; *Cook* v. *Dawson*, 29 Beav. 128; *Re Chawner's Will*, 8 Eq. 569; see *contrà*, *Clarke* v. *Royal Panopticon*, 4 Drew. 26).

Power to mortgage.

15. The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid (*c*).

Powers given by last section extended to survivors, devisees, &c.

(*c*) See the questions which have been raised as to how far the devisee of a trust estate can execute the trust (*Braybrooke* v. *Inskip*, Tudor's L. C., Conv.)

16. If any testator who shall have created such a charge as is described in the fourteenth section shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being

Executors to have power of raising money, &c. where there is no sufficient devise.

22 & 23 Vict. c. 35, s. 16.

named in such will (if any), shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate (*d*).

(*d*) See note to sect. 14. *ante*. Executors took a power of sale under this section (*Re Wilson, Pennington* v. *Payne*, 54 L. T. 600), but it confers no power on an administrator with the will annexed (*Re Clay and Tetley*, 16 Ch. Div. 3).

Purchasers, &c. not bound to inquire as to powers.

17. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections fourteen, fifteen and sixteen of this act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

Sections 14, 15 and 16 not to affect certain sales, &c., nor to extend to devises in fee or in tail.

18. The provisions contained in sections fourteen, fifteen and sixteen shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do (*e*).

(*e*) See note to sect. 14, *ante*, and *Re Wilson, Pennington* v. *Payne* 54 L. T. 600.

Not to be bound to see to the application of purchase-money.

23. The *bonâ fide* payment to and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security (*f*).

Previous law as to purchaser's obligation in case of sale for payment of debts or legacies:

(*f*) See also 23 & 24 Vict. c. 145, s. 29, and Conv. Act, 1881, s. 36, *post*, as to the present law.

Before these statutes, where a will contained no express trust or charge for payment of debts, a purchaser of the testator's land sold for payment of debts, was not bound to see to the application of the purchase-money, where the land was made assets, either by 11 Geo. 4 & 1 Will. 4, c. 47 (see *ante*, p. 365); or by 3 & 4 Will. 4, c. 104 (see *ante*, p. 377).

Where express trust or charge for payment of debts generally;

Where a will contained an express trust or charge for payment of debts generally, a purchaser was not bound to see to the application of the purchase-money (Williams, Real Assets, 51, 62); even where a testator charged the land with a specified debt, and also with his other debts generally (*Robinson* v. *Lowater*, 5 D. M. & G. 272). And the rule had reference to the time of the testator's death, and did not cease to be

applicable, though the debts were subsequently paid (*Forbes* v. *Peacock*, 1 Phill. 717; see *Stroughill* v. *Anstey*, 1 D. M. & G. 653). Where a testator, "in case his personal estate should be insufficient for the payment of his debts," charged the same upon his real estate, the executor could give valid receipts for the purchase-money, without showing the insufficiency of the personal estate (*Greetham* v. *Colton*, 34 Beav. 615; but see *Carlyon* v. *Truscott*, 20 Eq. 348). 23 & 23 Vict. c. 35, s. 23.

Where debts and legacies were charged generally, a purchaser was not bound to see to the application of the purchase-money (*Johnson* v. *Kennett*, 3 M. & K. 630; see *Carlyon* v. *Truscott*, 20 Eq. 351). Freehold and leasehold estate was devised to A., subject to the payment of debts and annuities. A. sold the real estate. The purchaser, insisting that the annuitants ought to concur, filed a bill against the vendor for a specific performance. The vendor's answer admitted the sufficiency of the personal estate to pay the debts; that they had all been paid since the contract, and that the sale had not been made for the specific purpose of satisfying the debts; it was held, that these circumstances did not vary the rule as to the liability of the purchaser to see to the application of the purchase-money, and that he was bound to complete (*Page* v. *Adam*, 4 Beav. 269; see *Dowling* v. *Hudson*, 17 Beav. 248; *Jones* v. *Price*, 11 Sim. 557; Sugd. V. & P. 840, 841, 11th ed.); but the rule did not apply where the circumstances of the transaction afforded intrinsic evidence of a breach of trust, and that the mortgage or purchase-money was not to be applied for payment of the debts and legacies (*Watkins* v. *Cheek*, 2 Sim. & Stu. 199; see *Eland* v. *Eland*, 4 M. & C. 420; *Forbes* v. *Peacock*, 1 Phill. 721). For payment of debts and legacies generally;

Where the trust was for payment of specified debts (*Binks* v. *Rokeby*, 2 Mad. 238) or of legacies only (*Johnson* v. *Kennett*, 3 M. & K. 630), the purchaser was bound to see to the application of the purchase-money. And it was decided, that where a person who was a trader at his death devised his real estates, subject to the payment of legacies, the purchaser of the estate from the devisee was bound to see to the application of his purchase-money in satisfaction of the legacies charged on the land, notwithstanding their liability under 47 Geo. 3, sess. 2, c. 74, to the payment of the simple contract debts (*Horn* v. *Horn*, 2 Sim. & Stu. 448). For payment of particular debts or of legacies.

It is doubtful whether this section is retrospective (See *Bennett* v. *Lytton*, 2 J. & H. 158).

See further as to the liability of a purchaser to see to the application of the purchase-money, *Elliot* v. *Merryman*, 1 White & Tudor's L. C. Eq.; Dart, V. & P. 670 *et seq.*, 6th ed.; and the note to 23 & 24 Vict. c. 145, s. 29, and Conv. Act, 1881, s. 36, *post*.

PAYMENT OF MORTGAGE DEBTS.

17 & 18 Victoriæ, cap. 113.

An Act to amend the Law relating to the Administration of the Estates of Deceased Persons.

[11th August, 1854.]

Whereas it is expedient that the law whereunder the real and personal assets of deceased persons are administered should be amended: be it enacted as follows: 17 & 18 Vict. c. 113, s. 1.

1. When any person shall, after the thirty-first day of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with Heir or devisee of real estate not to claim payment of mort-

17 & 18 Vict. c. 113, s. 1.

gage out of personal assets.

the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof; provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and fifty-five (*a*).

Not to affect rights claimed under any will, &c. before 1st January, 1855.

Extent of act.

2. This act shall not extend to Scotland.

(*a*) The above act (known as Locke King's Act), and the acts amending the same, can now be cited as the Real Estate Charges Acts, 1854, 1867, and 1877. (Short Titles Act, 1892.)

Previous law as to the payment of mortgage debts.

The rule previous to 17 & 18 Vict. c. 113, was, that the personal estate of the deceased debtor was the primary fund to pay off a mortgage, unless an intention was shown to throw the debt on the mortgaged estate. The object of the act was to make the mortgaged estate the primary fund, unless an intention can be shown to throw the debt on the personalty (*Goodwin* v. *Lee*, 1 K. & J. 378; *Swainson* v. *Swainson*, 6 D. M. & G. 652). For the previous law as to the exoneration of estates from mortgage debts contracted, or adopted, by the owner, and also as to the acts which amounted to an adoption of a mortgage debt, see further, *Ancaster* v. *Mayer* (1 White & Tudor, L. C., Eq.)

Bequests of incumbered chattels.

In the case of specific bequests of chattels which are subject to charges, a distinction has been taken between charges created by the testator and charges incident to the chattel, such as calls on shares or the rent of leaseholds. In the first case the specific legatee is entitled to have the legacy freed from the charge, in the second case he is not so entitled (*Bothamley* v. *Sherson*, 20 Eq. 316; see *Lewis* v. *Lewis*, 13 Eq. 227). In the case of bequests of shares not fully paid, any call made before the testator's death but remaining unpaid at that time, must be borne by the residuary estate, and calls made after the death by the legatee (*Addams* v. *Ferick*, 26 Beav. 384; *Day* v. *Day*, 1 Dr. & Sm. 261). So in bequests of leaseholds, the rent up to the testator's death must be borne by the residuary estate, and after that time by the specific legatee (*Hawkins* v. *Hawkins*, 13 Ch. Div. 470).

Land, &c. within the act.

The act 17 & 18 Vict. c. 113, was held not to apply to leaseholds (*Solomon* v. *Solomon*, 12 W. R. 540; *Gael* v. *Fenwick*, 22 W. R. 211; *Re Wormsley*, *Hill* v. *Wormsley*, 4 Ch. D. 665). In the case, however, of persons dying since 31st December, 1877, the act has been rendered applicable to leaseholds by 40 & 41 Vict. c. 34, *post*, p. 398 (*Re Kershaw*, *Drake* v. *Kershaw*, 37 Ch. D. 674). The act applies to copyholds (*Piper* v. *Piper*, 1 J. & H. 91). Where freeholds were settled by deed upon trusts for conversion, a share in the produce, which was under the terms of the deed taken as personal estate, was held not to be an "interest in land" within the act (*Lewis* v. *Lewis*, 13 Eq. 218). Where an interest in land is given

17 & 18 Vict. c. 113, s. 1.

by a testator, with the option of retaining it in specie, or of having it converted, if the person elect to take without conversion, the act applies, but if he takes it as converted, the act does not apply (13 Eq. 227).

Charge by way of mortgage within the acts.

The act only applies where a property is specifically charged (*Dunlop* v. *Dunlop*, 21 Ch. Div. 590; see *Hepworth* v. *Hill*. 30 Beav. 476). It would seem that a banker's general lien is not within the act (*Dunlop* v. *Dunlop*, *sup.*, 592). A general charge on real estate by a testator, in aid of his personal estate, is not within the act, until the amount has, in the administration of the estate, been accurately defined, and the devisee has expressly taken the estate, subject to such ascertained charge (*Hepworth* v. *Hill*, 30 Beav. 476). An equitable mortgage by deposit and memorandum is within the act (*Pembroke* v. *Friend*, 1 J. & H. 132); even where the memorandum expressed that the deposit was made as collateral security for the repayment of a sum borrowed upon a promissory note (*Coleby* v. *Coleby*, 2 Eq. 803). Even without a memorandum such a mortgage is within the act (*Davis* v. *Davis*, 24 W. R. 962). In Ireland a judgment mortgage is within the act (*Nesbitt* v. *Lawder*, 17 L. R. Ir. 553). In the case of persons dying after 31st December, 1877, see the words in 40 & 41 Vict. c. 34 (*post*, p. 398), "or any other equitable charge." The charge under 1 & 2 Vict. c. 110, s. 13, arising by virtue of a delivery in execution under a judgment is within the words of 40 & 41 Vict. c. 34 (*Re Anthony*, *Anthony* v. *Anthony*, 1892, 1 Ch. 450).

Vendor's lien.

A lien for unpaid purchase-money was held not to be a charge by way of mortgage within the act (*Hood* v. *Hood*, 5 W. R. 74; *Barnwell* v. *Ironmonger*, 1 Dr. & Sm. 260; see *Day* v. *Day*, 14 W. R. 261). The word "mortgage" was afterwards extended so as to include a lien for unpaid purchase-money upon lands or hereditaments purchased by a testator (30 & 31 Vict. c. 69, s. 2, *post*, p. 397). But the last-mentioned section did not apply where the purchaser died intestate (*Harding* v. *Harding*, 13 Eq. 493). See now 40 & 41 Vict. c. 34, *post*, p. 398.

A. granted a Scotch estate to his son under the burden of the payment of a mortgage debt, secured upon another estate belonging to A. in England. A. died, domiciled in England, and by his will appointed executors, directed payment of his debts, and devised the mortgaged estate to his son. The mortgage debt was properly payable out of the Scotch estate, and the testator's general personalty was exonerated therefrom (*Smith* v. *Moreton*, 37 L. J. Ch. 6; 1867, W. N. 251).

Act applies in favour of crown.

Where the personalty goes to the crown for want of next of kin, it has been held, notwithstanding the words of the act, "as between the different persons claiming through or under the deceased person," that the statute applies, and the crown takes exonerated from mortgage debts (*Dacre* v. *Patrickson*, 1 Dr. & Sm. 186).

Proviso in the act.

A will, executed by the testator before 1855, but not coming into operation until after that date, is, as between the claimants under it, "a will already made," within the proviso, and republication at a time subsequent to the 1st January, 1855, does not deprive it of this character (*Rolfe* v. *Perry*, 3 D. J. & S. 481). The proviso was held not to apply to the case of an heir, where the intestate, before 1855, had executed a mortgage, reserving the equity of redemption to himself and his heirs (*Piper* v. *Piper*, 1 J. & H. 91). Nor where the personal estate had been bequeathed by a will made before 1855 (*Power* v. *Power*, 8 Ir. Ch. R. 340). The heir of a testator, taking by descent an estate which had been the subject of a lapsed devise in a will made prior to 1855, was held to take *cum onere*, inasmuch as he was not a person claiming "under or by virtue of a will" within the meaning of the proviso (*Nelson* v. *Page*, 7 Eq. 25).

Contrary intention within the act.

With regard to a contrary intention within the act, it was laid down that each case must rest on its own circumstances (*Rolfe* v. *Perry*, 3 D. J. & S. 486). See *Eno* v. *Tatham* (3 D. J. & S. 443), where *Turner*, L. J., disapproved of the dicta of Lord *Campbell* in *Woolstencroft* v. *Woolstencroft* (2 D. F. & J. 350); *Mellish* v. *Vallins* (2 J. & H. 199); *Smith* v. *Smith* (3 Giff. 263). Regard must be had, in the case of persons dying after 1867, to 30 & 31 Vict. c. 69 (*post*, p. 396), and in the case of persons dying after

17 & 18 Vict. c. 113, s. 1.

31st December, 1877, to 40 & 41 Vict. c. 34 (*post*, p. 398), in determining the question whether an intention has been expressed to exclude the operation of the act.

Cases as to persons dying before 1868.

In the case of persons dying before 1868, the following distinctions were laid down. Where a testator directed his debts to be paid out of some particular fund or property, or description of property, out of which, according to the rule established by the statute, they would not be primarily payable, he was taken to signify an intention to exclude the statutory rule: but when he merely directed his debts to be paid, or to be paid out of his estate generally, he did not signify an intention to exclude that rule (Per *Romilly*, M. R., *Brownson* v. *Lawrance*, 6 Eq. 5). Whenever a testator had mortgaged his estates, and by his will provided a fund, either his residuary personal estate, or an estate devised for the purpose, or the general personal estate and other property mixed up with it, or, in other words, when he provided a fund of any description whatever for the payment of his debts; that was an indication of an intention that the land was not to be the primary fund within the act; but that the personal estate or the particular fund provided was to exonerate it from the mortgage debt (*Maxwell* v. *Hyslop*, 4 Eq. 413).

Expressions not excluding the act.

The following provisions were held not sufficient to exclude the act. A direction that "all just debts be paid as soon as may be" (*Pembroke* v. *Friend*, 1 J. & H. 132). A direction that a testator's debts should be paid as soon as could be after his decease (*Coote* v. *Lowndes*, 10 Eq. 376). A direction that all a testator's just debts should be paid out of his estate (*Brownson* v. *Lawrance*, 6 Eq. 1). A direction that all the testator's just debts, funeral and testamentary charges and expenses should be paid and discharged *by his executors*, as soon as convenient after his decease, out of his estate (*Woolstencroft* v. *Woolstencroft*, 2 D. F. & J. 347). A direction by a testator that all his just debts and funeral and testamentary expenses should be paid and discharged out of his personal estate (*Rowson* v. *Harrison*, 31 Beav. 207).

Expressions excluding the act.

The following provisions were sufficient to exclude the act. A bequest of all personal estate to trustees with a direction to pay debts, where one of the trustees was a devisee of the mortgaged property (*Smith* v. *Smith*, 3 Giff. 263). A bequest of a testator's personal estate to trustees upon trust to pay thereout all his debts, funeral and testamentary expenses, (*Moore* v. *Moore*, 1 D. J. & S. 602; *Porcher* v. *Wilson*, 12 W. R. 1001). A bequest of personalty, "subject to the payment thereout of all the testator's just debts" (*Mellish* v. *Vallins*, 2 J. & H. 194). A gift of all the testator's personal estate, "subject to the payment of his debts, funeral and testamentary expenses," the real estate being devised in a mode not pointing in any way to the mortgage debt being paid out of the property (*Eno* v. *Tatham*, 3 D. J. & S. 443). A gift of residue of real and personal estate to trustees upon trust for sale, the moneys arising therefrom to be held upon trust in the first place to pay funeral and testamentary expenses, and debts (*Newman* v. *Wilson*, 31 Beav. 33). A gift of the residue of real and personal estate to trustees upon trust to convert and pay thereout all just debts, &c. (*Maxwell* v. *Hyslop*, 4 Eq. 407; L. R. 4 H. L. 506). A declaration that trustees should stand possessed of a testator's residuary real and personal estate, and the proceeds thereof, subject in the first place to the payment of his just debts, &c., and a power for the acting trustees and executors to pay and satisfy any debts owing or claimed to be owing by or from him, and any liabilities to which he or his estate might be subject (*Stone* v. *Parker*, 1 Dr. & Sm. 212). A bequest of residue of his real and personal estate "after paying mortgage and other debts" (*Greated* v. *Greated*, 26 Beav. 621). A devise of the mortgaged estate for sale and payment of legacies followed by a devise of residue of real and personal estate with a direction that any mortgages, debts or incumbrances, specifically affecting any parts of the testatrix's residuary real or personal estate, be exclusively borne by and paid out of the premises specifically charged therewith and subject thereto, that all her debts, &c., be paid out of her said residuary real and personal

estate (*Allen* v. *Allen*, 30 Beav. 395). See, further, the notes, pp. 397, 398, *post*. 17 & 18 Vict. c. 113, s. 1.

As between different portions of an estate comprised in one mortgage which are devised to different persons, the act, in the absence of a contrary intention, applies and compels the devisees to contribute rateably (*Newmarch* v. *Storr*, 9 Ch. Div. 17; which see as to meaning of words "or any other real estate of such person"). It has been also held that as between different freehold estates comprised in the same mortgage, the mortgage debt was borne rateably although one estate was specifically devised, and the other passed under a residuary devise (*Gibbins* v. *Eyden*, 7 Eq. 375; *Sackville* v. *Smyth*, 17 Eq. 153; see *Re Smith*, *Hannington* v. *True*, 33 Ch. D. 195). Where freeholds and leaseholds were mortgaged together, and the mortgagor died intestate, it was held, as between his heir and administrator, that the freeholds and leaseholds must bear the burden rateably (*Evans* v. *Wyatt*, 31 Beav. 217). And where freeholds and a policy were mortgaged together and the mortgagor's will declared different trusts of real and personal estate, the mortgage debt was borne rateably (*Trestrail* v. *Mason*, 7 Ch. D. 655; *Leonino* v. *Leonino*, 10 Ch. D. 460). An intention, however, may be expressed upon the mortgage documents that one property shall be the primary security (*Bute* v. *Cunynghame*, 2 Russ. 299; see 10 Ch. D. 465). Such an intention was found on the documents in *Lipscombe* v. *Lipscombe* (7 Eq. 501); *De Rochfort* v. *Dawes* (12 Eq. 540). The words "for further and better securing" were sufficient for the purpose (*Stringer* v. *Harper*, 26 Beav. 33); but not the words "collateral security" (*Athill* v. *Athill*, 16 Ch. Div. 211; *Williams* v. *Early*, 16 Ch. D. 214 n.) Incidence of debt as between different properties in same mortgage.

As to the apportionment of a mortgage debt between several estates comprised in the same mortgage, see Fisher on Mortgages, 659, 4th ed.; Story, Eq. Jur. sects. 484, 1233 b. Contribution.

As to the order in which funds are to be applied in payment of a mortgage debt, where the statutory rule has been excluded by the expression of a contrary intention, see the observations of M. R., in *Allen* v. *Allen*, 30 Beav. 395; and the argument in *Smith* v. *Moreton*, 37 L. J. Ch. 6; see also 2 Fisher on Mortgages, 659, 4th ed. It may be the result of a testator's words that a mortgaged estate is to be exonerated only so far as his personalty extends; and that there is no right to go upon the other real estate (*Rodhouse* v. *Mold*, 13 W. R. 854). Order in which funds are applicable where statutory rule excluded.

Where the mortgage debts of a testator are (under a direction in his will) primarily payable out of his personal estate, the devisees of a mortgaged estate are not entitled to have the mortgage debt satisfied out of the personal estate until the pecuniary and specific legatees and annuitants are satisfied; the pecuniary legatees and annuitants being entitled to have the assets marshalled, so that any payments in respect of the mortgage debt out of the personal estate would have to be recouped by the mortgaged estate (*Porcher* v. *Wilson*, 14 W. R. 1011). And where annuities were charged on lands, out of which a mortgage debt was, under this act, held to be primarily payable, the act did not preclude the right of the annuitants to have the assets marshalled (*Buckley* v. *Buckley*, 19 L. R. Ir. 544). Marshalling.

30 & 31 Victoriæ, cap. 69.

An Act to explain the Operation of an Act passed in the Seventeenth and Eighteenth Years of her present Majesty, Chapter One hundred and thirteen, intituled "An Act to amend the Law relating to the Administration of Deceased Persons." [25th July, 1867.]

30 & 31 Vict. c. 69, s. 1.

Whereas by an act passed in the seventeenth and eighteenth years of her present Majesty it is enacted, among other things, when any person shall, after the thirty-first of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such lands or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof:

And whereas doubts may exist upon the construction of the said act, and it is expedient that such doubts should for the future be removed:

Be it therefore enacted as follows:

In construing wills, general direction for payment of debts out of personalty not to include mortgage debts, unless such intention expressly implied.

1. In the construction of the will of any person who may die after the thirty-first day of December, one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate (*a*).

(*a*) Under this section it was laid down that a direction, to be a declaration of an intention contrary to the rule laid down by Mr. Locke King's Act, must be a direction applying to mortgage debts in such terms as distinctly and unmistakeably to refer to or describe them (per *Giffard*, V.-C., *Nelson* v. *Page*, 7 Eq. 28). And in accordance with this principle, the

following provisions have been held not sufficient to exclude the act:— A direction to executors "to pay all my just debts, funeral and testamentary expenses, out of my personal estate, in exoneration of my real estate" (*Rossiter* v. *Rossiter*, 13 Ch. D. 355). A direction to trustees to pay out of personal estate all debts, including specialty debts, in full exoneration of the real estate (*Buckley* v. *Buckley*, 19 L. R. Ir. 544). A devise and bequest of residue to trustees, on trust, subject to payment thereout of all debts (*Lewis* v. *Lewis*, 13 Eq. 218). A devise of real estate to a wife, "absolutely to do with as she think proper" (*Re Smith*, *Hannington* v. *True*, 33 Ch. D. 195). A charge on a portion of the real estate, of all just debts (not specifically referring to mortgage debts) in aid of personal estate, and in exoneration of other real estate (*Newmarch* v. *Storr*, 9 Ch. Div. 12). A devise of part of a mortgaged estate specifically, and the remainder as residue, with a charge of debts on residuary real estate in aid of personalty (*Sackville* v. *Smyth*, 17 Eq. 153; see *Re Smith*, *Hannington* v. *True*, 33 Ch. D. 195). And where a testator gave certain real estate to his wife during widowhood and gave his residuary real and personal estate to trustees to convert, and pay his debts, including mortgages on the property given to his wife during widowhood, and after her death or second marriage gave the pure personalty to charities and realty to widow absolutely, it was held that the mortgages on the residuary realty must be paid out of the proceeds of such realty (*Elliott* v. *Dearsley*, 16 Ch. Div. 322).

Expressions not excluding the act.

Where there was a direction to executors to apply the proceeds of certain policies to pay private debts, and a bequest of residue of personal estate, "subject to the payment of my trade debts (which I hereby declare shall be a charge upon my personal estate)," and the title deeds of the real estate had been deposited with a bank as security for a trade account, there was sufficient expression of "contrary intention" to exonerate the real estate from the trade debt (*Re Fleck*, *Colston* v. *Roberts*, 37 Ch. D. 677). The act was excluded in *Re Nevill*, *Robinson* v. *Nevill*), 62 L. T. 864).

Act excluded.

For the previous cases as to a "contrary intention" within 17 & 18 Vict. c. 113, see *ante*, p. 398.

2. In the construction of the said act and of this act, the word "mortgage" shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator (*b*).

Interpretation of word "mortgage."

(*b*) This section did not apply where the purchaser died intestate (*Harding* v. *Harding*, 13 Eq. 493), but did apply where the purchaser devised the land to trustees, but died intestate as to the beneficial interest (*Dowdall* v. *McCartan*, 5 L. R. Ir. 313). See now 40 & 41 Vict. c. 34 (*post*, p. 398).

3. This act shall not extend to Scotland.

Extent of act.

40 & 41 Victoriæ, cap. 34.

An Act to amend the Acts seventeenth and eighteenth Victoria, chapter one hundred and thirteen, and thirtieth and thirty-first Victoria, chapter sixty-nine.

[2nd August, 1877.]

40 & 41 Vict. c. 34, s. 1.

Be it enacted as follows:

Application of acts in schedule.

1. The acts mentioned in the schedule hereto shall, as to any testator or intestate dying after the thirty-first December one thousand eight hundred and seventy-seven, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate (*a*).

(*a*) See as to this section the notes to 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, *supra*; *Re Anthony*, *Anthony* v. *Anthony*, 1892, 1 Ch. 456). This act has extended the provisions of the former acts to leaseholds (*Drake* v. *Kershaw*, 37 Ch. D. 674); and in the case of a vendor's lien to intestates (*Broadbent* v. *Groves*, 24 Ch. D. 100). It has been observed that the expression of a contrary intention referred to in this act is limited to the case of a testator, the expression "by deed or other document" of such an intention not being mentioned (*Ib.*)

Act not to extend to Scotland.

2. This act shall not extend to Scotland.

Schedule.

17 & 18 Vict. c. 113 ..	An Act to amend the law relating to the administration of the estates of deceased persons.
30 & 31 Vict. c. 69 ..	An Act to explain the operation of the Act 17 & 18 Vict. c. 113.

AMENDMENT OF THE LAWS RESPECTING WILLS.

1 VICTORIÆ, CAP. 26.

An Act for the Amendment of the Laws with respect to Wills. [3rd July, 1837.]

1 Vict. c. 26, s. 1.

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Meaning of certain words in this act;

"Will:"

12 Car. 2, c. 24.

14 & 15 Car. 2, (I.)

"Real estate:"

"Personal estate:"

Number:

Gender:

2. An Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards and Primer Seisins, whereby a Man may devise Two Parts of

Repeal of the Statutes of Wills, 32 Hen. 8,

1 Vict. c. 26, s. 2.

c. 1, and 34 & 35 Hen. 8, c. 5.

10 Car. 1, sess. 2, c. 2 (I.)

Sects. 5, 6, 12, 19, 20, 21 and 22 of the Statute of Frauds, 29 Car. 2, c. 3; 7 Will. 3, c. 12 (I.).

Sect. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10 (I.).

Sect. 9 of 14 Geo. 2, c. 20.

25 Geo. 2, c. 6 (except as to colonies).

25 Geo. 2, c. 11 (I.).

55 Geo. 3, c. 192.

his Land;" and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an act passed in the parliament of Ireland in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, &c., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates *pur autre vie;* and also an act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America," except so far as relates to his Majesty's colonies and plantations in America; and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates;" and also an act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates *pur autre vie* to which this act does not extend.

1 Vict. c. 26, s. 3.

3. (*a*) It shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir-at-law or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator (*b*); and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right or customary or copyhold (*c*), notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory or other future interests in any real or personal estate (*d*), whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

All property may be disposed of by will,

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates *pur autre vie*;

contingent interests;

rights of entry;

and property acquired after execution of the will.

(*a*) A will of realty is governed by the *lex loci rei sitæ* (1 Jarm. Wills, 1); and this rule, so far as regards the validity of the dispositions in the will, applies to leaseholds (*Freke* v. *Carbery*, 16 Eq. 461; *Duncan* v. *Lawson*, 41 Ch. D. 394). In the case of personalty, the law of the country in which the deceased was domiciled at his death not only decides the course of distribution or succession, but regulates the decision as to what constitutes the last will (*Lynch* v. *Paraguay*, L. R. 2 P. & M. 268; *Abd-ul-Messih* v. *Farra*, 13 App. Cas. 437). Foreign personal assets, however, are governed by the law of their own locality for the purpose of legal representation, collection, and administration, as distinguished from distribution among the successors (*Blackwood* v. *The Queen*, 8 App. Cas. 82; *Commissioner of Stamps* v. *Hope*, 1891, A. C. 476; see *Re Kloebe, Kannreuther* v. *Geiselbrecht*, 28 Ch. D. 175). The provisions of 1 Vict. c. 26

Wills of realty governed by the *lex loci rei sitæ*;
wills of personalty by the *lex domicilii*.

1 Vict. c. 26, s. 3.

apply only to persons having an English domicile (*Croker* v. *Hertford*, 4 Moore, P. C. 339; *Bremer* v. *Freeman*, 10 Moore, P. C. 306). But as to the form in which wills of personalty may be executed by British subjects dying after 6th August, 1861, see now 24 & 25 Vict. c. 114, *post*, p. 438. As to conventions between this country and foreign countries for the purpose of determining the domicile of deceased persons, see 24 & 25 Vict. c. 121, *post*, p. 440; and as to domicile generally, see Dicey on Domicile.

Aliens. Aliens may dispose of personalty by will (1 Wms. Exors. 12). Aliens were formerly incapable of devising realty (*Fourdrin* v. *Gowdey*, 3 M. & K. 383). As to aliens claiming under a devise, see *Davies* v. *Lynch* (I. R. 4 C. L. 570). But now real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject (33 & 34 Vict, c. 14, s. 2). This last section is not retrospective (*Sharp* v. *St. Sauveur*, 7 Ch. 343); and does not confer upon aliens the privileges of 24 & 25 Vict. c. 114, *post*, p. 438 (*Bloxam* v. *Favre*, 9 P. Div. 130).

The sovereign. As to the power of the sovereign to dispose of personalty by will, see 39 & 40 Geo. 3, c. 88, s. 10; and to devise realty, see 39 & 40 Geo. 3, c. 88, s. 10. See further, *A. G.* v. *Windsor* (8 H. L. C. 369); *Re Geo.* 3 (3 Sw. & Tr. 199).

Infants, married women, soldiers and seamen, lunatics. See as to the wills of infants, sect. 7 of this act; of married women, sect. 8; of soldiers and seamen, sects. 11 and 12; of lunatics, *Smith* v. *Tebbitt*, L. R. 1 P. & M. 398; *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549; Pope on Lunacy, 2nd ed. 352.

Chose in action. (*b*) It was never intended that this section should make any kind of personalty bequeathable which was not bequeathable before. Therefore a testator cannot bequeath a promissory note, made to him, so as to pass the right to sue on it: such right is in the executor (*Bishop* v. *Curtis*, 18 Q. B. 879).

Devisable interests in land. A person in possession of land without other title has a devisable interest (*Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Clarke* v. *Clarke*, I. R. 2 C. L. 395). Even before the passing of this act a person who had sold an estate under circumstances which entitled him in equity to have the sale set aside had in the estate an interest of such a nature as to be devisable (*Gresley* v. *Mousley*, 4 De G. & J. 78).

Testator dying without heirs. A doubt has been suggested whether this act extends to the case of a testator dying without heirs, and whether, therefore, in order to prevent an escheat, three witnesses should not in such a case attest the will as under the old law (Williams, R. P. 125, note (*u*), 12th ed.)

Copyholds—Estate remains in heir till admittance of devisee. (*c*) The effect of this section in the case of copyholds is to enable a copyholder to devise his estate in every case, dispensing with a surrender to the use of the will, but leaving the estate in the customary heir till the admittance of the devisee (*Garland* v. *Mead*, L. R. 6 Q. B. 441). Where a copyholder devised his estate to trustees, appointing them guardians of his customary heir, who was an infant, and the trustees without disclaiming tendered the infant heir for admittance, and the lord would not admit on account of the devise, the Court of Queen's Bench refused (as a matter of discretion) to grant a mandamus to compel the lord to admit the heir (*R.* v. *Garland*, L. R. 5 Q. B. 269); but subsequently held, that the lord could not seize *quousque* for want of a tenant (*Garland* v. *Mead*, L. R. 6 Q. B. 441). The section enables a testator to devise copyholds free from the widow's right to freebench (*Lacey* v. *Hill*, L. R. 19 Eq. 346).

Contingent and executory interests. (*d*) Before this act, contingent and executory estates and possibilities accompanied with an interest were devisable (*Selwin* v. *Selwin*, Burr. 1131; *Moore* v. *Hawkins*, 2 Eden's C. C. 342; *Roe* v. *Griffiths*, 1 Bl. Rep. 605; *Roe* v. *Jones*, 1 Hen. Bl. 30; *Jones* v. *Roe*, 3 East, 88; 17 Ves. 182; *Scawen* v. *Blunt*, 7 Ves. 300). Such an interest, however, was not devisable at law where the person who was to take was not in any degree ascertainable before the contingency happened; as where there was "a devise to two

equally, or to the survivor of them, and to be disposed of by her, the survivor, as she might by will devise;" the will of one of such devisees made during their joint lives, although she survived, was held inoperative (*Doe* v. *Tomkinson*, 2 M. & S. 164). As to the exercise by will since the Wills Act of a power of appointing an equitable estate given to two persons or the survivor, see *Thomas* v. *Jones* (1 D. J. & S. 63). By this section contingent interests are devisable whether the testator may or may not be ascertained as the person, or one of the persons, in whom the same respectively may become vested. A contingent estate in fee under a shifting clause may be devised both under the old and new law (*Ingilby* v. *Amcotts*, 21 Beav. 585). 1 Vict. c. 26, s. 3.

Possibilities in personal estate could be disposed of by will as well as assigned in equity before this statute and 8 & 9 Vict. c. 106 (Fearne, 439; Pollexf. 44; 2 Freem. 250; 9 Mod. 101; 2 P. Wms. 608; 1 P. Wms. 572; 3 P. Wms. 132).

See further as to what property may be devised or bequeathed, 1 Jarm. Wills, 46 *et seq.*, 4th ed.

4. Provided always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid (*e*). As to the fees and fines payable by devisees of customary and copyhold estates.

(*e*) See 4 & 5 Vict. c. 35, ss. 88, 89, 90, as to admissions. The cases as to the admittance of devisees of copyholds and the fines payable are collected in Fisher's Digest, 1848—1855. As to the fines on admission

1 Vict. c. 26, s. 4.

payable by trustees of copyholds, see Lewin on Trusts, p. 248, 9th ed. (*Bence* v. *Gilpin*, L. R. 3 Ex. 76; *Bristow* v. *Booth*, L. R. 5 C. P. 80; *Everingham* v. *Ivatt*, L. R. 7 Q. B. 683).

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

5. When any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

and the lord to be entitled to the same fine, &c. when such estates are not now devisable as he would have been from the heir in case of descent.

Estates *pur autre vie*.

6. If no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate (*f*).

(*f*) The words "in case there shall be no special occupant" in this section include both the case where there is no special occupant named in the grant, as also the case where the heir is named as special occupant, but the grantee dies without leaving an heir (*Plunket* v. *Reilly*, 2 Ir. Ch. R. 585). So where leasehold estates *pur autre vie* were devised in trust for A., his heirs, sequels in right, executors, administrators, and assigns. A. survived the devisor, and, being illegitimate, died without heirs and intestate, living the *cestui que vie:* it was held, that the devised estates passed under this act to A.'s administrator, the nominee of the crown (*Reynolds* v. *Wright*, 2 D. F. & J. 589).

A testator gave a rent-charge to A. for life, and directed that after her death it should be continued and equally divided between B., C., and D. during their lives and the life of the longest liver. B. predeceased A.; and it was held, that the interest in the rent-charge which passed on A.'s

death to B.'s executors was an estate *pur autre vie* within this section (*Chatfield* v. *Berchtoldt*, 7 Ch. 192). As to estates *pur autre vie*, see 1 Wms. Exors. 686—692, 8th ed.; *Lewis Bowles' case*, Tudor's L. C. Conv. 1 Vict. c. 26, s. 6.

7. No will made by any person under the age of twenty-one years shall be valid (*g*). No will of a person under age valid;

(*g*) Sect. 24 makes a will speak from the testator's death; but this does not extend to the testator's capacity, and the will of an infant would not become operative by his attaining his majority (Sugd. R. P. Stat. 330). The power given by 12 Car. 2, c. 24, s. 8, to infants to appoint guardians of their children by will appears to be repealed (*Ib.*) As to an infant appointing a guardian by deed, see *Morgan* v. *Hatchell* (19 Beav. 86); *Re Brown* (18 Ch. Div. 61).

A will made by an infant seaman was held valid under sect. 11 (*Re M'Murdo*, L. R. 1 P. & M. 540).

8. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act (*h*). nor of a *feme covert*, except such as might now be made.

(*h*) Sub-sect. (1) of sect. 1 of the M. W. P. Act, 1882, provides that a married woman shall, in accordance with this act, be capable of disposing by will of any real or personal property as her separate property in the same manner as if she were a *feme sole* (See note to that section, *ante*, p. 326). The following note relates to the law independent of the effect of that section. M. W. P. Act, 1882.

A married woman has, properly speaking, no testamentary capacity (*Dye* v. *Dye*, 13 Q. B. Div. 156). Sect. 8 of the Wills Act preserved the incapacity of coverture as it stood before that act (*Bernard* v. *Minshull*, John. 297; *Thomas* v. *Jones*, 2 J. & H. 483; 1 D. J. & S. 81). The only cases, accordingly, in which a married woman can, independently of the M. W. P. Act, 1882, make a will are as follows:— Wills of married women independently of the M. W. P. Act, 1882.

(1.) She can dispose by will of separate estate, real and personal (*Taylor* v. *Meads*, 4 D. J. & S. 597; see *Dye* v. *Dye*, 13 Q. B. Div. 147).

(2.) She can, in exercise of a power, dispose by will of real and personal estate (*Noble* v. *Willock*, L. R. 7 H. L. 580; *Thomas* v. *Jones*, 1 D. J. & S. 63). As to the revocation of such a will, see *Hawksley* v. *Barrow* (L. R. 1 P. & M. 147); *Re Tenney* (45 L. T. 78).

(3.) She can, with the assent of her husband, dispose by will of personal estate (*Willock* v. *Noble*, L. R. 7 H. L. 580). His assent, however, to the particular will must be proved; a general assent is not sufficient (*Ib.* 597). And the husband must survive the wife (*Ib.* 591). The husband has a *locus pœnitentiæ* until he has either acted on the will or has assented to probate (*S. C.*, 8 Ch. 790). An expression by a husband after his wife's death of an intention to prove is sufficient assent (*Re Cooper*, 6 P. D. 34).

(4.) A married woman who is an executrix has, as such, power to make a will and to appoint an executor for the purpose of continuing the representation to the original testator (*Noble* v. *Willock*, L. R. 7 H. L. 590). The administrator with the will annexed, however, of the estate of a married woman does not, as such, represent an estate of which the married woman was executrix (*Re Bridger*, 4 P. D. 77).

The will, made during coverture, of a married woman who dies during coverture passes after-acquired separate estate, even where she has no separate estate at the date of her will (*Charlemont* v. *Spencer*, 11 L. R. Ir. 490; see *Re Bowen*, *James* v. *James*, 1892, 2 Ch. 291). Where, however, a married woman, entitled to 3,800*l.* for her separate use, made a will which disposed of the 3,800*l.* and also contained a residuary gift, and her husband subsequently died, having left all his property to his wife, and Application to the wills of married women of sects. 24 and 27.

1 Vict. c. 26, s. 8.

she died without having re-executed her will after her husband's death, her will only disposed of the 3,800*l.*, and not of the property left by her husband (*Willock* v. *Noble*, L. R. 7 H. L. 580; see *Re Price*, *Stafford* v. *Stafford*, 28 Ch. D. 709; *Re Cuno*, *Mansfield* v. *Mansfield*, 43 Ch. Div. 12; *Re Smith*, *Bilke* v. *Roper*, 45 Ch. D. 632, where a married woman's will was held not to have been republished after her husband's death).

Where a married woman, entitled for life to a rent-charge for her separate use, made a will during coverture, which she did not re-execute after her husband's death, the will passed accumulations of the rent-charge made during coverture, but not those made afterwards (*Re Wilson*, *Menteath* v. *Campbell*, 26 W. R. 848). Where, however, personal estate was settled in trust for A. during her life for her separate use, and after her decease, in case she should survive her husband, in trust for A. for her separate use absolutely, and A. survived her husband, her will made during the coverture disposed of the separate property (*Bishop* v. *Wall*, 3 Ch. D. 194).

It was decided that, notwithstanding sect. 8 of the Wills Act, a general gift in the will of a married woman operated, under sect. 27, to pass property over which she had only a testamentary power (*Bernard* v. *Minshull*, John. 276; see *Re Ludlam*, 63 L. T. 330). And where a general power was vested in the survivor of A., B., and C., and C. ultimately became the survivor, it was held (under sects. 24 and 27) that the power was well exercised by a residuary devise in the will of C., made after the death of A., but during the life of B.; C. having been a married woman both at the date of her will and the date of her death (*Thomas* v. *Jones*, 1 D. J. & S. 63).

Will of married woman in execution of power which never arises.

Trust funds were limited by settlement to a married woman absolutely if she survived her husband, but if she predeceased him, she was to have a general power of appointment by will. During the coverture she made her will disposing of the property; she survived her husband, but did not re-execute her will, and administration was granted limited to such personal estate as by the settlement the testatrix had a right to dispose of: held, that the power had not arisen, and the will was therefore inoperative (*Trimmell* v. *Fell*, 16 Beav. 537; *Price* v. *Parker*, 16 Sim. 198; see *Jones* v. *Southall*, 30 Beav. 187; *Blaiklock* v. *Grindle*, 7 Eq. 215).

Function of the Probate Division.

Before the Jud. Acts it was held that in the case of a will executed by a married woman, under a power, the Court of Probate must determine whether or not there was a will (*Re Hallyburton*, L. R. 1 P. & M. 90); and should see that every properly executed testamentary paper, material for the consideration of the Court of Chancery, was included in the probate (*Re Fenwick*, L. R. 1 P. & M. 319); but that the Court of Probate would not determine whether or not the testatrix was testable (*Barnes* v. *Vincent*, 5 Moore, P. C. 201); nor whether the power had been duly executed (*Paglar* v. *Tongue*, L. R. 1 P. & M. 158); nor would it decide questions of construction (*Re De Pradel*, L. R. 1 P. & M. 454), all of which were questions for the Court of Chancery. The usual form of probate was limited to the property which the deceased had power to dispose of, and had disposed of, accordingly; and her husband or her next of kin were entitled to a grant of administration *cæterorum* (*Re Crofts*, L. R. 2 P. & M. 18; *Re Graham*, *Ib.* 385; *Noble* v. *Phelps*, *Ib.* 276, where see form of probate.)

Form of probate.

In a case decided after the Jud. Acts, but before the M. W. P. Act, 1882, and where probate had been granted in the old limited form, the Court of Appeal laid down that upon an application for probate, the Probate Division should as far as possible determine whether the married woman had separate property or had duly executed the testamentary power (*Re Tharp*, 3 P. Div. 76). But it has been pointed out that that Division may not have the requisite machinery (*Harding* v. *Sutton*, 59 L. T. 838).

Now, according to the rules made by the Probate Division in 1887, probates of wills of married women and of widows made during coverture, and letters of administration with such wills annexed, are granted in ordinary form with no limitation (*Re Price*, 12 P. D. 137). And *semble* upon

such an application for probate there is a presumption that the married woman had separate property (*Harding* v. *Sutton*, 59 L. T. 838). The effect of the probate in general form, however, is only to enable the executor to get in the wife's assets, whether she had power to dispose of them by will or not, and does not affect the beneficial title which may be subsequently decided in the Chancery Division (*Smart* v. *Tranter*, 43 Ch. Div. 587; *Re Lambert, Stanton* v. *Lambert*, 39 Ch. D. 626; see *Re Smith, Bilke* v. *Roper*, 45 Ch. D. 638). 1 Vict. c. 26, s. 8.

9. No will shall be valid unless it shall be in writing (*i*) and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof (*j*) by the testator or by some other person in his presence and by his direction (*k*); and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time (*l*), and such witnesses shall attest and shall subscribe the will in the presence of the testator (*m*), but no form of attestation shall be necessary (*n*). Every will shall be in writing and signed by the testator in the presence of two witnesses at one time.

(*i*) The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence (*Sugden* v. *St. Leonards*, 1 P. D. 154).

Where a will, the contents of which have been brought to the knowledge of a testator, has been executed by him, words cannot be omitted therefrom on the ground of error in the preparation of the will (*Harter* v. *Harter*, L. R. 3 P. & M. 11; *Rhodes* v. *Rhodes*, 7 App. Cas. 192; see rules stated in *Guardhouse* v. *Blackburn*, L. R. 1 P. & M. 109). But words inserted by fraud or by mistake without the knowledge of the testator may be rejected (*Morell* v. *Morell*, 7 P. D. 68; *Fulton* v. *Andrew*, L. R. 7 H. L. 448). *Quære*, however, where their rejection alters the sense of the remainder (*Rhodes* v. *Rhodes*, *sup.*)

(*j*) As to the position of the signature of the testator, see 15 & 16 Vict. c. 24, s. 1, *post*, p. 435, and cases there quoted.

(*k*) A signature by the testator of his name after the attestation by the witnesses, although in their presence, is not a compliance with the statute (*Re Olding*, 2 Curt. 865; *Re Byrd*, 3 Curt. 117). A will was held to have been signed before the witnesses subscribed, although the confused recollection of the witnesses raised a doubt upon the point (*Cooper* v. *Bockett*, 3 Curt. 648; *Brenchley* v. *Still*, 2 Rob. 162; *Thompson* v. *Hall*, 16 Jur. 1144; *Re Jones*, 1877, W. N. 10). A mark by the testator for a signature was held sufficient, although the name did not appear (*Re Bryce*, 2 Curt. 325); and even where a wrong name was added to the mark, but there was no doubt as to the identity of the testator, the execution was held good (*Re Clarke*, 1 Sw. & Tr. 22; *Re Douce*, 2 Sw. & Tr. 593). Signature by testator.

An attesting witness may sign the will for the testator by his direction (*Re Bailey*, 1 Curt. 914). The witness, in fact, attests the *direction* of the testator, and that direction amounts to an acknowledgment (*Smith* v. *Roberts*, 1 Rob. 262). But such signature, although made by the testator's direction, is insufficient if not made in his presence (*Kevil* v. *Lynch*, I. R. 8 Eq. 244). A party signing a will for a testator, who was too ill to sign, by his direction signed it in his own name, but expressed it to be on behalf of the testator. This was deemed sufficient (*Clark's case*, 2 Curt. 329). A., in the presence of a testator, and by his direction, impressed the testator's usual signature at the foot of a codicil, by means of a stamp upon which such signature had been engraved: it was held, that the will was duly signed (*Jenkyns* v. *Gaisford*, 11 W. R. 854). There must be some act or word on the part of the testator to show that the signature was made at his request (*Re Marshall*, 13 L. T. 643). By some other person by testator's direction.

(*l*) The testator's signature must be made or acknowledged in the presence of the witnesses. Where the witnesses had seen the testatrix Signature made in presence of witnesses.

1 Vict. c. 26, s. 9.

write what the Court presumed to be her signature, it was held sufficient, although they did not see the signature, and she did not acknowledge it to them (*Smith* v. *Smith*, L. R. 1 P. & M. 143).

Acknowledgment of signature in presence of witnesses.

There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by the witnesses is his will, or state that his signature is inside the will (*Blake* v. *Blake*, 7 P. Div. 102; following *Hudson* v. *Parker*, 1 Rob. 14; and disapproving of *Becket* v. *Howe*, L. R. 2 P. & M. 1; and *Gwillim* v. *Gwillim*, 2 Sw. & Tr. 200).

Where a will is signed by the testator before the witnesses are called in, the mere circumstance of calling in witnesses to sign without giving them any explanation of the instrument, does not amount to a sufficient acknowledgment (*Ilott* v. *Genge*, 4 Moo. P. C. 265; *Re Swinford*, L. R. 1 P. & M. 630; *Pearson* v. *Pearson*, L. R. 2 P. & M. 451). It is not, however, necessary that the testator should say in express terms to the witnesses "That is my signature." A request for subscription has been held sufficient (*Keigwin* v. *Keigwin*, 3 Curt. 607; *Re Ashmore*, *Ib.* 756; *Gaze* v. *Gaze*, *Ib.* 451; *Re Davies*, 2 Rob. 337; *Re Claridge*, 39 L. T. 612; *Daintree* v. *Butcher*, 13 P. Div. 102). Where the request for subscription was made to the witnesses by a third party in the presence of the testatrix who said no word during the proceeding, there was a sufficint acknowledgment (*Inglesant* v. *Inglesant*, L. R. 3 P. & M. 172; *Re Bishop*, 30 W. R. 567; but see *Morritt* v. *Douglas*, L. R. 3 P. & M. 1). Where A. placed his seal on the paper, and delivered it as his act and deed, it was held there was no sufficient acknowledgment (*Re Sumners*, 2 Rob. 295).

Attestation and subscription by witnesses.

(*m*) It has long been settled, that after a will has been signed or acknowledged by the testator, there must be the subscription of the witnesses in the presence of the testator (*White* v. *British Museum*, 6 Bing. 310). To make a valid subscription and attestation to a will there must be either the name of the witness or some mark intended to represent it. A correction of an error in a previous writing of the witness's name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose (*Hindmarsh* v. *Charlton*, 8 H. L. C. 160). Nor the adding of an address (*Re Trevanion*, 2 Rob. 315). Nor the acknowledgment by a witness of his signature by putting a dry pen over it (*Hindmarsh* v. *Charlton*, 8 H. L. C. 160; *Playne* v. *Scriven*, 1 Rob. 772). The court must be satisfied that the act done by the witness was intended by him to evidence his attestation. Where a man wrote the word "witness," it was held an insufficient attestation (*Re Eynon*, L. R. 3 P. & M. 92); also where another after writing his christian name was unable through feebleness to complete his signature (*Re Maddock*, L. R. 3 P. & M. 169).

The initials of attesting witnesses to a testamentary paper are a sufficient subscription under this act (*Re Christian*, 2 Rob. 110; *Re Martin*, 6 Not. Cas. 694; *Re Blewitt*, 5 P. D. 116; *Margary* v. *Robinson*, 12 P. D. 8). Where one of the attesting witnesses subscribed his description, without signing his name, it was held sufficient (*Re Sperling*, 12 W. R. 354).

A will may be attested by the witnesses making marks (*Re Amiss*, 2 Rob. 116); and the testator may write the names of the witnesses opposite their respective marks (*Re Ashmore*, 3 Curt. 756). But an attesting witness, able to write, cannot subscribe for another witness who is unable to write (1 Not. Cas. 456). A husband who is witness to a will cannot also subscribe for his wife (*Re White*, 2 Not. Cas. 461); nor a wife for her husband (*Re Duggins*, 39 L. J. Prob. 34). A will was attested by one witness in his own handwriting. He also held and guided the hand of a second witness who could neither read nor write, this was held sufficient (*Harrison* v. *Elvin*, 3 Q. B. 117; *Re Frith*, 27 L. J. Prob. 6). Where the names of two attesting witnesses to a will, who were unable to write, were written by another person whilst they held the top of the pen, the will was duly attested (*Re Lewis*, 31 L. J. Prob. 153; see *Re Cope*, 2 Rob. 335).

1 Vict. c. 26, s. 9.

For a case where the name of the witness was erased by the testator and re-written by the witness, see *Re Coleman* (2 Sw. & Tr. 314); and for a case where the signatures of the witnesses were sworn to be in the handwriting of the testator, see *Re Lee* (4 Jur. N. S. 790).

If both the witnesses are dead, it will not be presumed that they did not both sign at the same time, from the difference in the colour of the ink (*Trott* v. *Trott*, 29 L. J. Prob. 156).

It is not necessary that the name of the witness should be written upon the same side of the paper on which the name of the testator occurs (*Re Chamney*, 1 Rob. 757; *Woodhouse* v. *Balfour*, 13 P. D. 2; *Margary* v. *Robinson*, 12 P. D. 8); but the court must be satisfied that the name of the witness was subscribed for the purpose of attesting the testator's signature (*Re Wilson*, L. R. 1 P. & M. 269; *Griffiths* v. *Griffiths*, L. R. 2 P. & M. 300; see *Re Streatley*, 1891, P. 172); and the testator's signature attested must be the operative one (*Sweetland* v. *Sweetland*, 4 Sw. & Tr. 6; *Ewen* v. *Franklin*, 1 Jur. N. S. 1220; *Re Dilkes*, L. R. 3 P. & M. 164; *Phipps* v. *Hale*, *ib.* 166). The attestation of the witness if not on the same sheet of paper as the signature of the testator must be on paper physically connected therewith (*Re Braddock*, 1 P. D. 433; *Re Hatton*, 6 P. D. 204).

Testator's presence.

The execution must be attested by the witnesses in the actual or constructive presence of the testator (*Newton* v. *Clarke*, 2 Curt. 320; *Tribe* v. *Tribe*, 1 Rob. 275; *Longford* v. *Eyre*, 1 P. W. 740; *Casson* v. *Dade*, 1 Br. C. C. 99). Even in the case of a blind person it must appear that the will was so attested that the testator, if he had had his eyesight, could have seen the witnesses subscribe (*Re Piercy*, 1 Rob. 278). Where the subscription of the witnesses takes place in a different room from that in which the testator is, he must be proved to have been in a position whence he could have seen the witnesses as they subscribed their names (*Norton* v. *Bazett*, 3 Jur. N. S. 1084; *Jenner* v. *Ffinch*, 5 P. D. 106). But it is not necessary that the witnesses should subscribe in the presence of each other (*Faulds* v. *Jackson*, 6 Not. Cas. Suppl. 1; *Re Webb*, 2 Jur. N. S. 309).

Attestation clause should be added.

(*n*) Although a will may be valid without any attestation clause (*Bryan* v. *White*, 2 Robert. 315), yet one should be added; otherwise, in order to obtain probate, it is necessary to have an affidavit of one of the subscribing witnesses to prove that the provisions of the act, in reference to the execution of the will, have in fact been complied with (*Belbin* v. *Skeats*, 1 Sw. & Tr. 148).

Presumption in favour of due execution in absence of evidence.

If upon the face of a will to which there is no memorandum of attestation there be the signature of the testator at the foot or end thereof, and the subscriptions of two witnesses; in the absence or death of the witnesses, the *primâ facie* presumption is, that the testator signed in the joint presence of the two witnesses, and that they subscribed in his presence. If the subscribing witnesses do not remember the facts attendant upon the execution of the will, the presumption is the same (*Burgoyne* v. *Showler*, 1 Rob. 5; *Foot* v. *Stanton*, 2 Jur. N. S. 380; *Re Torre*, 8 Jur. N. S. 494; *Re Colyer*, 14 P. D. 48; *Woodhouse* v. *Balfour*, 13 P. D. 2; *Vinnicombe* v. *Butler*, 13 W. R. 392; *Re Puddephatt*, L. R. 2 P. & M. 97).

Evidence showing that statutory requisites were not complied with.

Where, however, the witnesses negative compliance with the requisites of the act, the will cannot be supported unless their evidence be rebutted by proof of circumstances, showing that the witnesses cannot be credited, or that from the facts and circumstances which they state their recollection fails them (*Re Ayling*, 1 Curt. 913; *Gove* v. *Gawen*, 3 Curt. 151; *Pennant* v. *Kingscote*, *Id.* 642; *Bennett* v. *Sharp*, 1 Jur. N. S. 456; *Leech* v. *Bates*, 1 Rob. 714; *Noding* v. *Alliston*, 14 Jur. 904; *Glover* v. *Smith*, 57 L. T. 60; *Crofts* v. *Crofts*, 13 W. R. 526; *Wright* v. *Rogers*, L. R. 1 P. & M. 678; *Bailey* v. *Frowan*, 19 W. R. 511). Where witnesses have deposed, the one positively that the will was not executed in the testator's presence, and the other as positively declared that it was, the court has given the preponderance to the witness deposing affirmatively in accordance with the statement set forth in the attestation clause (*Brenchley* v. *Still*, 2 Rob.

1 Vict. c. 26, s. 9.

176, 177; *Farmar* v. *Brock*, 1 Deane, 187; 2 Jur. 670). Declarations by the testator are inadmissible (*Sugden* v. *St. Leonards*, 1 P. D. 227).

Invalid testamentary instrument rendered valid by subsequent instrument duly executed.

Although a testamentary instrument is not properly executed or attested, yet, if it is clearly referred to by one of later date properly executed and attested, it will be operative, and no particular form of expression is necessary; therefore, where there was a will duly executed, then a codicil attested by one witness only, and lastly, a codicil duly executed, which was described as "another codicil to my will," the second codicil was held to give operation to the first codicil (*Ingoldby* v. *Ingoldby*, 4 Not. Cas. 439; *Re Hilhouse*, 1 Eccl. & Adm. Rep. 111). It would be the same if the will were informally executed, but a codicil duly executed were to be described as a codicil to his last will (*Hill's Case*, 4 Not. Cas. 404; *Hally's Case*, 5 Not. Cas. 510); it is not properly a question of incorporation (See *Id.* 512). Alterations of a will made after its execution were held confirmed by subsequent execution of a codicil which did not, however, refer to them (*Tyler* v. *Merchant Taylors' Co.*, 15 P. D. 216).

Where a testator directed that in a certain event a former will which had been revoked by marriage should be revived, the former will was included in the probate (*Re Bangham*, 1 P. D. 429); but where a testatrix purported by a codicil to revive a will not only revoked but destroyed, the court refused to grant probate of the draft (*Hale* v. *Tokelove*, 2 Robert. 318; *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342; see *Re Steele*, L. R. 1 P. & D. 577).

Incorporation of unattested papers.

An unattested paper, which would have been incorporated in an attested will or codicil executed according to the Statute of Frauds, is now in the same manner incorporated, if the will or codicil is executed according to the requirements of this section (*Allen* v. *Maddock*, 11 Moore, P. C. 427; see *Anderson* v. *Anderson*, 13 Eq. 381). The paper to be incorporated need not be void or valid *per se*, and whether of itself void or valid is equally entitled to probate (*Sheldon* v. *Sheldon*, 1 Robert. 81; and see *Dicken's Case*, 3 Curt. 60; *Willesford's Case*, *Ib.* 77; *Bacon's Case*, 3 Not. Cas. 644; *Smartt's Case*, 4 Not. Cas. 38; *Darby's Case*, 4 Not. Cas. 427).

Paper must be in existence,

But the paper intended to be incorporated must be shown to have been in existence at the time the will was executed (*Singleton* v. *Tomlinson*, 3 App. Cas. 404; *Ferraris* v. *Hertford*, 3 Curt. 468; *Re Watkins*, L. R. 1 P. & D. 19; as to lists of articles referred to, see *Re Ash*, 2 Jur. N. S. 526; and as to a paper coming into existence between the execution of a will and a codicil, see *Re Truro*, L. R. 1 P. & M. 201; *Re MacGregor*, 60 L. T. 840).

and capable of identification.

And the paper must be clearly identified with the description of it given in the will (*Singleton* v. *Tomlinson*, *sup.*; *Smart* v. *Prujean*, 6 Ves. 565; *Von Straubenzee* v. *Monck*, 11 W. R. 109; *Re Norris*, 14 W. R. 348; see *Re Daniell*, 8 P. D. 14; *Symes* v. *Appelbe*, 57 L. T. 599). Where there is a reference in a duly executed testamentary instrument to another testamentary instrument imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence, and such parol evidence is not excluded by this statute (*Allen* v. *Maddock*, 11 Moore, P. C. 427; see Wigram on Evid., prop. 5). The principle of this case, however, will not be extended (*Re Greves*, 1 Sw. & Tr. 250; 7 W. R. 86). Thus, where a codicil referred to "the last will of me," parol evidence was admitted to identify the will (*Re Heathcote*, 6 P. D. 30). But where the will did not refer to a document as then existing, the court refused to receive parol evidence, to show that the document was written before the will was signed (*Re Dallow*, L. R. 1 P. & M. 189; *Re Sunderland*, *Ib.* 198). A reference in a will to documents "accompanying this my will," was held an insufficient identification (*Re Yockey*, 29 L. T. 699).

Effect of codicil on papers referred to in will.

Where the will, if read as speaking at the date of the codicil, contains language which would operate as an incorporation of a document, such document is entitled to probate by force of the codicil, although not in existence until after the execution of the will (*Re Truro*, L. R. 1 P. & M. 201; see *Re Macgregor*, 60 L. T. 840).

Probate of incorporated documents.

In requiring the probate of an incorporated document the court exercises a discretion, and does not require it where the person having custody of the document refuses to produce it (*Re Sibthorp*, L. R. 1 P. & M. 106);

or where the document is bulky, or cannot be found (*Quihampton* v. *Going*, 24 W. R. 917). Where a foreign will was confirmed by an English will, probate of both was required (*Re Howden*, 30 L. T. 768; see *Re Donaldson*, L. R. 3 P. & M. 45; *Re Bolton*, 12 P. D. 202). *Secus*, where there was no such confirmation (*Re Astor*, 1 P. & D. 150; see *Re De la Rue*, 15 P. D. 185; *Re Callaway*, *Id.* 147; *Re Seaman*, 1891, P. 253; *Re Fraser*, *Id.* 285). As to probate of an English translation of a French will, see *Re Cliff* (1892, 2 Ch. 229). 1 Vict. c. 26, s. 9.

Whether probate be granted or not the incorporated document will be regarded as part of the will (*Bizzey* v. *Flight*, 3 Ch. D. 269; *Quihampton* v. *Going*, *sup.*, a case of memoranda in ledger as to advances). Even where not incorporated such memoranda may be *primâ facie* evidence as to advances (*Whately* v. *Spooner*, 3 K. & J. 542; see *Smith* v. *Conder*, 9 Ch. D. 170).

Probate has been granted of a document in the form of a deed poll, properly executed, upon evidence that it was intended as a will (*Re Slimm*, 15 P. D. 156; *Milnes* v. *Foden*, *Id.* 105; see *Re Colyer*, 14 P. D. 48). Will in form of a deed.

10. No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity (*o*). Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

(*o*) This section applies to powers created since as well as before the act (*Hubbard* v. *Lees*, L. R. 1 Ex. 255). Where a power requires specifically a will with the solemnity of sealing in addition to those solemnities rendered necessary by the statute, this section applies; and declares that a will without such additional solemnity shall be sufficient; but the section does not touch the case of a power requiring an instrument in writing, sealed and delivered. Such a power was accordingly held not to have been duly exercised by a will executed in conformity with this act (*Taylor* v. *Meads*, 4 D. J. & S. 597, 602; following *West* v. *Ray*, Kay 385; *Collard* v. *Sampson*, 4 D. M. & G. 224; and overruling *Buckell* v. *Blenkhorn*, 5 Ha. 131; *Man* v. *Ricketts*, 7 Beav. 93; see *Orange* v. ~~*Beckford*~~, 4 Drew. 363; Sugden, Pow., 217—221, 8th ed.)

Publication of a will is equivalent to delivery. Accordingly, where a power was required to be exercised by instrument in writing signed, sealed, and delivered by the donee in the presence of witnesses, it was held well executed by a will "signed, sealed, published and acknowledged, and declared by the donee to be her last will," in the presence of witnesses (*Smith* v. *Adkins*, 14 Eq. 402).

A testamentary instrument signed, but invalid for want of attestation, is not a good execution of a power to appoint by writing signed, or by will (*Re Daly*, 25 Beav. 456). Unattested instrument.

A will in execution of a power, invalid according to the law of the domicile, but valid according to English law, was admitted to probate (*Re Hallyburton*, L. R. 1 P. & M. 90; see *Baxendale* v. *De Valmer*, 57 L. T. 556). A power to appoint personal property "by will duly executed," given to an English lady who died domiciled abroad, was held duly executed by a will invalid according to English law, but valid according to the law of her domicile, and admitted to probate in England (*D'Huart* v. *Darkness*, 34 Beav. 324); but a power to appoint property "by will executed in the presence of one or more witnesses," was held not to have been executed by an unattested codicil made in France and admitted to probate under 24 & 25 Vict. c. 114 (*Re Kirwan*, 25 Ch. D. 373). Power well executed by will valid according to law of domicile.

As to the execution of powers by deed, see 22 & 23 Vict. c. 35, s. 12 (*post*).

1 Vict. c. 26, s. 11.

Soldiers and mariners' wills excepted.

11. Provided always, and be it further enacted, that any soldier being in actual military service (*p*), or any mariner or seaman being at sea (*q*), may dispose of his personal estate as he might have done before the making of this act.

Law before the act.

(*p*) According to the law existing before the Statute of Frauds, "Testaments as regarded personal property might be either written or verbal, otherwise called nuncupative; of which the former were committed to writing and published or declared by the testator as his will, the latter depended on merely oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing . . . . . written wills of personalty needed not in general any witnesses . . . . . and though written in another man's hand and never signed by the testator, yet if it proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate" (2 Steph. Com. 202, 203, 5th ed.)

Statute of Frauds.

The Statute of Frauds (29 Car. II. c. 3), which restricted the mode of making wills, contained an exception in favour of the wills of soldiers in actual military service, and of seamen being at sea: and this exception has been continued by the present section. In the case, however, of wills disposing of the wages or effects of merchant seamen, regard must be had to 17 & 18 Vict. c. 104, s. 200, and in the case of wills of petty officers and seamen in the Royal Navy, and of marines and non-commissioned officers of marines, so far as the same relate to money payable by the Admiralty or effects or money in charge of the Admiralty, regard must be had to 28 & 29 Vict. c. 72.

Soldiers.

The privilege granted by sect. 11 is confined, so far as regards soldiers, by the insertion of the words, "actual military service," to those who are *on an expedition*; and, consequently, it has been decided that the will of a soldier made while he was quartered in barracks, either at home (*Drummond* v. *Parish*, 3 Curt. 522), or in the colonies (*White* v. *Repton*, 3 Curt. 818; *Re Phipps*, 2 Curt. 368; *Re Johnson*, 2 Curt. 341), is not privileged. The same was held as to the will of a soldier made at Bangalore, in the East Indies, whilst in command of the army there stationed, and who died whilst on a tour of inspection of the troops under his command (*Re Hill*, 1 Rob. 276). But where an officer was on his way from one regiment to another, both regiments being at the time on active service, it was held that his will was privileged (*Herbert* v. *Herbert*, D. & Sw. 10). An unattested will, made by an officer on service at Berbice, was allowed to pass as that of a soldier in actual military service at the prayer of the party whose interest was prejudiced by such will (*Re Phipps*, 2 Curt. 368). The term "soldier" in this section extended to persons in the military service of the East India Company (*Re Donaldson*, 2 Curt. 386). As to obtaining probate of soldiers' wills privileged under this section, see *Re Hackett* (28 L. J. Prob. 42); *Re Neville* (*Ib.* 52); *Re Thorne* (4 Sw. & Tr. 36). Alterations occurring in a will made by a soldier in actual military service will be presumed to have been made during such service (*Re Tweedale*, L. R. 3 P. & M. 204).

An accepted Volunteer who proceeds to barracks under orders is, even before the arrival of the embarcation order, on an expedition & within this provision. In bonis Hiscock. XVII. T.L.R. 110.

Seamen.

(*q*) The term "mariner or seaman" does not exclude any person in her Majesty's navy, though superior of the ship being "at sea," from the exception contained in this act (*Re Hayes*, 2 Curt. 338). The section applies to the purser of a man-of-war (*Ib.*), and to a surgeon in the navy (*Re Saunders*, L. R. 1 P. & M. 16), and to seamen, whether in the Queen's or merchant's service (*Re Milligan*, 2 Rob. 108; *Morrell* v. *Morrell*, 1 Hagg. 51).

At sea.

This section was held to apply to the will of the commander-in-chief actually engaged in a naval operation on board a Queen's ship in a river (*Re Austen*, 2 Rob. 611). But not to the commander-in-chief of the naval force of Jamaica, living on shore at the official residence (*Seymour's case*, cited 3 Curt. 530; 2 Curt. 339). Where a naval officer, invalided at a foreign station, was returning home in a steamer, his will was privileged

(*Re Saunders*, L. R. 1 P. & M. 16). As also the will of a seaman on board a man-of-war permanently stationed in Portsmouth harbour (*Re M'Murdo*, L. R. 1 P. & M. 540). 1 Vict. c. 26, s. 11.

Where a man has joined a vessel on service, and has commenced a voyage in it, a will made in the course of that voyage is within the exception, although such will was in fact made on shore (*Re Lay*, 2 Curt. 375). But where the deceased wrote a letter stating that he had shipped on board a vessel lying in Melbourne harbour on the date of the letter, but it did not appear whether the letter was written before or after he went on board, the letter was not admitted to probate (*Re Corby*, 18 Jur. 634).

A will made under this section remains operative unless expressly revoked, although the maker of such will lives in England several years after the date of such will (*Re Leese*, 17 Jur. 216); but probate was refused when the will was in a conditional form, *e.g.*, "Instructions to be followed if I die at sea or abroad" (*Lindsay* v. *Lindsay*, L. R. 2 P. & M. 459; *Re Porter*, *Ib.* 22; *Re Robinson*, *Ib.* 171).

Act not to affect certain provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to wills of petty officers and seamen and marines.

12. This act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy (*r*).

(*r*) This section, and 11 Geo. 4 & 1 Will. 4, c. 20 (which bound the crown: *Re Bevan*, 14 W. R. 147), have been repealed by 28 & 29 Vict. c. 112, s. 1.

Publication not to be requisite.

13. Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

Will not to be void on account of incompetency of attesting witness.

14. If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Gifts to an attesting witness to be void.

15. If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will (*s*).

(*s*) The effect of the section is to render the devisee incapable of taking, and such a person cannot be reckoned in a class ascertainable at the

1 Vict. c. 26, s. 15.

testator's death or afterwards (*Re Coleman and Jarrom*, 4 Ch. D. 172). Where, accordingly, there was a devise to A. for life with remainder among her children as tenants in common, and one of A.'s children living at the death was an attesting witness, it was held that his share went to the rest of the class (*Fell* v. *Biddolph*, L. R. 10 C. P. 701). The decision was similar where the gift was to a class as joint tenants (*Young* v. *Davies*, 2 Dr. & Sm. 167); but was different in *Jull* v. *Jacobs* (24 W. R. 947), where the gift was held to be in effect a gift to surviving children by name.

Where the execution of a will was attested by two marksmen and signed also by two other persons as witnesses, the court held that the signature of the two latter must be regarded as affixed likewise in attestation of the will, and that the legacy to the wife of one of them failed (*Wigan* v. *Rowland*, 11 Hare, 157). And where a devisee attested a will as a third witness, at the request of another person, the testator objecting, it was held that his interest failed (*Randfield* v. *Randfield*, 11 W. R. 847). So where the third attestation was at the request of the testator (*Cozens* v. *Crout*, 21 W. R. 781). Where a will was executed in the presence of two witnesses, and the signature of a third person, who was residuary legatee, appeared also at foot of the will, the court received evidence that the legatee's name was not written to attest the testator's signature, and ordered it to be omitted in the probate (*Re Sharman*, L. R. 1 P. & M. 661; see *Re Purssglove*, 26 L. T. 405; *Re Smith*, 15 P. D. 2).

Attestation of codicil by legatee.

A legacy was given by will, and a codicil confirming the will was attested by the legatee: the gift was held to be good (*Gurney* v. *Gurney*, 3 Drew. 208; *Tempest* v. *Tempest*, 2 K. & J. 635; see *Gaskin* v. *Rogers*, 2 Eq. 284).

Will attested by legatee's wife confirmed by codicil.

Where a testatrix gave a share of her residue to B., and one of the attesting witnesses to the will was B.'s wife, and by a codicil, attested by other witnesses, the testatrix confirmed her will, the codicil incorporated the will so as to render the gift to B. valid (*Anderson* v. *Anderson*, 13 Eq. 381; see *Burton* v. *Newbery*, 1 Ch. D. 234).

The marriage, after attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise (*Thorpe* v. *Bestwick*, 6 Q. B. D. 311).

Gift in trust.

A bequest in trust was not invalidated by the wife of the trustee attesting the signature of the testatrix (*Cresswell* v. *Cresswell*, 6 Eq. 69). But where, by a codicil attested by A., personal estate was given to B. upon parol trusts in favour (amongst others) of A.; A.'s interest was held to fail, just as it would have done had the trust been declared in the codicil (*Re Fleetwood, Sidgreaves* v. *Brewer*, 15 Ch. D. 594).

Where a solicitor attested a will in which he was named trustee, and by which he was empowered to make professional charges, the above section deprived him of any right to profit costs (*Re Pooley*, 40 Ch. Div. 1; *Re Barber, Burgess* v. *Vinnicome*, 31 Ch. D. 665).

Creditor attesting to be admitted a witness.

16. In case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor to be admitted a witness.

17. No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Will to be revoked by marriage.

18. Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or

her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions) (*t*). 1 Vict. c. 26, s. 18.

(*t*) Under the old law the marriage of a testator did not revoke his will; but under certain circumstances there was an implied revocation by marriage and the birth of issue (1 Wms. Exors. 196, 8th ed.) Old law.

Under this section a will is not revoked by a marriage with a deceased wife's sister; and there is no distinction in such a case between a testator who is a natural-born subject and one who is a naturalized British subject (*Mette* v. *Mette*, 1 Sw. & Tr. 416). A will executed after a marriage invalid under the Indian Divorce Act, was revoked by a subsequent marriage between the same parties (*Warter* v. *Warter*, 15 P. D. 152). Marriage with deceased's wife's sister.

Where by a settlement freeholds were, in default of appointment, limited to A., her heirs and assigns, A.'s will exercising a power was revoked by marriage (*Vaughan* v. *Vanderstegen*, 2 Drew. 168; see *Logan* v. *Bell*, 1 C. B. 872).

The reason for the exception is, that a revocation of the will in a case to which the exception applies, would operate only in favour of those entitled in default of appointment, and the new family of the testator would derive no benefit from it (*Re Fitzroy*, 1 Sw. & Tr. 133). Exception in case of wills in execution of powers.

The exception applies where in any contingency the property, in default of appointment, would not pass to the heir, &c., of the deceased (*Re Fenwick*, L. R. 1 P. & M. 319). Also, where such persons take under the settlement, and not by descent or under the Statute of Distributions (*Re Fitzroy*, 1 Sw. & Tr. 133; *Re Worthington*, 20 W. R. 260). It also applied where next of kin would have taken, not next of kin under the statute (*Re McVicar*, L. R. 1 P. & M. 671).

Where, after making a will exercising a power and disposing of absolute property, a testator married, the exercise of the power was held to fall within the exception and limited administration was granted (*Re Russell*, 15 P. D. 111).

19. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances (*u*). No will to be revoked by presumption.

(*u*) See *Re Wells*, *Hardisty* v. *Wells* (42 Ch. D. 646).

20. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required (*v*), or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed (*x*), or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (*y*). No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

(*v*) The use of the words "last will" in a testamentary paper does not necessarily import a revocation of all previous instruments, either in the case of personalty (*Cutts* v. *Gilbert*, 9 Moo. P. C. 131; overruling on this point *Plenty* v. *West*, 1 Rob. 204; see *Lemage* v. *Goodban*, L. R. 1 P. & M. 61); or in the case of real estate (*Freeman* v. *Freeman*, 5 D. M. & G. 704). Words "last will."

An express revocatory clause in general terms revokes all former wills, including a prior testamentary appointment (*Sotheran* v. *Dening*, 20 Ch. Div. 99; *Harvey* v. *Harvey*, 32 L. T. 141; see *Cottrell* v. *Cottrell*, L. R. 2 P. & M. 397, where a revocatory clause in an Italian will was held to revoke an English will so far as regards personal estate and executors). But an express revocatory clause is not essential, either in the case of Express revocatory clause.

1 Vict. c. 26, s. 20.

ordinary wills (*Dempsey* v. *Lawson*, 2 P. D. 98), or in the case of testamentary appointments (*Re Tenney*, 45 L. T. 78). "The question is, What disposition did the testator intend? not Which or what number of papers did he desire or expect to be admitted to probate?" (*Dempsey* v. *Lawson*, 2 P. D. 107). Where, accordingly, upon the construction of a subsequent will, the court considered that it contained all the testamentary dispositions which the testatrix intended at that time to constitute her last will, a prior will was held revoked, although the subsequent will contained no residuary or revocatory clauses (*Dempsey* v. *Lawson*, *ubi sup.*; see *Henfrey* v. *Henfrey*, 4 Moo. P. C. 29; *McAra* v. *M'Cay*, 21 L. R. Ir. 138; *Palmer* v. *Peat*, 58 L. J. Prob. 44). On the other hand, a prior will was admitted to probate on the ground that the subsequent will did not dispose of the residue (*Re Petchell*, L. R. 3 P. & M. 153; *Re Hartley*, 29 W. R. 356). And if, upon the face of a testamentary document read in connection with the facts known to the testator at the time, it is doubtful whether the testator intended wholly to revoke a prior will, parol evidence will be admitted to ascertain the intention (*Jenner* v. *Ffinch*, 5 P. D. 206; see *Paton* v. *Ormerod*, 1892, P. 247).

A subsequent devise inconsistent with a prior devise was held to revoke such prior devise, even where the subsequent devise was invalid, being to a charity (*Baker* v. *Story*, 31 L. T. 631; see, however, *Alexander* v *Kirkpatrick*, L. R. 2 H. L. Sc. 397, 403). But where, by a fourth codicil (containing no revocatory clause) the whole personal estate was given to A. upon parol trusts, it was said that if effect could not have been given to the trusts, the original dispositions would have remained unaffected (*Re Fleetwood*, *Sidgreaves* v. *Brewer*, 15 Ch. D. 594). Where an appointment by will was revoked by a codicil which also purported to exercise the same power in an invalid manner, the revocation was held effectual, the doctrine of dependent relative revocation not applying (*Quinn* v. *Butler*, 6 Eq. 225; see *Re Gentry*, L. R. 3 P. & M. 80). A legacy given in clear terms will not be revoked unless the words of revocation are also clear (*Re Percival*, *Boote* v. *Dalton*, 59 L. T. 21; *Cleoburey* v. *Beckett*, 14 Beav. 583).

To establish the revocation of a former will relating to personalty by a subsequent will not forthcoming, by parol evidence of execution only, in the absence of any draft or instructions, such evidence must be strong and conclusive as to the contents of the subsequent will (*Cutto* v. *Gilbert*, 9 Moo. P. C. 131); but where it was proved that a subsequent will (not forthcoming) contained a clause of revocation, the prior will was revoked (*Wood* v. *Wood*, L. R. 1 P. & M. 309; see *Brown* v. *Brown*, 8 E. & B. 876, a case of real estate).

Revocation by another will or codicil.

If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both papers are entitled to probate (*Lemage* v. *Goodban*, L. R. 1 P. & M. 57; *Geaves* v. *Price*, 11 W. R. 809; see *Re Howard*, L. R. 1 P. & M. 636).

A testator left four testamentary instruments duly executed. After the Ecclesiastical Court had held that the second and third alone were valid as to the personal estate (1 Rob. 204), the Court of Chancery, on the certificate of the Common Pleas (6 C. B. 201), decided that, as to the real estate, the last instrument alone constituted the last will (*Plenty* v. *West*, 16 Beav. 173).

Revocation by writing declaring an intention to revoke.

(*x*) A testatrix devised real estates, and by a subsequent deed, attested by two witnesses, she conveyed them on other trusts. It was held that the deed, assuming it to be void as a *turpis contractus*, was not a writing declaring an intention to revoke within this section (*Ford* v. *De Pontes*, 30 Beav. 572). A writing, by which a testator merely revokes a prior testamentary disposition, will not be admitted to probate (*Re Fraser*, L. R. 2 P. & M. 40); *secus*, if it be of a testamentary character (*Re Durance*, *Ib.* 406; *Re Hubbard*, L. R. 1 P. & M. 53; and see *Re Hicks*, *Ib.* 683).

Revocation by an act of destruction.

(*y*) A mere abandonment of his will by a testator is not a sufficient revocation. There must be some act done by him, or by some one in his presence, and by his direction (*Andrew* v. *Motley*, 12 C. B. N. S. 514).

1 Vict. c. 26, s. 20.

All acts by which a testator may destroy or mutilate a testamentary instrument are in their nature equivocal: unless the act be done *animo revocandi*, there is no revocation (*Powell* v. *Powell*, L. R. 1 P. & M. 212).

Animus revocandi necessary.

Where, therefore, the act of destruction is referable wholly and solely to the intention of setting up some other testamentary paper, the *animus revocandi* has only a conditional existence, the condition being the validity of the paper intended to be substituted; and where the condition is unfulfilled, there is no revocation (*Ib.*; *Dancer* v. *Crabb*, L. R. 3 P. & M. 98); but the evidence must be clear as to the intention of the act of destruction (*Eckersley* v. *Platt*, L. R. 1 P. & M. 281); and subsequent declarations by the testator as to his intention will not be admitted (*Re Weston*, L. R. 1 P. & M. 633).

Dependent relative revocation.

Mistake.

Where a testator tore up his will under a mistaken impression that it was invalid, it was held that there was no revocation (*Giles* v. *Warren*, L. R. 2 P. & M. 401; *Re Thornton*, 14 P. D. 82); and so where a man destroyed his will in a fit of delirium tremens (*Brunt* v. *Brunt*, L. R. 3 P. & M. 37). But it seems that a testator may subsequently adopt the act so as to effect a revocation. Probate was granted of a will which depended for its validity upon a confirmation by codicil, although the codicil had been destroyed, the destruction being held to have been effected with no intention of revoking the will (*James* v. *Shrimpton*, 1 P. D. 433).

Part of will may be revoked by tearing.

It is not the manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means which will satisfy the requisites of the law; the act must be accompanied with the *intention* of revoking: there must be the *animus* as well as the act. It is the *animus*, also, which must govern the extent and measure of operation to be attributed to the act (*Clarke* v. *Scripps*, 2 Rob. 567; *Clarkson* v. *Clarkson*, 2 Sw. & Tr. 497; see *Doe* v. *Harris*, 6 Ad. & Ell. 209). Thus, where the first seven or eight lines of a will had been cut and torn off, it was admitted to probate in its incomplete state (*Re Woodward*, L. R. 2 P. & M. 206; *Christmas* v. *Whinyates*, 3 Sw. & Tr. 81; see *Re Leach*, 63 L. T. 111; *Re Maley*, 12 P. D. 134). But where the third and fourth sheets of a will were alone discovered, a power to appoint by will or by any writing in the nature of a will was not duly executed (*Gullan* v. *Grove*, 26 Beav. 64). And where a testator destroyed some sheets of a will and substituted others, but did not re-execute, the whole will was revoked (*Treloar* v. *Lean*, 14 P. D. 49).

Tearing off seal.

A testator having made a will executed under seal, and published and attested as a sealed instrument, afterwards for the purpose of revoking it tore off the seal and with it part of a word, the tearing off the seal was sufficient to revoke the will (*Price* v. *Powell*, 3 H. & N. 341; see *Doe* v. *Harris*, 6 Ad. & E. 209). By the usual statement in the witnessing clause at the end of a will that the testator has set his hand to the preceding pages, a testator makes the signatures on those pages a part of his will, and if having so recited he afterwards, *animo revocandi*, tears off the signatures from the preceding pages, it is a good revocation (*Williams* v. *Tyley*, Johns. 530). A will was held revoked by the testator cutting out his signature (*Hobbs* v. *Knight*, 1 Curt. 768; *Walker* v. *Armstrong*, 21 Beav. 305, on appeal, 4 W. R. 770), or erasing his own signature and those of the witnesses (*Re Morton*, 12 P. D. 141). But the accidental cutting through the signature of one of the witnesses was not a revocation (*Re Taylor*, 63 L. T. 230); nor was the erasure by the witnesses of their own signatures (*Margary* v. *Robinson*, 12 P. D. 8). Probate was granted in a case where the testator directed the name of an attesting witness to be erased (*Re Greenwood*, 1892, P. 7).

Tearing off signatures.

Signatures replaced.

A testator cut out of his will the names of the attesting witnesses, and afterwards on the same day replaced the piece so cut out, saying that the will would do for the present. The court granted probate (*Re Eeles*, 32 L. J., Prob. 4; see *Re De Bode*, 5 Not. Cas. 189). Where the signature of the testator to a will had been cut out, but gummed on to its former place, the will was not admitted to probate (*Bell* v. *Fothergill*, L. R. 2 P. & M. 148; *Magnesi* v. *Hazelton*, 44 L. T. 586); but where a testator partially

1 Vict. c. 26, s. 20.

erased his own signature, and then re-wrote it, probate was granted (*Re Kennett*, 2 N. R. 461).

Cancelling.

A will is not destroyed within this section by being struck through with a pen, the name of the testator being crossed out and the names of the attesting witnesses being struck through. It was said by Sir H. *Jenner*, that when the legislature, after mentioning "burning" a will, and "tearing" a will, speaks of "otherwise destroying" a will, they must be understood as intending some mode of destruction *ejusdem generis*, not an act which is not a destroying in the primary meaning of the word, though it may have the same metaphorically, as being a destruction of the contents of the will; it never could have been their intention that the cancelling of a will should be a mode of destroying it (*Stephens* v. *Taprell*, 2 Curt. 465; *Re Brewster*, 6 Jur. N. S. 56). A testatrix obliterated, with the intention of revoking, several passages of her will, so that none of the parts obliterated could be distinguished upon the face of the will: this was a complete revocation of those parts (*Townley* v. *Watson*, 3 Curt. 761).

Destruction by any person other than the testator.

If the act of destruction be done by any person other than the testator, it must be by the testator's order and in his presence. Where a codicil was burnt by a testator's order, but not in his presence, probate was granted of a draft copy (*Re Dadds*, D. & Sw. 290). Destruction by another in the presence of the testatrix was held not ratified (*Mills* v. *Milward*, 15 P. D. 20).

Onus of proof of revocation.

After the due execution of a will has been proved, the burden of proving that it was revoked lies upon those who set up the revocation; and in the absence of evidence, revocation will not be presumed (*Benson* v. *Benson*, L. R. 2 P. & M. 172).

Will in testator's custody not forthcoming at his death;

But where a will remains in the custody of the testator from the time when it is made until his death, and cannot then be found, the presumption of law is, that it was destroyed by the testator, *animo revocandi* (*Eckersley* v. *Platt*, L. R. 1 P. & M. 281; *Sugden* v. *St. Leonards*, 1 P. D. 231). The presumption applies even where a duplicate copy properly executed exists in the custody of the solicitor (*Jones* v. *Harding*, 58 L. T. 60). The court must be satisfied that the will in the custody of the testator was not in existence at the time of his death (*Finch* v. *Finch*, L. R. 1 P. & M. 371). To rebut the presumption, declarations made by the testator that he has settled his affairs and appointed executors, and as to the person in whose possession the will is, are admissible in evidence (*Whiteley* v. *King*, 17 C. B. N. S. 756; 13 W. R. 83; *Sugden* v. *St. Leonards*, 1 P. D. 231), declarations to a contrary effect being admissible in answer (*Keen* v. *Keen*, L. R. 3 P. & M. 105). The presumption does not apply to a case where the testator becomes insane after the execution, and continues insane until his death (*Sprigge* v. *Sprigge*, L. R. 1 P. & M. 608).

found mutilated at his death.

Where a will in the custody of a testator is found after his death mutilated, the presumption in the absence of evidence is that it was mutilated by him after its execution, and, if there be a codicil, after the execution of the codicil (*Christmas* v. *Whinyates*, 2 Sw. & Tr. 81; 11 W. R. 371).

Revocation of codicils.

Under the law before this statute, a codicil stood or fell with the will to which it belonged; under the new law, where a will has been revoked, it was once held that probate of the codicil would not be granted, unless the court was satisfied that the testator intended the codicil to operate separately from the will (*Re Greig*, L. R. 1 P. & M. 72; see *Re Ellice*, 12 W. R. 353). But it is now settled that a codicil can only be revoked by one of the modes indicated in this section, and is not revoked by the revocation of the will (*Re Savage*, L. R. 2 P. & M. 78; *Re Turner*, *ib.* 403; *Black* v. *Jobling*, L. R. 1 P. & M. 635; *Farrer* v. *St. Catherine's College*, 16 Eq. 19; *Gardiner* v. *Courthope*, 57 L. T. 280), unless there was an intention to revoke both (*Re Bleckley*, 8 P. D. 169).

Where a codicil confirms a will in general terms, the will, together with all previous codicils, is taken to have been confirmed (*Green* v. *Tribe*, 9 Ch. D. 231, 234); and a reference to the date of the will in the confirming codicil does not constitute an implied revocation of antecedent codicils (*Green* v. *Tribe*, *sup.*; *Re De La Saussaye*, L. R. 3 P. & M. 42). So where

a third codicil confirmed a will (referred to by date) except as altered by a first codicil, it was held there was no implied revocation of a second codicil (*Follett* v. *Pettman*, 23 Ch. D. 337). Where, however, a codicil is of itself inoperative, a confirmation by a later codicil of a will which is referred to by date and is antecedent to the inoperative codicil will not operate so as to set up the inoperative codicil (*Burton* v. *Newbery*, 1 Ch. D. 234). 1 Vict. c. 26, s. 20.

A married woman may revoke a will made under a power in any of the modes pointed out by this section (*Hawksley* v. *Barrow*, L. R. 1 P. & M. 147). Revocation by married woman.

21. No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will (*z*). No alteration in a will shall have any effect unless executed as a will.

(*z*) The mere circumstance of the amount or the name of the legatee being inserted in different ink and in a different handwriting does not alone constitute an obliteration, interlineation or other alteration within the meaning of this section, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing. In such circumstances the *onus probandi* lies upon the party who alleges such alteration to have been made prior to execution, to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator (*Greville* v. *Tylee*, 7 Moo. P. C. C. 320). The rule is stated in a similar manner in *Williams* v. *Ashton* (1 J. & H. 115); *Simmons* v. *Rudall* (1 Sim. N. S. 137). Presumption as to time of alterations in wills.

More generally the rule is stated thus:—That in the absence of evidence there is a presumption that alterations on the face of a will were made after its execution (*Cooper* v. *Bockett*, 4 Moo. P. C. C. 439; *Re Sykes*, L. R. 3 P. & M. 26); and when a will has been republished by a codicil, after the execution of the codicil also (*Lushington* v. *Onslow*, 6 Not. Cas. 183). This presumption will not be rebutted by the fact that the alterations bear in the handwriting of the testator an earlier date than the will (*Re Adamson*, L. R. 3 P. & M. 253); but may be rebutted by evidence of declarations made by the testator before execution of the will (*Doe* v. *Palmer*, 16 Q. B. 747; *Dench* v. *Dench*, 2 P. D. 60), or of the codicil (*Re Sykes*, *sup.*); or by evidence of other persons that the alterations were made prior to the execution of the codicil (*Tyler* v. *Merchant Taylors' Co.*, 15 P. D. 216; see *Re Greenwood*, 1892, P. 7); or by the language of the codicil (*Re Heath*, 1892, P. 253). The court may look at any evidence for the purpose (*Re Tonge*, 66 L. T. 60).

Where an expert deposed that in his opinion some trifling alterations and interlineations appearing on the face of a will were written at the same time as the rest, they were admitted to probate (*Re Hindmarch*, L. R. 1 P. & M. 307; *Moore* v. *Moore*, I. R. 6 Eq. 166); and from the nature of certain interlineations and the internal evidence furnished by the document itself, the court concluded that they were made before execution and admitted them to probate (*Re Cadge*, L. R. 1 P. & M. 543; *Re Duffy*, I. R. 5 Eq. 506). Certain words were admitted as being in the nature of an interlineation (*Re Birt*, L. R. 2 P. & M. 214).

1 Vict. c. 26, s. 21.

Form of probate.

Where it appears that alterations have been made before execution, the probate is usually engrossed fair; but where the construction may be affected by the appearance of the original paper, probate is sometimes granted in fac-simile (1 Wms. Exors. 8th ed. 336). Where probate was granted with lines drawn in ink over the bequest of certain legacies, the Court of Chancery inferred the meaning of the testator from the instrument in that form (*Gann* v. *Gregory*, 3 D. M. G. 777; *Shea* v. *Boschetti*, 18 Beav. 321). In some cases the Court of Chancery has looked at the original will (*Maning* v. *Purcell*, 7 D. M. G. 55[illegible]; *Compton* v. *Bloxham*, 2 Coll. 201; see *Oppenheim* v. *Henry*, 9 Hare, 802, note (*b*)).

Where alterations made subsequently to the execution of the will are not attested in the manner required by this section, probate will be granted of the will as it originally stood, if that is apparent (*Re Beavan*, 2 Curt. 369; *Re Martin*, 1 Rob. 712; *Re Gaussen*, 16 W. R. 212); but if not, probate will be granted in blank as to such parts of the will as cannot be read (*Re Ibbetson*, 2 Curt. 337). In order to discover the words as they originally stood, the court will submit the will to the examination of persons accustomed to inspect writings; and it is sufficient if they can be made out with the aid of magnifying glasses, or by evidence of that nature (*Ib.*) Chemical agents have not been resorted to; nor will the court remove paper pasted over the whole of a bequest (*Re Horsford*, L. R. 3 P. & M. 211).

Meaning of "apparent."

The word "apparent" here used does not mean capable of being made apparent by extrinsic evidence, but applies to what is apparent on the face of the instrument itself. Where a testator obliterated *animo revocandi* several pages of his will, so that none of the parts could be distinguished upon the face of the will, this was a complete revocation of those parts (*Townley* v. *Watson*, 3 Curt. 761; see *Re Horsford*, L. R. 3 P. & M. 211).

Although this section does not, like the preceding one, contain the words, "with the intention of revoking the same," yet intention must accompany the acts mentioned in this section in the same way as intention must accompany the acts mentioned in the 20th section. Under the Statute of Frauds (*Bibb* v. *Thomas*, 2 W. Bl. 1044) and this act, intention is indispensable; under the former statute, to burn, or to tear, or to obliterate a part of a will, was altogether a nullity, if such act was done without an intention to revoke, and only for the purpose of making immediately some new disposition or alteration; and if, from want of compliance with the statutory regulations, such new disposition or alteration could not take effect, then the burning, tearing or obliteration, in no degree revoked the will, but it remained in full force as if nothing had been done to it. Similar principles must be applied in cases arising under the present statute (*Brooke* v. *Kent*, 3 Moo. P. C. C. 349, 350). Where a testator intended to alter a legacy by substituting a different sum to that originally given, and such substituted sum was not effectually given for want of compliance with the statute, the original legacy was not revoked, and evidence was admissible to show the original amount (*Brooke* v. *Kent*, 3 Moo. P. C. C. 334). Paper pasted over the amount of a legacy, leaving the name, will be removed for this purpose (*Re Horsford*, L. R. 3 P. & M. 211).

Attestation of alteration.

The initials of the testator and witnesses placed opposite an alteration are sufficient to render it valid (*Re Blewitt*, 5 P. D. 116); but not the initials of the witnesses only (*Re Shearn*, 43 L. T. 736; see *Re Dewell*, 17 Jur. 1130). As to whether the attestation gives validity to more than one alteration, see *Re Wilkinson* (6 P. D. 100); *Re Treeby* (L. R. 3 P. & M. 242).

As to when the signature to a will is to be deemed valid, see 15 & 16 Vict. c. 24, s. 1, and note thereto, *post*, p. 436.

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

22. No will or codicil, or any part thereof, which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and

afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown (*a*). 1 Vict. c. 26, c. 22.

(*a*) Before the act, the mere execution of a codicil to a will was sufficient to reaffirm the will by implication, and to revive it if it had been revoked. The only difficulty was to determine to what will the instrument was intended as a codicil (*Re Steele*, L. R. 1 P. & M. 575, 578). Since the passing of this statute a will cannot be revived by mere implication. To revive a will, a codicil must show an "intention to revive;" and the intention must appear on the face of the codicil either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some expression conveying to the mind of the court with reasonable certainty the existence of the intention (*Ib.*) As to republication, see *Re Smith, Bilke* v. *Roper* (45 Ch. D. 632, *post*, p. 435). Thus, mere references in codicils to revoked wills by their dates were insufficient to revive them (*Re Steele, sup.; Re Dennis*, 1891, P. 326). Unless it can be explained by the special circumstances of the case, *Payne* v. *Trappes* (1 Rob. 583), seems inconsistent with the above authorities; see also *Re Reynolds* (L. R. 3 P. & M. 35). As to an erroneous reference to date of will, see *Re Ince* (2 P. D. 111); *Re Stedham* (6 P. D. 205); *Re Gordon* (1892, P. 228). As to the revival of codicils, see *Green* v. *Tribe* (9 Ch. D. 232); *Burton* v. *Newbery* (1 Ch. D. 234; *ante*, p. 419). Where a testator revoked a first will by a second will, and by a subsequent codicil confirmed his last will, the first will was revived (*Re Van Cutsem*, 63 L. T. 252, see the words of confirmation; see also *Re Turner*, 64 L. T. 805).

Codicil must show an intention to revive.

Reference to revoked will by date.

A testatrix duly executed a will, and subsequently thereto, two other wills, both of which contained a clause revoking all former wills. She afterwards destroyed the two latter wills. Held, that the first will was not thereby revived, and that parol evidence was not admissible to show an intention to revive (*Major* v. *Williams*, 3 Curt. 432; *Powell* v. *Powell*, 1 P. & M. 209; *James* v. *Shrimpton*, 1 P. D. 431).

Destruction of revoking instrument.

The will intended to be revived must be in existence: and if a codicil refer to a will with the intention of reviving it, and it turn out that such will had been entirely burnt or destroyed by the testator *animo revocandi*, the codicil cannot effect its revival (*Hale* v. *Tokelove*, 2 Rob. 318; *Newton* v. *Newton*, 12 Ir. Ch. R. 118; *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342).

Will to be revived must be in existence.

A revoked will may be revived conditionally (*Re Bangham*, 1 P. D. 429).

Where a testator gave 100*l.* to his executor, and by a subsequent codicil gave him 500*l.* in substitution, and then revoked the second gift, the first gift was not set up again (*Boulcott* v. *Boulcott*, 2 Drew. 25).

Revocation of a substituted legacy.

23. No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (*b*).

A devise not to be rendered inoperative by any subsequent conveyance or act.

(*b*) This clause of the act applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee and afterwards take a reconveyance of them to themselves and a trustee to bar dower; but it does not apply to cases where the thing meant to be given is gone (*Moor* v. *Raisbeck*, 12 Sim. 139). All those cases in which it was formerly held that a will was revoked by an alteration of the estate of the testator, are now put an end to by this section

1 Vict. c. 26, s. 23.

(*Ford* v. *De Pontes*, 30 Beav. 593). As to revocation by alteration of estate, see, further, *Plowden* v. *Hyde* (2 D. M. & G. 684; 1 Jarm. Wills, 147 *et seq.*); and as to the bearing of this section upon wills prior to 1838, see *Langford* v. *Little* (2 J. & Lat. 613); *Walker* v. *Armstrong* (21 Beav. 284).

Devise of lands and subsequent contract to sell.

A testatrix having devised a real estate, afterwards sold it. The purchase was not completed until after her death. It was held that the purchase-money belonged to the personal representatives, and not to the devisees of the testatrix, notwithstanding her lien on the estate for the purchase-money, and notwithstanding this section of the act (*Farrar* v. *Winterton*, 5 Beav. 1). A similar decision was given where the estate devised had been conveyed to a purchaser who had deposited the deeds with the testatrix as a security for the purchase-money (*Moor* v. *Raisbeck*, 12 Sim. 139). And where the owner of an estate, after having devised it to an infant, agreed under compulsion to sell a portion of it to a railway company, and died before completion; it was held, that his executors, and not the devisee, were entitled to the purchase-money (*Re Manchester R. Co.*, 19 Beav. 365; *Ex p. Hawkins*, 13 Sim. 569). The rents, however, until completion will in such a case pass to the devisee (*Watts* v. *Watts*, 17 Eq. 217).

Option of purchase subsequently exercised.

The existence of a mere option of purchase, not exercised until after the testator's death, does not constitute a contract to sell which will affect the devise. Upon exercise of the option, accordingly, the purchase-money will be held upon the limitations declared by the will of the lands (*Drant* v. *Vanse*, 1 Y. & C. Ch. 580; *Emuss* v. *Smith*, 2 De G. & Sm. 722; see *Bowen* v. *Barlow*, 8 Ch. 171).

As to the effect of a devise upon lands contracted to be sold, see, further, 1 Jarm. Wills, 52 *et seq.*; 1 Dart V. & P. 301. And as to the effect, under the old law, of a contract to sell lands upon a prior devise, see *Andrew* v. *Andrew* (8 D. M. & G. 336; Sugd. R. P. Stat. 360—364).

Revocation of prior devise by contract under power of sale.

Where real estate is settled to such uses as A. shall by will appoint, with a power of sale in trustees exerciseable with A.'s consent, an appointment by A. has no effect on the purchase-money of the property sold with his consent, nor on the land purchased with such money (*Gale* v. *Gale*, 21 Beav. 349; *Blake* v. *Blake*, 15 Ch. D. 481).

Bequest of leaseholds and subsequent purchase of fee.

Where a testator bequeathed certain leaseholds for all the residue of the terms for which the same should be held by him at his death, and afterwards acquired the fee, it was held that the fee passed (*Struthers* v. *Struthers*, 5 W. R. 809; see *Cox* v. *Bennett*, 6 Eq. 422; *Saxton* v. *Saxton*, 13 Ch. D. 359). So with respect to an increased share in a partnership business (*Re Russell, Russell* v. *Chell*, 19 Ch. D. 432). A devise, however, of a mortgage estate is adeemed by a subsequent acquisition of the equity of redemption (*Yardley* v. *Holland*, 20 Eq. 428).

A will shall be construed to speak from the death of the testator.

24. Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (*c*).

(*c*) A gift of a testator's real and personal estate in a will prior to 1838 was read as a gift of the real estate belonging to the testator at the date of the will, and of the personal estate belonging to him at the date of his death (1 Jarm. Wills, 4th ed., 326; see, further, Hawk. Wills, 14; *Hance* v. *Truwhitt*, 2 J. & H. 216).

Under this section the court will consider what would be the proper construction of the will, assuming it to have been executed immediately before the testator's death, and whether, regard being had to the time when it was executed, anything appears in the will showing that, by this construction, the intention of the testator will be contravened (*O'Toole* v. *Browne*, 3 El. & Bl. 572).

1 Vict. c. 26, s. 24.

The qualification "unless a contrary intention shall appear by the will," does not render it necessary to find a contrary intention expressed in so many words: it is sufficient, if on a fair construction of the will, adhering to those rules which are usually adopted in construing wills, the contrary intention does appear (*Cole* v. *Scott*, 1 H. & T. 477). The date may show a contrary intention (*Re Wells*, *Hardisty* v. *Wells*, 42 Ch. D. 646).

Contrary intention.

A contrary intention may appear from a particular description being given of the subject of the gift. A testator devised all his freehold estate at B., which he purchased of C.; but a small piece of land, purchased with the estate by the testator of C., and always held with it, was leasehold. The testator subsequently purchased the fee of that small piece: the codicil did not pass the after-acquired fee (*Emuss* v. *Smith*, 2 De G. & Sm. 722). See *Pierce* v. *A. G.* (3 W. R. 612), where a subsequently-acquired freehold house was held not to pass under a gift of leaseholds and all other estate and effects. Where, however, a testator has bequeathed particular leaseholds, describing them as such, and has subsequently acquired the fee, the fee has been held to pass (*Struthers* v. *Struthers*, 5 W. R. 809; *Miles* v. *Miles*, 1 Eq. 462; *Cox* v. *Bennett*, 6 Eq. 422; *Wedgwood* v. *Denton*, 12 Eq. 290; *Saxton* v. *Saxton*, 13 Ch. D. 359). A devise of freeholds was limited, so as to exclude after-acquired property, by the words "which I have lately purchased" (*Cave* v. *Harris*, 57 L. T. 768).

Particular description of subject of gift.

Leaseholds.

Where a testatrix devised "all my Quendon Hall estates in Essex," and after the date of her will acquired other estates in the same locality, the after-acquired estates did not pass. The term was an arbitrary designation which had acquired a certain meaning in the mind of the testatrix, and could not be extended to other property to which she had not ascribed the arbitrary designation (*Webb* v. *Byng*, 1 K. & J. 580; see *Castle* v. *Fox*, 11 Eq. 554). But where a testator devised his estate called Cleeve Court, property acquired after the date of the will, and treated by the testator immediately before his death as additions to Cleeve Court, passed (*Castle* v. *Fox*, 11 Eq. 542; see also *Strevens* v. *Bailey*, 8 Ir. C. L. R. 410).

Arbitrary designations of real estate.

As to the effect of the words "heretofore mentioned," &c., occurring in the description of the property, see *Jepson* v. *Key* (2 H. & C. 873).

"Heretofore mentioned."

Devises have been held to pass after-acquired real estate, notwithstanding provisions which seemed to refer to personal estate only (*Stokes* v. *Salomons*, 9 Hare, 75; *O'Toole* v. *Browne*, 3 El. & Bl. 572; *Lloyd* v. *Lloyd*, 7 Eq. 458).

It was observed by *Wood*, V.-C., "A gift of 'all my stock' would pass all stock to which the testator was entitled at the time of his death. But suppose the bequest were of 'all my stock which I have purchased,' that would make a considerable difference, and would, I think, be enough on the face of the will to show that the testator was defining the particular portion of property which he intended to give as being property then in his possession" (*Douglas* v. *Douglas*, Kay, 405; see *Re Gray*, *Dresser* v. *Gray*, 36 Ch. D. 207). Again, it was said by *Wood*, V.-C., "When I refer to a particular thing, such as a ring or a horse, and bequeath it as 'my ring' or 'my horse,' it seems to me there might be considerable difficulty in saying that the 'contrary intention,' to which the act in its 24th section refers, does not appear on the face of the will; but when a bequest is of that which is generic—of that which may be increased or diminished, then, I apprehend, the Wills Act requires something more on the face of the will, for the purpose of indicating such 'contrary intention,' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'" A testatrix bequeathed, "*My* New Three-and-a-quarter per Cent. Annuities." At the date of her will she was possessed of 3,010*l.* 3*s.* 5*d.* per Cent. Annuities; and, at her death, of 17,010*l.* like annuities; held, that the bequest comprised the latter sum (*Goodlad* v. *Burnett*, 1 K. & J. 341; *Trinder* v. *Trinder*, 1 Eq. 695; *Bothamley* v. *Sherson*, 20 Eq. 312). See and distinguish the cases where bequests of "my shares" or "my debentures" have been held to fail on the ground of ademption (*Re Gibson*, 2 Eq. 669; *Re Lane*, *Luard* v. *Lane*, 14 Ch. D. 856).

Descriptions of money, stock, &c.

"My."

A bequest "of my stock in trade and debts accruing therefrom" was

1 Vict. c. 26, s. 24.

held to pass the testator's stock in trade and trade debts existing at the time of his death (*Ferguson* v. *Ferguson*, I. R. 6 Eq. 199; see also *Moore* v. *Madden*, I. R. 2 Eq. 511). Where a testator, after reciting his title to one third of a business, bequeathed "all my share in the business," and after the date of the will acquired the whole business; the will operated upon the testator's interest at his death (*Re Russell, Russell* v. *Chell*, 19 Ch. D. 432). A release of all moneys due from A. was construed as a release of moneys due at death, although the will contained a recital as to the sums in which A. was "now indebted" (*Everett* v. *Everett*, 7 Ch. Div. 428). But where a testator exonerated A. from "all claims in respect of moneys laid out by me in improvements of the estate in Scotland, and which money has, according to the laws of Scotland, been charged thereon;" the exoneration was held to apply only to moneys so charged at the date of the will (*Douglas* v. *Douglas*, Kay, 400). And a release of interest was held to be confined by a recital in the will to interest on a debt due to the testator at the date of the will (*Sidney* v. *Sidney*, 17 Eq. 65).

Effect of words referring to present time.

"Now."

Again, a contrary intention may appear from the words of the gift referring to the present time. Thus, where a testator devised the house "wherein I *now* reside," and "all the remainder of my real estates whereof I am *now* seised," and afterwards devised "all such trust estates as are *now* vested in me, or as to the leasehold premises as shall be vested in me at the time of my death:" freehold estates purchased by him between the date of his will and his death, did not pass under the devise (*Cole* v. *Scott*, 1 Hall & T. 477; 1 Mac. & G. 518). The word "now" received the same construction in *Hutchinson* v. *Barrow* (6 H. & N. 533; 9 W. R. 538); and "a gift of the house I now live in" was held to refer to the house as occupied by the testatrix at the date of the will (*Williams* v. *Owen*, 9 L. T. 200; *Re Champion*, 1892, W. N. 125, *contra*). On the other hand, where a testator devised a messuage wherein A. "now resides, with the stables or appurtenances thereto belonging and therewith occupied;" a garden acquired by the testator after the date of his will, passed (*Re Midland R. Co.*, 34 Beav. 525). Under a gift of "any other property that I may now possess," personalty acquired after the date of the will passed (*Wagstaff* v. *Wagstaff*, 8 Eq. 229; *Hepburn* v. *Skirving*, 4 Jur. N. S. 651). And *Malins*, V.-C., has expressed his dissent from the decision in *Cole* v. *Scott*, *sup.* (*Castle* v. *Fox*, 11 Eq. 542; see *Re Champion*, *Dudley* v. *Champion*, 1892, W. N. 125). A testator bequeathed leaseholds to A. charged with "the annuity of 9*l.* now charged thereon in favour of my sister;" held, that leaseholds acquired after the date of the will were included in the bequest (*Re Ord*, *Dickinson* v. *Dickinson*, 12 Ch. Div. 22). As to the effect of the words "in their present state," see *Re Portal and Lamb* (30 Ch. Div. 50). And as to a reference to lands "lately purchased," see *Cave* v. *Harris*, 57 L. T. 768.

Lands "of which I am seised."

Under a devise of lands "of which I am seised" at a particular place, lands acquired after the date of the will have been held to pass (*Doe* v. *Walker*, 12 M. & W. 591; *Langdale* v. *Briggs*, 3 Sm. & Giff. 246; *Lilford* v. *Keck*, 30 Beav. 300).

Codicil.

As to the effect on this question of a codicil confirming the will, see *Re Champion*, *Dudley* v. *Champion*, 1892, W. N. 125.

The section leaves open the question whether a particular property passes by the specific or residuary devise (*Re Portal and Lamb*, 30 Ch. Div. 50).

Residuary devise remains specific notwithstanding this statute.

A residuary devise of real estate was held to be specific before the Wills Act (*Mirehouse* v. *Scaife*, 2 M. & Cr. 695). And such a devise remains specific, notwithstanding the Wills Act (*Hensman* v. *Fryer*, 3 Ch. 420; *Gibbins* v. *Eyden*, 7 Eq. 371). Accordingly lands specifically devised, lands comprised in a residuary devise, and personal estate specifically bequeathed, are to be applied rateably in payment of debts (*Eddels* v. *Johnson*, 1 Giff. 22; *Pearmain* v. *Twiss*, 2 Giff. 130; *Clark* v. *Clark*, 4 Giff. 702; *Lancefield* v. *Iggulden*, 10 Ch. 136). But a pecuniary legatee has no right to call upon a residuary devisee to contribute to the payment of debts (*Farquharson* v. *Floyer*, 3 Ch. D. 109; *Phillips* v. *Low*, 1892, 1 Ch. 50).

A bequest, if specific under the law before this act, remains specific, but is enlarged as to its operation by the act (*Bothamley* v. *Sherson*, 20 Eq. 313). 1 Vict. c. 26, s. 24.

For the bearing of this section on the wills of married women, see the note to sect. 8 (*ante*, p. 405); and on wills in execution of powers, see the note to sect. 27 (*post*, p. 427). Married women, powers.

After the date of his will a testator was duly declared lunatic, and so remained till his death. During his lunacy changes were made by the court in the state of his property. It was held, that his will must be read as speaking from its date and not from the death of the testator (*Wheeler* v. *Thomas*, 4 L. T. 173). Lunatics.

It is doubtful whether this section applies to the construction of an excepting clause in a will (*Hughes* v. *Jones*, 1 H. & M. 765). Excepting clauses.

This section of the act does not apply to the objects of the testator's bounty. A testator bequeathed certain funds to A., a widow, for life or until her marriage, and after her death or marriage, amongst her children. A. married again between the date of the will and the death of the testator, and he was aware of her marriage: it was held, that A. was not entitled to the income of the funds (*Bullock* v. *Bennett*, 7 D. M. & G. 283; see *Gibson* v. *Gibson*, 1 Drew. 62). The words in the section, "with reference to the real estate and personal estate comprised in it," mean "so far as the will comprises dispositions of real and personal estate" (*Langdale* v. *Briggs*, 8 D. M. & G. 436). As to the period from which a will speaks, with reference to the objects of the gifts contained in it, see 1 Jarm. Wills, 323; and as to the construction of a gift to the husband of an unmarried daughter of the testator, see *Radford* v. *Willis*, 7 Ch. 7. Section does not apply to the objects of gift.

25. Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will (*d*). A residuary devise shall include estates comprised in lapsed and void devises.

(*d*) In wills prior to 1838, a residuary devise does not include specific devises which lapse (Hawk. Wills, 44), or which are void (*Smith* v. *Lomas*, 12 W. R. 949). But a residuary bequest does include lapsed and void legacies (Hawk. Wills, 40; see 1 Jarm. Wills, 761 *et seq.*) This section is to be construed upon the principle of assimilating a residuary devise of real estate, to a similar bequest of personalty (*Carter* v. *Haswell*, 26 L. J. Ch. 576; 5 W. R. 308; see *Blight* v. *Hartnoll*, 23 Ch. Div. 218). Rule as to wills prior to 1838.

A testatrix devised estate E. to A. absolutely, and "all my freeholds, &c. not hereinbefore devised" to A. for life, with remainders over; A. died before the testatrix: held, that estate E. passed under the residuary devise (*Green* v. *Dunn*, 20 Beav. 6). A testator devised specific real estate to M., and devised and bequeathed "*All other real and personal estate of which he might die possessed*" to M. and others of his children. M. died in his lifetime: it was held, that the devise expressed by the words "all other, &c." was a residuary devise within this section, and included the real estate devised to M. (*Cogswell* v. *Armstrong*, 2 K. & J. 227; and see *Culsha* v. *Cheese*, 7 Hare, 236; *Hickson* v. *Wolfe*, 9 Ir. Ch. R. 452). Residuary devises within this section.

It has been held that a residuary devise operating as an appointment under a special power is within this section; *Jessel*, M. R., laying down that the word "devise" in the act includes in general a devise by way of appointment under a power, whether special or general (*Freme* v. *Clements*, 18 Ch. D. 499). This principle, however, has been disapproved by the Court of Appeal who have held that it does not apply to sect. 33 (*Holyland* v. *Lewin*, 26 Ch. Div. 266).

1 Vict. c. 26, s. 25.

Gift of particular residue.

A testatrix gave lands in the parish of H. to A., B., and C. as joint tenants in fee, and devised to the plaintiff "all the rest of my freehold hereditaments in the parish of H., and all my freehold hereditaments in the parishes of," &c. The devise to A., B., and C. having been declared void, it was held that the lands comprised in that devise did not pass to the plaintiff under this section. *Mellish*, L. J., thought that the section only applied where there was what might be called an universal residuary devise; that is to say, a devise of all the residue of the testator's lands (*Springett* v. *Jenings*, 6 Ch. 333; see also *Re Brown*, 1 K. & J. 521).

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

26. A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will (*e*).

Law before the act.

(*e*) In the case of wills prior to 1838, "if a man has lands in fee and lands for years and devises all his lands . . . . the fee simple lands pass only and not the lands for years: but if he has no fee simple the lease for years passes" (*Rose* v. *Bartlett*, Cro. Car. 293). This rule was in substance overruled by the first portion of the above section (*Butler* v. *Butler*, 28 Ch. D. 72).

Cases on the section.

Devise of land.

Both the reversion in fee and also a derivative leasehold interest in the same land were held to pass under a devise of "freehold land" at a certain place (*Matthews* v. *Matthews*, 4 Eq. 278).

Devise of real estate.

Where a testator gave his "real estates" upon certain trusts and his personal estates upon other trusts, it was argued that the gift of real estates was a "general devise" within this section, and included leaseholds belonging to the testator; but it was held that the leaseholds passed with the personal estate (*Butler* v. *Butler*, 28 Ch. D. 66).

Where a testator having bequeathed the residue of his personal estate to A., devised all his lands, &c. at W. in the county of Durham, and at B. in the county of York, and all other his real estates in the counties of Durham and York, and all his estate and interest therein to trustees; it was held, under this section, by Sir J. *Romilly*, following the opinion of the Courts of Exchequer (5 Exch. 752), and Queen's Bench (18 Q. B. 474); but contrary to the opinion of Lord *Langdale* (11 Beav. 237), that the testator's leaseholds in Durham passed to the trustees (*Wilson* v. *Eden*, 16 Beav. 153).

A gift of real estate situate at a particular place has been held to include leaseholds (*Moase* v. *White*, 3 Ch. D. 163; *Best* v. *Standeven*, 1872, W. N. 44; *Re Davison*, *Greenwell* v. *Davison*, 58 L. T. 304).

Where a testator who had no freeholds, but had leaseholds which he believed to be freeholds, gave his real estate upon trust to make a payment; the leaseholds were charged with the payment (*Gully* v. *Davis*, 10 Eq. 562).

Contrary intention.

It would seem that the limitations of a will being applicable in their entirety to freehold land only is not by itself sufficient to show a contrary intention within the section (*Wilson* v. *Eden*, 16 Beav. 153, *contra*, *S. C.*, 11 Beav. 238). But the circumstance has great weight when combined with other indications in the will (*Prescott* v. *Barker*, 9 Ch. 174, in which case *Wilson* v. *Eden* was observed upon unfavourably).

A general gift shall include estates over which the

27. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a

general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will (*f*).

1 Viet. c. 26, s. 27.

testator has a general power of appointment.

(*f*) The general rule governing wills prior to 1838 has been thus stated: "It is clearly settled that a general devise or bequest will not, independently of the late statute, operate as an execution of a power; but it is also settled that where a testator disposes of real estate, not having any other than what is subject to the power, he is in such case to be taken as dealing with that estate; and that as to both realty and personalty, if the court is satisfied by the manner in which the particular property is referred to, that the testator intended to deal with that property, the disposition will be a valid execution of the power" (*Lake* v. *Currie*, 2 D. M. & G. 547; see Hawk. Wills, 22—26; 1 Jarm. Wills, 676 *et seq.*; *Re Comber*, 14 W. R. 172; *Re Bringloe*, 26 L. T. 58). Where a married woman was the donee of the power, the rule seems to be, that if the will would be ineffectual unless construed as an execution of the power, that construction shall prevail; but that if there is any other subject upon which her will may operate, the power will not be executed (1 Jarman, 678; *A. G.* v. *Wilkinson*, 2 Eq. 816).

Rule as to wills prior to 1838.

Under the new law it is necessary to show a contrary intention in order to exclude the execution of the power, while under the old law it was necessary to show the intention to exercise the power (*Lake* v. *Currie*, 2 D. M. & G. 548).

New law.

This section is confined to general powers, and does not extend to a special or limited power (*Re Williams*, *Foulkes* v. *Williams*, 42 Ch. Div. 93). Thus a power to appoint by will amongst children in such manner as the appointor shall think proper, is not within this section of the act (*Cloves* v. *Awdry*, 12 Beav. 604; *Russell* v. *Russell*, 12 Ir. Ch. R. N. S. 377). Nor is a power given by a testator to his wife to appoint by will among her relations or friends (*Re Caplin*, 2 Dr. & Sm. 527). Nor is a power to appoint to anyone except A. (*Re Byron*, *Williams* v. *Mitchell*, 1891, 3 Ch. 474), but such a power would seem to be within the section after the death of A. (*Ib.*) A power to appoint by deed or will to all and every "person or persons, child or children," was within this section (*Cofield* v. *Pollard*, 5 W. R. 774). A power of appointment by will only is within this section (*Re Powell*, 18 W. R. 228). A general bequest does not under this section operate as an execution of a power to appoint "by will referring to the power" (*Phillips* v. *Cayley*, 43 Ch. Div. 222; overruling *Re Marsh*, *Mason* v. *Thorne*, 38 Ch. D. 630; see *Re Phillips*, *Robinson* v. *Burke*, 41 Ch. D. 417; *Re Tarrant*, 1889, W. N. 146; *Re Davies*, *Davies* v. *Davies*, 1892, W. N. 120).

What powers are within this section.

Special powers not being within sect. 27, it is necessary to find a reference either to the power or the property. So held as regards personal estate (*Re Mattingley*, 2 J. & H. 426; *Rooke* v. *Rooke*, 2 Dr. & Sm. 38). As regards real estate, it was held before this act that where the testator had no real estate at the date of his will, a general devise to an object of the special power would exercise the power (*Standen* v. *Standen*, 2 Ves. jun. 589; see *Denn* v. *Roake*, 6 Bing. 478); but having regard to sect. 24 of the act this reason no longer applies (*Re Mills*, *Mills* v. *Mills*, 34 Ch. D. 186; *Re Williams*, *Foulkes* v. *Williams*, 42 Ch. Div. 93).

Special powers.

1 Vict. c. 26, s. 27.

Under this section a general residuary bequest will operate as an appointment of personal estate which the testator has power to appoint as he thinks proper (*Re Spooner*, 2 Sim. N. S. 129; *Clifford* v. *Clifford*, 9 Hare, 675; *A. G.* v. *Brackenbury*, 1 H. & C. 782); and as an exercise of a power to appoint sums of money up to a specified amount (*Re Jones, Greene* v. *Gordon*, 34 Ch. D. 65).

Powers exercised by general residuary bequest;

by general pecuniary legacies.

General pecuniary legacies, with no particular fund indicated for the payment, are bequests of personal property described in a general manner; and therefore, where the proper assets of the testator are inadequate, the will must be held to include personal estate subject to a general power of appointment, so far as is necessary to satisfy such legacies (*Hawthorn* v. *Shedden*, 3 Sm. & Giff. 293; *Re Wilkinson*, 4 Ch. 587). So a power of appointment over a reversionary fund was exercised by a pecuniary legacy in the will of a married woman who had no property apart from the power (*Ludlam* v. *Ludlam*, 63 L. T. 330). Where a testator having such a power makes a will directing the payment of his debts without more, and appointing an executor, the appointed fund is liable for the payment of his debts, if his own estate is insufficient (*Wilday* v. *Barnett*, 6 Eq. 193; *Re Davies*, 13 Eq. 166). *Wickens*, V.-C., was of opinion that the same rule would apply, though no executor were appointed; but that an appointment of an executor without more would not make the fund assets (*Re Davies*, 13 Eq. 166).

Direction for payment of debts.

Appointment of executor.

Stock liable to re-investment in land.

A general power of appointment over real estate (which was represented by stock liable to re-investment) was held not to be exercised by a bequest of "all moneys that I die possessed of," there being a tenant for life who, after the death of the testator, had a right to call for re-investment (*Re Greaves*, 23 Ch. D. 313). But where there was no such person, the power was held to have been exercised by a bequest of "the residue of my personal estate," regard being had to sect. 1 of this act (*Chandler* v. *Pocock*, 16 Ch. Div. 648). In the last-mentioned case the testatrix had procured the stock to be transferred into her own name before her death.

Appointee predeceasing the testator.

Where the appointee predeceases the testator, the question arises whether the property appointed passes as in default of appointment or devolves as the property of the appointor. "The question is one of intention, viz., whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed" (*Per Chatterton*, V.-C., *Re De Lusi*, 3 Ir. L. Rep. 232; adopted *Re Pinede*, 12 Ch. D. 672; *Willoughby-Osborn* v. *Holyoake*, 22 Ch. D. 240).

Real estate.

In the case of general powers of appointment over real estate where the donee of the power devised her real estate to trustees in trust for A., who predeceased her, it was held there was a resulting trust for the heir of the testatrix (*Re Van Hagan, Sperling* v. *Rochfort*, 16 Ch. Div. 18). And the heir was also held to take in the case of a direct appointment to A. (*Willoughby-Osborn* v. *Holyoake*, 22 Ch. D. 238).

Personal estate.

In the case of general powers of appointment over personal estate where the will of the donee contained a direct gift of residue to A., who predeceased the testator, it was held that the appointed property passed to the next of kin of the appointor (*Re Ickeringill, Hinsley* v. *Ickeringill*, 17 Ch. D. 151; *Re Pinede*, 12 Ch. D. 667). The two last cases were decided on the construction of the particular wills. In an earlier case the property was held to pass as in default of appointment (*Re Davies*, 13 Eq. 163).

Where the will of the donee of the power contained an express appointment to A., who predeceased him, and also a residuary gift, it was held that the residuary legatee took the property the subject of the power (*Re Spooner*, 2 Sim. N. S. 129; see *Gale* v. *Gale*, 21 Beav. 349).

So A. having power to appoint 1,000*l.* by will, and which in default of appointment was given over to B., duly appointed it to C., who died in the testator's lifetime: A. afterwards made a codicil giving his residue, and the dividends due at his death on the 1,000*l.* to his wife: it was held, that the 1,000*l.* passed to the wife under the residuary gift (*Bush* v. *Cowan*, 32 Beav. 228). In one case (see the terms of the residuary clause) the

next of kin of the appointor were held to take (*Wilkinson* v. *Schneider*, 9 Eq. 423). 1 Vict. c. 26, s. 27.

The "contrary intention" referred to in the section must be looked for in the will alone (*Boyes* v. *Cook*, 14 Ch. Div. 57). The rule is to inquire whether there is anything in the will inconsistent with the notion that the gift is meant to operate as an execution of the power (*Scriven* v. *Sandon*, 2 J. & H. 743). And for the purpose of ascertaining this contrary intention, it makes no difference whether the settlement creating the power was made by the testator himself or by a stranger (*Re Clark*, *Maddick* v. *Marks*, 14 Ch. Div. 422). The contrary intention has been found in the fact that the bequest is of personal estate "not otherwise effectually disposed of" (*Moss* v. *Harter*, 2 Sm. & G. 458); and also on the comparison of the words of two successive wills (*Pettinger* v. *Ambler*, 1 Eq. 510); and also in the fact that the will referred to a power different from the one possessed by the testatrix at her death (*Thompson* v. *Simpson*, 44 L. T. 710). It has, however, not been found in a confirmation of the settlement creating the power (*Hutchins* v. *Osborn*, 3 De G. & J. 142; *Lake* v. *Currie*, 2 D. M. & G. 536). Contrary intention.

Coupling sections 24 and 27 together, the true construction of this statute is, that a will may operate as an execution of all powers vested in the testator immediately before his death (*Thomas* v. *Jones*, 2 J. & H. 482). Effect of sections 24 and 27.

General powers have been held to have been executed by wills dated prior to the instrument creating the power (*Patch* v. *Shore*, 2 Dr. & Sm. 589; *Hodsdon* v. *Dancer*, 16 W. R. 1101), even where the power has been created by the testator himself subsequently to the will (*Boyes* v. *Cook*, 14 Ch. Div. 53; *Re Hernando*, *Hernando* v. *Sawtell*, 27 Ch. D. 284; *Airey* v. *Bower*, 12 App. Cas. 263). The circumstances under which a testator has executed the subsequent instrument cannot be looked at to ascertain a contrary intention (*Boyes* v. *Cook*, *sup.*, disapproving of *Re Ruding*, 14 Eq. 266; see *Thompson* v. *Simpson*, 44 L. T. 710; *Airey* v. *Bower*, *sup.*; *Re Wells*, *Hardisty* v. *Wells*, 42 Ch. D. 646). Where A. bequeathed her residue to such persons as B. should by deed or will appoint, and in default over, and B. died before A., B.'s will did not operate as an execution of the power by anticipation (*Jones* v. *Southall*, 32 Beav. 31). General powers executed by wills of prior date.

It is doubtful whether sect. 24 applies in a similar manner to a will made in exercise of a special power (*Re Wells*, *Hardisty* v. *Wells*, 42 Ch. D. 657; see *Stillman* v. *Weedon*, 16 Sim. 26, where a special power was executed by will of prior date, which referred to the property which was the subject of the power). Special power.

A general power given to the survivor of two persons may, under sect. 24, be exercised by the will of the ultimate survivor executed during the joint lives (*Thomas* v. *Jones*, 1 D. J. & S. 63). As to whether a special power can be so exercised, see Sugd. Powers, 124, 8th ed.; *Cronin* v. *Roche* (8 Ir. Ch. R. 103); *Cooper* v. *Martin* (3 Ch. 47); *Re Blackburn* (1889, W. N. 188). Where a power to appoint among children was, in default of any joint appointment by the husband and wife, to be exercised by the survivor "after the decease of the other:" a will made during their joint lives by the one who survived did not operate as an execution (*Cave* v. *Cave*, 8 D. M. & G. 131). Powers given to survivor of several.

Sect. 27 applies to the wills of married women (*Bernard* v. *Minshull*, Johns. 276; see the note to sect. 8, *ante*, p. 405).

With regard to the exercise by will of powers of revocation and new appointments in deeds, a general devise by will subsequent in date to the deed reserving the power does not *per se* amount by virtue of this section to an exercise of such power (*Re Brace*, *Welch* v. *Colt*, 1891, 2 Ch. 671; *Charles* v. *Burke*, 43 Ch. D. 223, n.) In a case decided apart from this section, it was said that the intention to revoke must be shown; but might either appear by the express terms, or might be inferred from the circumstance that the will would otherwise be ineffectual (*Pomfret* v. *Perring*, 5 D. M. & G. 775; *Palmer* v. *Newell*, 20 Beav. 38). Powers of revocation in deeds.

Pomfret v. *Perring* (*sup.*), was the case of a special power of appointment, but the reasoning applied to general powers (*Re Brace*, *Welch* v.

1 Vict. c. 26, s. 27.

Colt, 1891, 2 Ch. 677). In another case a power of revocation reserved by deed was not exercised by a will dated before the deed, the date amounting to a contrary intention within sect. 24 (*Re Wells*, *Hardisty* v. *Wells*, 42 Ch. D. 646).

Revocation of testamentary appointments.

In the case of appointments by will a general clause of revocation in a later will revokes an appointment by an earlier will, unless it be entirely unreasonable that it should have that effect (*Sotheran* v. *Dening*, 20 Ch. Div. 99; *Harvey* v. *Harvey*, 32 L. T. 141; *Re Eustace*, L. R. 3 P. & M. 183; *Re Kingdon*, *Wilkins* v. *Pryer*, 32 Ch. D. 604). The old rule as to this was different (*Re Merritt*, 1 Sw. & Tr. 112; *Re Joys*, 4 Sw. & Tr. 214). A testamentary appointment may be revoked by a subsequent will containing dispositions inconsistent with the earlier will, and which does not refer thereto, but is expressed to be in exercise of all powers, &c. (*Re Tenney*, 45 L. T. 78); and even where not so expressed (*Re Gibbes*, *White* v. *Randolf*, 37 Ch. D. 143).

A devise without any words of limitation shall be construed to pass the fee.

28. Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will (*g*).

Rule as to wills prior to 1838.

(*g*) In wills prior to 1838, a devise of lands to a person without any words of limitation confers an estate for life only (Hawk. Wills, 130). The various cases in which such indefinite devises are enlarged to a fee simple are considered (2 Jarm. Wills, 268; Hawk. Wills, 131; and see *Lloyd* v. *Jackson*, L. R. 2 Q. B. 269; *Bolton* v. *Bolton*, L. R. 5 Ex. 145; *Pickwell* v. *Spencer*, L. R. 7 Ex. 105; *Re Harrison*, 5 Ch. 408; *Lander* v. *Elsmore*, 27 L. T. 603; *Re De la Hunt and Pennington*, 57 L. T. 874; *Yarrow* v. *Knightley*, 8 Ch. Div. 736). The mere fact of a devise, otherwise conferring an estate for life only, being to several persons to be divided equally among them, did not enlarge the interest to a fee (*Gatenby* v. *Morgan*, 1 Q. B. D. 685).

A devise, before 1838, of "rents and profits" to A. without words of limitation passes an estate for life: such a devise, since 1837, passes the fee (Hawk. Wills, 120; *Re Martin*, *Martin* v. *Martin*, 1892, W. N. 120). And a devise of the "income" of land also passes the fee (*Mannox* v. *Greener*, 14 Eq. 456).

Cases under this section.

A. being seised in fee of freeholds, by his will dated since this act, devised them to B. "to be kept in trust for C., that is, B. is to let the premises, and give the rent to my son C. for his support." Held, that C. took the absolute interest (*Malcolmson* v. *Malcolmson*, 17 L. T. O. S. 44). A testator, by his will dated in December, 1838, gave to his niece the house she lived in, and grass for a cow in Gill Field. Held, that she took an estate in fee simple in the house, and the right of pasture of a cow during her pleasure (*Reay* v. *Rawlinson*, 29 Beav. 88; conf. *Pym* v. *Harrison*, 32 L. T. 817, a case under the old law).

A testator devised his real estate to a devisee in fee charged with certain annuities or annual rent-charges to two annuitants; it was held, on a special case, that the annuitants took the annuities for life; and that this section of the act only applies to estates vested in or in the power of the testator, and not to estates or interests created *de novo* by his will (*Nicholls* v. *Hawkes*, 10 Hare, 342). As to the question whether an annuity given by will is perpetual or for life only, see Hawk. Wills, 125; Theobald, 366.

Lord *St. Leonards* considered that cases where, after the devise without any words of limitation, there are gifts over also without words of limitation, were not within the purview of the act, and that it would be dangerous to extend it to them (R. P. Stat. 382).

Contrary intention.

Where the particular devise is without words of limitation, a "contrary intention" that the fee shall not pass does not appear from the fact that in other parts of the will words of inheritance have been used (*Wieden* v.

Wisden, 2 Sm. & Giff. 396); nor from the fact of a power of appointment in favour of children and a husband being given to a married woman in a devise in her favour of copyholds to be her separate property (*Brook* v. *Brook*, 3 Sm. & G. 280). So, the fact that, in a devise to two persons, power was given to the devisees to sell their property for their life, followed by a direction that the survivor of the devisees should take the property given to the other, was no indication that such survivor should take a life interest only (*Chellew* v. *Martin*, 21 W. R. 671). 1 Vict. c. 26, s. 28.

A contrary intention, however, was collected from the circumstance, that by the same will an estate was subsequently given which could not come into existence unless the first devise was construed to be a life estate (*Gravenor* v. *Watkins*, L. R. 6 C. P. 500). And where a testator devised freeholds to several as joint tenants and to the survivor of them, his heirs and assigns, the latter words indicated a contrary intention within the section, so that the devisees took as joint tenants for life with a contingent remainder in fee to the survivor (*Quarm* v. *Quarm*, 1892, 1 Q. B. 184).

29. In any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue (*h*). The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

(*h*) In wills prior to 1838, the words "die without issue" and "die without having issue," in gifts both of real and personal estate, are construed to mean the death of the person spoken of and failure of his issue at the time of his death or at any time afterwards; unless the context shows the meaning to be confined to a failure of issue at the time of his death. The words "die without leaving issue" in devises of real estate are construed in the same way as the words "die without issue;" but in bequests of personalty they import a failure of issue at the death of the person spoken of (Hawk. Wills, 205, 213). Old rules of construction as to wills prior to 1838.

The various cases in which the words "die without issue," &c., occurring in old wills are restrained by the context to mean a failure of issue at the death of the person are considered in Hawk. Wills, 207; 2 Jarm. Wills, 509 *et seq.*; Theobald, 500 *et seq.* As to the effect of similar limitations occurring in a deed, see *Morgan* v. *Morgan* (10 Eq. 99); *Olivant* v. *Wright* (9 Ch. D. 646).

It was said, that the object of this section is to redress the inconvenience which had arisen from the words "dying without issue," and other similar words having acquired a legal meaning different from the popular meaning (*Greenway* v. *Greenway*, 1 Giff. 138). In the case of wills since 1837, words importing failure of issue have been held to mean failure of issue at the death (*Re Mid Kent Co.*, 11 W. R. 417; *Jarman* v. *Vye*, 2 Eq. 784; *Dowling* v. *Dowling*, 1 Ch. 612; see *Re Allen*, 3 Drew. 382, and *Upton* v. *Hardman*, 9 Eq. 157 (dying without male issue)). Cases under new law.

1 Vict. c. 26, s. 29.

The section does not touch the question whether any particular form of words shall import want or failure of issue during the life of the person spoken of, or a want or failure of issue at the time of his death; the only construction excluded by the section being an indefinite failure of issue. In some cases, to which this section has no application, gifts over upon death without leaving issue have been read as gifts over upon death without having had issue (*Treharne* v. *Layton*, L. R. 10 Q. B. 459; see *Re Ball*, *Slattery* v. *Ball*, 40 Ch. Div. 11).

Words importing failure of issue.

As this section is expressly confined to the word "issue," it makes no change in the meaning of the expression "die without heirs of the body" (*Re Sallery*, 11 Ir. Ch. R. 236; *Dawson* v. *Small*, 9 Ch. 651; *Harris* v. *Davis*, 1 Coll. 416, and the remarks on that case, 2 Jarm. 533; see *contra*, *Dodds* v. *Dodds*, 10 Ir. Ch. R. 476). Where a testator, by his will dated in 1840, devised real estate to his daughter "and her lawful heirs," "but in case she should not happen to have any child," then to his nephew and his heirs, it was held, that the daughter took a fee simple with an executory devise over to the nephew (*Mathews* v. *Gardiner*, 17 Beav. 254).

This section of the act has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one"; which additional words, upon the authority of decided cases, modify their meaning (*Morris* v. *Morris*, 17 Beav. 198).

Contrary intention.

It was doubted whether the words "unless a contrary intention shall appear by the will by reason of such person having a prior estate tail" applied to a gift of personalty, or are to be confined to a gift of real estate in which alone, properly speaking, there can be an estate tail (*Greenway* v. *Greenway*, 2 D. F. & J. 137). The words had been previously applied to a gift of personalty (*Green* v. *Green*, 3 De G. & Sm. 480; see also *Green* v. *Giles*, 5 Ir. Ch. 25; *Re O'Beirne*, 1 J. & Lat. 352).

Final proviso.

The operation of the section is limited by the final proviso. The cases in which words importing a failure of issue refer to the objects of a preceding gift are discussed 2 Jarm. Wills, 447 *et seq.*; Theobald, 495.

No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

30. Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication (*i*).

(*i*) See note to sect. 31.

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

31. Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied (*k*).

(*k*) In wills prior to 1838, where a testator devised lands to his executors for payment of his debts, or until his debts were paid, the executors only took an estate for so many years as were necessary to raise the sum required (Co. Litt. 42 a; 8 Rep. 96 a; 1 P. Wms. 509). It was the same

where an estate was devised till such time as a particular sum should be raised out of the rents and profits (*Cordell's case*, Cro. Eliz. 316; 1 P. Wms. 118; Co. Litt. 45 b; Com. Dig. Biens (A. 1). 1 Vict. c. 26, s. 31.

According to the old law, trustees under a devise to them and their heirs *primâ facie* took a fee; and that estate could not be cut down unless it could be pointed out on the face of the will what less estate they took (*Collier* v. *Walters*, 17 Eq. 261, 263; see also *Baker* v. *White*, 20 Eq. 174). The cases are collected Theobald, 324.

In wills since 1837 the result of the present act "is, that trustees whose estate is not expressly defined by the will must, in every case, *and whatever be the nature of the duty imposed on them*, take either an estate for life or an estate in fee" (2 Jarman, 321).

In wills since 1837 trustees have been held to take an estate in fee from having a power of leasing (*Re Eddel*, 11 Eq. 559), and a power of maintenance (*Berry* v. *Berry*, 7 Ch. D. 657), and from being directed to pay debts (*Marshall* v. *Gingell*, 21 Ch. D. 790).

Devises of estates tail shall not lapse.

32. Where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

33. Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*l*).

(*l*) As to the doctrine of lapse, see 1 Jarman, 338, 4th ed.; *Elliot* v. *Davenport*, Tudor, L. C. Conv.

Date of death of devisee or legatee.

The words "shall die" in this section refer to the period at which the act came into operation. Thus lapse was prevented by this section where the devisee or legatee died before the date of the will, but after the act came into operation (*Winter* v. *Winter*, 5 Hare, 306; *Mower* v. *Orr*, 7 Hare, 473; *Wisden* v. *Wisden*, 2 Sm. & G. 396; and see *Loxley* v. *Heath*, 27 Beav. 535); *secus*, where he died before the act came into operation (*Wild* v. *Reynolds*, 5 Not. Cas. 1; *Barkworth* v. *Young*, 4 Drew. 21).

This section was held to extend to a case where the issue of the legatee, who was alive at the date of the will, was not the same issue as was in existence when the legatee died (*Re Parker*, 1 Sw. & Tr. 523; but see Sugd. R. P. Stat. 393).

Subject of the gift becomes the absolute property of the predeceased devisee or legatee.

This section does not substitute for the predeceased devisee or legatee the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee, and therefore disposable by his will, notwithstanding his death in the lifetime of the testator (*Johnson* v. *Johnson*, 3 Hare, 157; *Re Mason*, 34 Beav. 494; *Pickersgill* v. *Rodger*, 5 Ch. D. 163). Probate duty was held to be payable in the same manner as if the legatee had survived the testator (*Perry* v. *Regina*, L. R. 4 Exch. 28).

The fictitious survivorship created by this section will not be extended beyond the limits necessary to carry out the purpose of the act. There-

1 Vict. c. 26, s. 33.

fore, where a married woman in whose settlement there was a covenant to settle property coming to her during the coverture, and to whom a legacy was left by her father's will, predeceased him, but by reason of her having issue, the legacy did not lapse; the legacy was not within the covenant (*Pearce* v. *Graham*, 32 L. J. Ch. 359). Where, however, after a bequest to a daughter, a testator directed that "in case she survived him" the legacy should be subject to the trusts of the daughter's settlement; and the daughter predeceased the testator, leaving issue; the legacy was ordered to be paid to the settlement trustees (*Re Hone*, 22 Ch. D. 663).

The gift is to take effect as if the beneficiary had died immediately after the testator. Accordingly where a married woman to whom a legacy was left by her father's will died in his lifetime leaving her husband surviving, who also died before the father, administration to the married woman's estate was granted as if she had died immediately after her father (*Re Councill*, L. R. 2 P. & M. 314). And where a married woman to whom freeholds were devised in fee by her father's will, died in his lifetime leaving her husband surviving, and also issue of her marriage, the husband was held entitled to an estate by the curtesy (*Eager* v. *Furnivall*, 17 Ch. D. 118). A child who was held to take under this section having devised to his father, the devise lapsed (*Re Hensler*, *Jones* v. *Hensler*, 19 Ch. D. 612).

This section renders it necessary for a testator intending that a legacy given to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will (*Re More*, 10 Hare, 178). Where a testator gave a legacy to his daughter, with a gift over, in the event of her dying unmarried, to such of his other children as she should appoint, and in default of appointment to his other children equally, and the daughter died in the testator's lifetime, unmarried, and without having exercised the power of appointment: it was held, that the legacy had not lapsed, and that one of the other children was entitled to a share (*Kellett* v. *Kellett*, I. R. 5 Eq. 298).

Section does not apply to gifts to a class.

The section applies wherever the words of the will amount to a gift to children as *personæ designatæ* (*Stansfield* v. *Stansfield*, 15 Ch. D. 84). As to the application of the section to a gift to "my surviving children," see *Fullford* v. *Fullford* (16 Beav. 565). The intention of the legislature was to provide against lapse merely, and not to alter the construction to be put on any will. On arriving at the conclusion that there would have been a lapse, then the statute applies, not otherwise. This section does not apply to the case of a gift to a class, for according to the rule before the act, under a gift to children as a class, the share to which a surviving child would have been entitled did not lapse in consequence of his death in the testator's lifetime (*Olney* v. *Bates*, 3 Drew. 323; *Browne* v. *Hammond*, Johns. 215; *Re Jackson*, *Shiers* v. *Ashworth*, 25 Ch. D. 164).

Gifts in exercise of powers.

This section applies to a testamentary appointment made under a general power (*Eccles* v. *Cheyne*, 2 K. & J. 676), but not under a special power (*Griffiths* v. *Gale*, 12 Sim. 354; *Freeland* v. *Pearson*, 3 Eq. 663; *Holyland* v. *Lewin*, 26 Ch. Div. 266).

Act not to extend to wills made before 1838, nor to estates *pur autre vie* of persons who die before 1838.

34. This act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and this act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight (*m*).

Revocation of wills prior to 1838 by acts since 1837.

(*m*) The provisions of the statute as to the operation of a will and of the gifts in it do not apply to wills prior to 1838 (*Langford* v. *Little*, 2 J. & Lat. 633; see *Randfield* v. *Randfield*, 9 W. R. 1); but with respect to

the revocation of wills prior to 1838, acts of revocation done subsequently to 1837 must be considered with reference to the statute (*Hobbs* v. *Knight*, 1 Curt. 768; *Benson* v. *Benson*, L. R. 2 P. & M. 172). 1 Vict. c. 26, s. 34.

Formerly wills of personalty might be republished by parol acts or declarations of the testator; and republication made a will speak from the date at which it was republished (1 Wms. Exors. 209, 220, 8th ed.) But since this statute nothing short of a re-execution of a will itself, or the formal execution under the act of some document which directly or impliedly affirms it, can confer new or further testamentary validity upon it beyond that which it derived from its original execution (*Noble* v. *Phelps*, L. R. 2 P. & M. 282; and see *Rolfe* v. *Perry*, 3 D. J. & S. 481). Republication.

Under this section the effect of the re-execution of the will by the codicil is the same as if the testator had at the date of the codicil made a will in the words of the will so re-executed (*Winter* v. *Winter*, 5 Hare, 306; *Anderson* v. *Anderson*, 13 Eq. 381). A codicil made after the act to a will made before the act was held to have the effect of bringing a bequest in the will to a deceased daughter under the 33rd section of this act (*Skinner* v. *Ogle*, 1 Rob. 363); and in another case to bring within the operation of the will lands acquired subsequently to the date of the codicil (*Langdale* v. *Briggs*, 3 Sm. & G. 246). The confirmation, however, of a will by codicil does not revive a legacy adeemed in the interval between the will and the codicil (*Montague* v. *Montague*, 15 Beav. 565; see *Sidney* v. *Sidney*, 17 Eq. 65). Will re-executed by codicil.

Words of confirmation in a codicil were held to amount to a republication of the will as of the date of the codicil (*Re Champion*, *Dudley* v. *Champion*, 1892, W. N. 125). A subsequent testamentary instrument which did not refer to a will did not amount to republication (*Re Smith*, *Bilke* v. *Roper*, 45 Ch. D. 632). A codicil which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil (*Burton* v. *Newbery*, 1 Ch. D. 234).

35. This act shall not extend to Scotland (*n*). Act not to extend to Scotland.

(*n*) As to the adoption of this act in the colonies, see 4 Davidson, Conv. 350, n; Hayes & Jarm. Wills, 59, 7th ed.

THE WILLS ACT AMENDMENT ACT, 1852.

15 & 16 VICTORIÆ, CAP. 24.

An Act for the Amendment of an Act passed in the First Year of the Reign of Her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills." [17th June, 1852.]

WHEREAS the laws with respect to the execution of wills require further amendment: be it therefore enacted as follows: 15 & 16 Vict. c. 24, s. 1.

1. Where by an act passed in the first year of the reign of her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills," it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, 1 Vict. c. 26.

15 & 16 Vict. c. 24, s. 1.

When signature to a will shall be deemed valid.

and by his direction (*a*): every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at or after, or following, or under, or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (*b*), and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature (*c*), or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation (*d*), or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses (*e*), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made (*f*).

See note (a), 1852 Vict.

(*a*) 1 Vict. c. 26, s. 9, *ante*, p. 407; where see note.

Signature placed on paper wafered to will.

A will was held to be duly executed where the signatures of the testator and the attesting witnesses were written on a separate piece of paper, which had been previously wafered to the foot of the will (*Cook* v. *Lambert*, 11 W. R. 401; *Re Horsford*, L. R. 3 P. & M. 211). But there must be evidence that the paper was so attached at the time of signature (*Re West*, 12 W. R. 89).

(*b*) Where the signature was at the end of a notarial minute, which immediately followed the will, it was held, that such a signature was a compliance with this statute (*Page* v. *Donovan*, 3 Jur. N. S. 220). Signatures placed beside or opposite to the end of the will have been held good (*Re Wright*, 4 Sw. & Tr. 35; *Re Jones*, 13 W. R. 414; *Re Williams*, L. R. 1 P. & M. 4; *Re Coombs*, *ib.* 302; *Re Stokes*, 31 L. T. 552).

Where a testator signed the first five sheets of a will, but omitted to sign the sixth, which was the last, and the attesting witnesses signed all six sheets, no part of the will was admitted to probate (*Sweetland* v. *Sweetland*, 13 W. R. 504; *Re Dilkes*, L. R. 3 P. & M. 164). So where the testator's mark was placed in the middle of the writing (*Margary* v. *Robinson*, 12 P. D. 8).

Blanks.

(*c*) Wills have been held duly executed where blank spaces were left after the concluding words (*Hunt* v. *Hunt*, L. R. 1 P. & M. 209; *Re Archer*, L. R. 2 P. & M. 252).

(*d*) A. wrote his will, concluding with an attestation clause, in which his name appeared. He afterwards called in two witnesses, told them the paper was his will, read the latter portion of it to them, including the attestation, and requested that they would sign their names, which they did; the execution was valid (*Re Walker*, 2 Sw. & Tr. 354; see *Smith* v. *Smith*, L. R. 1 P. & M. 143; *Re Casmore*, *ib.* 653; *Re Harris*, 23 W. R. 734; *Re Pearn*, 1 P. D. 70). Signature in attestation clause.

(*e*) Probate was granted in a case in which the signature of the testator occurred beneath that of the witnesses (*Re Jones*, 1877, W. N. 10).

(*f*) Words written underneath and following the signature of the testator have been included in the probate (*Re Brompton*, 33 L. J. Prob. 153; *Re Woodley*, *ib.* 154; *Re Powell*, 13 W. R. 696; *Re Ainsworth*, L. R. 2 P. & M. 151; *Re Birt*, *ib.* 214), but a clause written underneath the signature, although before execution, has been excluded (*Re Greator*, 2 Jur. N. S. 1172; *Re Dallow*, L. R. 1 P. & M. 189; *Re Dearle*, 39 L. T. 93). As also a clause added by testator after signing his name (*Re Arthur*, L. R. 2 P. & M. 273). In one case the first side of a sheet of paper, where the signature occurred, was held to be the last side (*Re Wotton*, L. R. 3 P. & M. 159). Words following signature, inserted after signing.

2. The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the ecclesiastical courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will. Act to extend to certain wills already made.

3. The word "will" shall in the construction of this act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said act of the first year of the reign of her Majesty Queen Victoria (*g*). Interpretation of "will."

(*g*) 1 Vict. c. 26, s. 1, *ante*, p. 399.

4. This act may be cited as "The Wills Act Amendment Act, 1852." Short title of act.

WILLS OF PERSONALTY BY BRITISH SUBJECTS.

24 & 25 Victoriæ, cap. 114.

An Act to Amend the Law with respect to Wills of Personal Estate made by British Subjects. [6th August, 1861.]

24 & 25 Vict. c. 114, s. 1.

Be it enacted by, &c., as follows:

Wills made out of the kingdom to be admitted if made according to the law of the place where made.

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin (*a*).

(*a*) Before this act, a will must have been executed according to the law of the country where the testator was domiciled at the time of his death (1 Wms. Exors. 366). And a will so executed, though not falling within sect. 1, will still be good under sect. 4. As to what documents an English Court will look in construing a French will, see *Re Cliffe*, 1892, 2 Ch. 229.

A will in English form made in France by a British subject is well executed according to French law, and will therefore be admitted to probate in England under the first condition in this section (*Re Lacroix*, 2 P. D. 94; see *Milnes* v. *Foden*, 15 P. D. 105); but the act was held not to apply to the case of a naturalized alien where the letters of naturalization excepted the rights of a native born British subject out of the British dominions (*Re Carlo Gatti*, 39 L. T. 639).

When a British subject dies abroad after the passing of this act, leaving a will executed in England, in accordance with the law of England, upon motion for probate it is not necessary to consider whether he had or had not acquired a foreign domicil (*Re Rippon*, 3 Sw. & Tr. 177).

With regard to domicile it has been held, independently of this act, that a will in execution of a power is valid if made in accordance with the law of the testator's domicile at the date of the will (*Re Alexander*, 29 L. J. Prob. 93; see *Milnes* v. *Foden*, 15 P. D. 107); or at the date of his death (*D'Huart* v. *Harkness*, 34 Beav. 324). See also note to sect. 10 of Wills Act, *ante*, p. 411.

A will in execution of a power may be entitled to probate under this act, and yet by reason of its not being executed in accordance with the Wills Act (sect. 9) may be invalid as a testamentary exercise of the power (*Re Kirwan*, 25 Ch. D. 373).

This act does not extend to the case of a will in English form executed abroad by an alien; and in spite of the Naturalization Act, 1870, such a will cannot be admitted to probate, even where the testator's domicile of origin was English (*Bloxam* v. *Favre*, 9 P. Div. 130).

In determining what papers are testamentary under this act the court will have regard to the law of one country only (*Pechell* v. *Hilderley*, L. R. 1 P. & M. 673).

Probate is conclusive that an instrument is testamentary, but does not

determine the validity of the dispositions contained in it (*Whicker* v. *Hume*, 7 H. L. C. 124). It seems, therefore, that this act leaves the extent of the power of testamentary disposition over personal property in England to be determined by the law of the testator's domicile at his death, except in cases within sect. 3 (4 Davidson, Conv. 349, n.) 24 & 25 Vict. c. 114, s. 1.

In the case of a will of English leaseholds, questions as to the validity of the gifts are determined according to English law (*Freke* v. *Carbery*, 16 Eq. 461; see *Duncan* v. *Lawson*, 41 Ch. D. 394); but so far as regards the formality of execution, there seems to be no reason why such a will should not fall within this section.

See further as to this statute, Sugd. R. P. Stat. 398 *et seq.*; Hayes & Jarm. Wills, 539 *et seq.*, 7th ed.

Wills made in the kingdom to be admitted if made according to local usage.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made (*b*).

(*b*) Sect. 2 applies as well to a naturalized British subject as to a British subject by birth (*Re Gally*, 1 P. D. 438).

Change of domicile not to invalidate will.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same (*c*).

(*c*) Probate was granted of a will made by a domiciled Scotchman who subsequently acquired an English domicile (*Re Reid*, L. R. 1 P. & M. 74).

This section appears to mean not merely that the will is to remain a valid instrument, notwithstanding a change of domicile, but that as to property within the United Kingdom its operation is not to be curtailed (4 Davidson, Conv. 349, n.)

Nothing in this act to invalidate wills otherwise made.

4. Nothing in this act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this act.

Extent of act.

5. This act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this act.

WILLS AND DOMICILE OF BRITISH SUBJECTS ABROAD, &c.

24 & 25 VICTORIÆ, CAP. 121.

An Act to amend the Law in relation to the Wills and Domicile of British Subjects dying whilst resident abroad, and of Foreign Subjects dying whilst resident within her Majesty's Dominions.

[6th August, 1861.]

24 & 25 Vict. c. 121, s. 1.

WHEREAS by reason of the present law of domicile the wills of British subjects dying whilst resident abroad are often defeated, and their personal property administered in a manner contrary to their expectations and belief; and it is desirable to amend such law, but the same cannot be effectually done without the consent and concurrence of foreign states: be it therefore enacted by, &c., as follows:

No British subject dying in a foreign country to be deemed to have acquired a domicile unless resident there for one year immediately preceding his or her death, &c., and for all purposes of testate or intestate succession shall retain the domicile possessed at the time of going to reside in such foreign country.

1. Whenever her Majesty shall by convention with any foreign state agree that provisions to the effect of the enactments herein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty by any order in council to direct, and it is hereby enacted, that from and after the publication of such order in the London Gazette no British subject resident at the time of his or her death in the foreign country named in such order shall be deemed under any circumstances to have acquired a domicile in such country unless such British subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the order in council) a declaration in writing of his or her intention to become domiciled in such foreign country; and every British subject dying resident in such foreign country, but without having so resided and made such declaration as aforesaid, shall be deemed for all purposes of testate or intestate succession as to moveables to retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid (*a*).

(*a*) It is believed that no such convention has yet been agreed to. See further, as to the probable operation of the act, Hayes & Jarm. Wills, 540, 7th ed.; Sugd. R. P. Stat. 398.

No foreign subject dying in Great Britain or Ireland to be

2. After any such convention as aforesaid shall have been entered into by her Majesty with any foreign state it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette

it shall be and is hereby enacted, that no subject of any such foreign country who at the time of his or her death shall be resident in any part of Great Britain or Ireland shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident within Great Britain or Ireland for one year immediately preceding his or her decease, and shall also have signed, and deposited with her Majesty's secretary of state for the home department, a declaration in writing of his or her desire to become and be domiciled in England, Scotland or Ireland, and that the law of the place of such domicile shall regulate his or her moveable succession.

24 & 25 Vict. c. 121, s. 2.

deemed to have acquired a domicile unless resident therein for one year immediately preceding his or her death, &c.

3. This act shall not apply to any foreigners who may have obtained letters of naturalization in any part of her Majesty's dominions.

Who this act shall not apply to.

4. Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign state within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul, or consular agent, shall immediately apply for and shall be entitled to obtain from the proper court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such court shall seem fit (*b*).

When subjects of foreign states shall die in her Majesty's dominions, and there shall be no persons to administer to their estates, the consuls of such foreign states may administer.

(*b*) As to administration of property in England belonging to a person domiciled out of this country, see 1 Wms. Exors. 436, 8th ed.; *Re Dost Aly Khan* (6 P. D. 6).

APPORTIONMENT OF RENTS AND PERIODICAL PAYMENTS.

33 & 34 Victoriæ, cap. 35.

An Act for the better Apportionment of Rents and other Periodical Payments. [1st August, 1870.]

33 & 34 Vict. c. 35, s. 1.

Whereas rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising divers statutes have been passed in the eleventh year of the reign of his late Majesty King George the Second (chapter nineteen), and in the session of Parliament holden in the fourth and fifth years of his late Majesty King William the Fourth (chapter twenty-two), and in the session of Parliament held in the sixth and seventh years of his late Majesty King William the Fourth (chapter seventy-one), and in the session of Parliament held in the fourteenth and fifteenth years of her present Majesty (chapter twenty-five), and in the session of Parliament held in the twenty-third and twenty-fourth years of her present Majesty (chapter one hundred and fifty-four):

And whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences:

Be it therefore enacted as follows:

Short title.

1. This act may be cited for all purposes as "The Apportionment Act, 1870."

Rents and periodical payments shall accrue from day to day and be apportionable in respect of time.

2. From and after the passing of this act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly (*a*).

(*a*) As to questions of apportionment arising before 1st August, 1870, see the act 4 & 5 Will. 4, c. 22; Shelford's R. P. Stat. 8th ed., 542.

The question frequently raised under the old law whether such a determination of the interest had occurred as would give rise to an apportionment (see *Shipperdson* v. *Tower*, 8 Jur. 485) cannot arise under the Act of 1870 (*Clive* v. *Clive*, 7 Ch. 433).

Application of act,

Where the event on which apportionment is claimed occurs after the passing of the act, the act applies whether the instrument comes into

operation before or after the act (*Lawrence* v. *Lawrence*, 26 Ch. D. 795; following *Re Cline*, 18 Eq. 213; see *Patching* v. *Barnett*, 43 L. T. 50; *Re Thacker*, 1873, W. N. 10). 33 & 34 Vict. c. 35, s. 2.

The act applies as between the estate of a testator and a person claiming under a specific gift of real estate (*Hasluck* v. *Pedley*, 19 Eq. 271; *Constable* v. *Constable*, 11 Ch. D. 681) and of personal estate (*Re Griffith, Carr* v. *Griffith*, 12 Ch. D. 655; *Pollock* v. *Pollock*, 18 Eq. 329; correcting *Whitehead* v. *Whitehead*, 16 Eq. 528). Similarly the act applies between tenant for life and remainderman (*Re Cline*, 18 Eq. 213; *Pollock* v. *Pollock*, *ib.* 329).

as between vendor and purchaser;

As between vendor and purchaser the words of sect. 2 seem wide enough to give rise to an apportionment of rent when not provided for by the contract. See, however, *Re Keillor* (I. R. 6 Eq. 329), where a purchaser of land was held liable to all rent payable after the purchase; and *Black* v. *Homersham* (4 Ex. D. 24), where a purchaser of shares was held entitled to all dividends declared after the contract (See further Dart, V. & P. 6th ed. 915).

It was held under the old law that the legal operation of a conveyance of land in the occupation of a tenant was to vest in the purchaser all the vendor's interest in rents not due at the date of conveyance (*Flinn* v. *Calow*, 1 Man & G. 589).

Where a condition on a sale of leaseholds provided that the purchaser should have possession on a certain day, all outgoings up to that day being cleared by the vendors, the vendors were held bound to pay an apportioned part of the current rent (*Lawes* v. *Gibson*, 1 Eq. 135).

as between landlord and tenant.

As between landlord and tenant, where, during a quarter, a succession of interest occurs in the reversion, the case falls within the proviso at the end of sect. 4, and only one action can be brought for the entire rent. But where the succession occurs among the persons entitled to the term, the reversioner can sue each person liable for his proportion of rent (*Swansea Bank* v. *Thomas*, 4 Ex. D. 94). The act has not altered the date at which the rent becomes due (*United Club Co.*, 60 L. T. 665; see sect. 3).

Payments apportionable.

Under this act an apportionment has been made of rents (*Capron* v. *Capron*, 17 Eq. 288; *Roseingrave* v. *Burke*, I. R. 7 Eq. 186; see *South Kensington Co-operative Stores*, 17 Ch. D. 161); dividends on stock (*Pollock* v. *Pollock*, 18 Eq. 329); an occasional bonus on shares in an unincorporated life assurance society which was held to be a public company within sect. 5 (*Re Griffith, Carr* v. *Griffith*, 12 Ch. D. 655); a salary (*Treacy* v. *Corcoran*, I. R. 8 C. L. 40); but not of profits arising from a newspaper (*Re Cox*, 9 Ch. D. 159); nor of the profits of a private trading partnership (*Jones* v. *Ogle*, 8 Ch. 192); nor of parish rates (*Re Wearmouth Co.*, 19 Ch. D. 640).

In the case of an annuity charged on the estate of a tenant for life and secured by a term, it was held under the old law that unless the annuitant had entered into possession he was not entitled to claim arrears of his annuity out of the apportioned rents belonging to the tenant for life's estate (*Paget* v. *Anglesey*, 17 Eq. 283).

The right specially conferred by 14 & 15 Vict. c. 25, s. 1, upon a remainderman to an apportioned part of the rent under a lease granted by a tenant for life seems now to belong to him under the general provisions of this act.

No apportionment of income will be made as between tenant for life and remainderman with reference to the variation in price of stock arising from the distance of a period of sale or investment from the last payment of dividend (*Scholefield* v. *Redfern*, 2 Dr. & Sm. 173; *Freeman* v. *Whitbred*, 1 Eq. 266; see *Re Clarke, Barker* v. *Perowne*, 18 Ch. D. 160).

The apportionment contemplated by the above act is one in respect of time. As to the apportionment (in a different sense) of rent-service and rent-charges in certain cases, see 22 & 23 Vict. c. 35, ss. 3, 10, *post*; and with respect to leases granted after the 31st of December, 1881, see Conv. Act, 1881, s. 12, *post*.

33 & 34 Vict. c. 35, s. 3.

Apportioned part of rent, &c. shall be payable when the next entire portion shall have become due.

3. The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before.

Persons shall have the same remedies for recovering apportioned parts as for entire portions.

4. All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this act to the same by action at law or suit in equity (*b*).

Proviso as to rents reserved in certain cases.

(*b*) See *Swansea Bank* v. *Thomas*, 4 Ex. D. 94, *ante*, p. 443.

Interpretation of terms.

5. In the construction of this act—

The word "rents" includes rent-service, rent-charge, and rent-seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe.

The word "annuities" includes salaries and pensions.

The word "dividends" includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies (*c*), divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made (*d*), but the said word "dividend" does not include payments in the nature of a return or reimbursement of capital.

(*c*) See *Jones* v. *Ogle* (8 Ch. 192); *Re Griffith, Carr* v. *Griffith* (12 Ch. D. 655) 33 & 34 Vict. c. 35, s. 5.

(*d*) It was held under the old law that for the purpose of apportionment a dividend was to be taken as payable on the day on which it was actually payable, and not on the day on which it was declared (*Hartley* v. *Allen*, 27 L. J. Ch. 621).

6. Nothing in this act contained shall render apportionable any annual sums made payable in policies of assurance of any description. Act not to apply to policies of assurance;

7. The provisions of this act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place (*e*). nor where stipulation made to the contrary.

(*e*) It was held under the similar words of sect. 3 of 4 & 5 Will. 4, c. 22, that inference from the whole tenor and context of the will was not sufficient to exclude the operation of the act (*Tyrrell* v. *Clark*, 2 Drew. 86).

ENACTMENTS RELATIVE TO JUDGMENTS AFFECTING REAL AND PERSONAL PROPERTY,

CONTAINED IN THE 1 & 2 VICT. c. 110; 2 & 3 VICT. c. 11; 3 & 4 VICT. c. 82; 18 & 19 VICT. c. 15; 23 & 24 VICT. c. 38, ss. 1—5; 27 & 28 VICT. c. 112; 32 & 33 VICT. c. 62, ss. 24—28; 51 & 52 VICT. c. 51.

1 & 2 VICTORIÆ, CAP. 110.

An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England. [16th August, 1838.]

WRIT OF ELEGIT.

1 & 2 Vict. c. 110, s. 11.

Sheriff empowered to deliver execution of lands to judgment creditor.

11. And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law: be it therefore further enacted, that it shall be lawful for the sheriff or other officer to whom any writ of elegit, or any precept in pursuance thereof, shall be directed at the suit of any person upon any judgment, which at the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty's superior courts at Westminster, to take and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might without the assent of any other

person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, tenements, rectories, tithes, rents and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a court of equity: provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform and render to the lord of the manor or other person entitled all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform and render, in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: [*provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this act had not passed*] (*d*).

1 & 2 Vict. c. 110, s. 11.

Proviso as to copyhold lands.

Proviso as to purchasers, mortgagees and creditors.

The words in italics have been repealed by 37 & 38 Vict. c. 96.

(*d*) Before this act the writ of elegit (which was founded on 13 Edw. 1, c. 18, the Statute of Westminster), affected only one moiety of the judgment debtor's lands. This section, however, has extended the remedy of the judgment creditor to the *whole* of the debtor's lands. The section expressly includes (1) copyholds which were not subject to execution under the old law (See *ante*, p. 385). (2) Rectories and tithes, which however are not ecclesiastical but lay (*Hawkins* v. *Gathercole*, 6 D. M. & G. 24; *Bates* v. *Brothers*, 2 Sm. & G. 509; *Sweeny* v. *Fleming*, 14 Ir. Ch. R. 23). (3) Land over which the debtor has a disposing power, as to which see the note to sect. 13 (*post*, p. 453). (4) Land held in trust for the debtor (As to this see before the act 29 Car. 2, c. 3, s. 10; *Hunt* v. *Coles*, 1 Comyns, 226; *Steele* v. *Phillips*, Beatty, 193; *Hickson* v. *Aylward*, 3 Molloy, 25). The present section did not change the nature of the trust estates which might be taken under an elegit, and the old authorities apply (*Re Newcastle*, 8 Eq. 705; *Digby* v. *Irvine*, 6 Ir. Eq. R. 155). According to these authorities it was held that the trust must be a clear and simple trust for the debtor only (*Doe* v. *Greenhill*, 4 B. & Ald. 684; *Forth* v. *Norfolk*, 4 Madd. 503; *Harris* v. *Booker*, 4 Bing. 96). A term held on trust to attend the inheritance might be taken (*Doe* v. *Evans*, 1 C. & M. 450); but with regard to a particular equitable interest in leaseholds it was said that it could not be taken (*Re Newcastle*, 8 Eq. 706). An equity of redemption cannot be taken either in freeholds (*Beckett* v. *Buckley*, 17 Eq. 435; *Wells* v. *Kilpin*, 18 Eq. 298; *Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 282; *Plunket* v. *Penson*, 2 Atk. 290; see *Thornton* v. *Finch*, 4 Giff. 515), or in leaseholds (*Salt* v. *Cooper*, 16 Ch. D. 544).

What may be taken under an elegit.

The following interests in land may, according to decided cases, be taken under an elegit:—An estate tail (*Ashburnham* v. *St. John*, Cro. Jac. 85; Gilb. Exec. 106; see *Lewis* v. *Duncombe*, 20 Beav. 398). An estate for

1 & 2 Vict. c. 110, s. 11.

life, even in land excluded from a power of leasing (*Davis* v. *Marlborough*, 2 Swans. 121). The estate of a joint tenant (*Lord Abergavenny's case*, 6 Rep. 78 b; 2 Cru. Dig. 376), or of a tenant in common or a coparcener (2 Cru. Dig. 54). A reversion expectant on a lease for years or lives (*Bishop of Bristol*, 3 Leon, 113; *R.* v. *Lane*, 6 M. & W. 489; *Re South*, 9 Ch. 373). In the last-mentioned case the creditor to whom the land has been delivered cannot eject the tenants (*Doe* v. *Wharton*, 8 T. R. 2); but may sue (*Hatton* v. *Haywood*, 9 Ch. 236; *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565), or distrain (*Lloyd* v. *Davies*, 2 Ex. 103), for rent falling due after the inquisition (*Sharp* v. *Key*, 8 M. & W. 379); and this without attornment by the tenants (*Lloyd* v. *Davies*, *sup.*; *Rogers* v. *Pitcher*, 6 Taunt. 207). As to a reversion expectant on a mortgage for a term of years, see *Poole* v. *Whitt* (15 M. & W. 571); *Plunket* v. *Penson* (2 Atk. 293). Leaseholds may be taken (*Re Hobson*, 33 Ch. D. 493; *Carter* v. *Hughes*, 2 H. & N. 714; *Fleetwood's case*, 8 Rep. 171), notwithstanding the Bankruptcy Act, 1883, s. 146 (*Richardson* v. *Webb*, 1 Morrell, 40). Land in ancient demesne (*Cox* v. *Barnsley*, Hob. 47; *Martin* v. *Wilks*, Moore, 211). A rent-charge (Moore, 32; see *Wooton* v. *Shirt*, Cro. Eliz. 742). Land belonging to a railway company; whether surplus (*Re Hull & Barnsley R. Co.*, 40 Ch. D. 119), or that on which the line, &c., is built (*Re Cowbridge R. Co.*, 5 Eq. 413). Land held by a public body for a public purpose (*Worrall Waterworks Co.* v. *Lloyd*, L. R. 1 C. P. 719; see, however, *Jersey* v. *Uxbridge Authority*, 1891, 3 Ch. 183). Land subject to an equitable mortgage (*Whitworth* v. *Gaugain*, 1 Phil. 728; *Brunton* v. *Neale*, 14 L. J. Ch. 8). Land of which a receiver has been appointed (*Gooch* v. *Haworth*, 3 Beav. 428); but the leave of the court must be obtained (*Bowen* v. *Brecon R. Co.*, 3 Eq. 541).

What may not be taken.

The following interests in land cannot be taken under an elegit. An equity of redemption either in freeholds or leaseholds (*ante*, p. 447). Land of which the debtor was mortgagee, but which has become vested by conveyance in a purchaser or mortgagee for valuable consideration, the vendor's mortgage being paid off then or previously (18 & 19 Vict. c. 15, s. 11; see *Avison* v. *Holmes*, 1 J. & H. 544; *Greaves* v. *Wilson*, 25 Beav. 434). An interest in remainder (*Re South*, 9 Ch. 369; *Re Hamilton*, 31 Ch. Div. 294). Land comprised in a prior voluntary conveyance (*Beavan* v. *Oxford*, 6 D. M. & G. 529). The interest of a debtor in land which has already been taken under an elegit (*Carter* v. *Hughes*, 2 H. & N. 714). A rent-seck (*Walsall* v. *Heath*, Cro. Eliz. 656). An inalienable office (*Anon.*, Dyer, 7). Glebe or a churchyard (*Arbuckle* v. *Cowtan*, 3 Bos. & P. 327; *Parry* v. *Jones*, 1 C. B. N. S. 345). As to an advowson, see *Robinson* v. *Tongue* (3 P. Wms. 401).

The goods and chattels personal of a debtor cannot now be taken under an elegit (46 & 47 Vict. c. 52, ss. 146, 168).

Inquisition.

In an inquisition on an *elegit* taken since this act, it is not necessary to set out the land by metes and bounds; it is sufficient to describe it in such a manner as would be sufficient to identify it in a conveyance (*Doe* v. *Parry*, 13 M. & W. 356).

Beneficed clerk.

Where the judgment debtor is a beneficed clerk, and has no lay fee in the bailiwick of the sheriff to whom the writ was directed, the creditor may, as soon as the return is filed, sue out one or more writs of *fieri facias de bonis ecclesiasticis*, or of sequestration (R. S. C. Ord. 43, rr. 3, 4, 5).

Sheriff's poundage.

As to a sheriff's poundage, see 29 Eliz. c. 4, s. 1; 3 Geo. 1, c. 15, s. 16; 8 Geo. 1, c. 25, s. 5; 1 Vict. c. 55; and 50 & 51 Vict. c. 55, ss. 20, 29; *Nash* v. *Allen*, 4 Q. B. 784; *Pilkington* v. *Cooke*, 16 M. & W. 615; *Marshall* v. *Hicks*, 10 Q. B. 15; *Lee* v. *Dangar*, 1892, 1 Q. B. 231; 1892, W. N. 71; *Shoppee* v. *Nathan*, 1892, 1 Q. B. 245; *Woolford* v. *Levy*, *ib.* p. 772.

As to the present form of the writ of elegit, see R. S. C. App. H., No. 3.

Writ of Fieri Facias.

1 & 2 Vict. c. 110, s. 12.

Sheriff empowered to seize money, bank notes, &c., and to pay money or bank notes to execution creditors, and to sue for amount secured by bills of exchange and other securities.

12. By virtue of any writ of fieri facias to be sued out of any superior or inferior court, [*after the time appointed for the commencement of this act*,] or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes (whether of the Governor and Company of the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the person against whose effects such writ of fieri facias shall be sued out; and may and shall pay or deliver to the party suing out such execution, any money or bank notes, which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, as a security or securities for the amount by such writ of fieri facias directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and that the payment to such sheriff or other officer, by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued; provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action (*e*).

Proviso as to indemnity of sheriff.

(*e*) The words in *italics* have been repealed by 37 & 38 Vict. c. 96.

Effect of section.

The effect of this section is, to place bank notes and money seized under a *fi. fa.* upon the same footing as goods; therefore they are not to be treated as the property of the execution creditor until handed over by the sheriff to him (*Collingridge* v. *Paxton*, 11 C. B. 683), and are not available

1 & 2 Vict. c. 110, s. 12.

in the sheriff's hands to satisfy a writ of *fi. fa.* lodged with him against such execution creditor at the suit of a third person (*Ib.*)

Cases under this section.

This section does not extend to a debt owing to the judgment debtor (*Helmore* v. *Smith*, 35 Ch. Div. 447; *Harrison* v. *Paynter*, 6 M. & W. 387; *Alleyn* v. *Darcy*, 5 Ir. Ch. R. 56); or to money in the hands of a third party in trust for him (*Robinson* v. *Peace*, 7 Dowl. P. C. 93; *Fieldhouse* v. *Croft*, 4 East, 510), as in the hands of a sheriff (*Collingridge* v. *Paxton*, 11 C. B. 683; see *Harrison* v. *Paynter*, 6 M. & W. 387; *Masters* v. *Stanley*, 8 Dowl. P. C. 169), unless the sheriff has appropriated it for the debtor (*Wood* v. *Wood*, 4 Q. B. 397). A charging order has, however, been made on cash in court to assist an execution on a *fi. fa.* (*Brereton* v. *Edwards*, 21 Q. B. Div. 488; but see *France* v. *Campbell*, 9 Dowl. P. C. 914); and leave has been given to seize a cheque drawn in favour of the debtor by the Accountant General, but not delivered to him (*Watts* v. *Jeffreys*, 3 Mac. & G. 422; see *Courtoy* v. *Vincent*, 15 Beav. 486). It has been said that this section applies only to securities of a similar nature to those expressly mentioned (*Rollason* v. *Rollason*, 34 Ch. D. 496). Policies of assurance, however, have been held within it (*Stokoe* v. *Cowan*, 29 Beav. 637; see *contra*, *Re Sargent*, 7 L. R. Ir. 66), also the covenant to pay in a mortgage (*Avison* v. *Holmes*, 1 J. & H. 530).

Fieri facias generally.

What may be taken.

Independently of this section, the sheriff can, under a *fi. fa.*, seize all goods and chattels belonging to the debtor, including, in particular, the following: (1) Terms of years and leaseholds (*Fleetwood's case*, 8 Rep. 171; *Doe* v. *Smith*, 1 M. & R. 137; *Taylor* v. *Cole*, 3 T. R. 292; *Doe* v. *Donston*, 1 B. & Ald. 230); which may be sold without seizing or taking possession of either the indenture of lease or the property (*Coleman* v. *Rawlinson*, 1 F. & F. 330). The term remains in the debtor until assignment by the sheriff (*Playfair* v. *Musgrove*, 14 M. & W. 239; *Giles* v. *Grover*, 9 Bing. 128; *Doe* v. *Jones*, 9 M. & W. 372), which must be by deed (8 & 9 Vict. c. 106, s. 3); and the tenants in possession cannot be turned out by the sheriff (*R.* v. *Deane*, 2 Show. 85; see *Taylor* v. *Cole*, 3 T. R. 292; *Burden* v. *Kennedy*, 3 Atk. 739; *Doe* v. *Brawn*, 5 B. & Ald. 243). (2) A rent-charge (*York* v. *Twiner*, Cro. Jac. 78). (3) Growing crops (*Re Woodham*, 20 Q. B. D. 40; *Gwilliam* v. *Barker*, 1 Price, 274; see 14 & 15 Vict. c. 25, s. 2). (4) Fixtures which the debtor can remove as against his landlord (*Place* v. *Flagg*, 4 M. & R. 277; *Winn* v. *Ingleby*, 5 B. & Ald. 625; *Pitt* v. *Shew*, 4 B. & Ald. 206; *Evans* v. *Roberts*, 5 B. & C. 841; see *Dumergue* v. *Rumsey*, 2 H. & C. 777). (5) Ships or shares in ships (*Harley* v. *Harley*, 11 Ir. Ch. R. 451; *Dickinson* v. *Kitchen*, 8 El. & Bl. 789). (6) The interest of a pawnbroker in a pledge (*Rollason* v. *Rollason*, 34 Ch. D. 495; see *Squire* v. *Huetson*, 1 Q. B. 308). (7) Goods let to the debtor (*Lancashire Co.* v. *Fitzhugh*, 6 H. & N. 502). (8) The interest of the debtor in partnership property (*Holmes* v. *Muntze*, 4 Ad. & El. 127; *Johnson* v. *Evans*, 7 Man. & Gr. 240; *Helmore* v. *Smith*, 35 Ch. Div. 436; as to charging such an interest, see *post*, p. 455).

What may not be taken.

The following cannot be seized under a *fi. fa.*:—Clothes, bedding, and tools, to the value of 5*l.* (8 & 9 Vict. c. 127, s. 8); certain farm produce (56 Geo. III. c. 50). An equitable interest in leaseholds (*Re Newcastle*, 8 Eq. 700; *Scott* v. *Scholey*, 8 East, 467), or an equity of redemption of leaseholds (*Lyster* v. *Dolland*, 1 Ves. 431). Fixtures annexed to the debtor's freehold (*Winn* v. *Ingleby*, 5 B. & Ald. 625). Rolling stock, plant and buildings of a railway (30 & 31 Vict. c. 127, s. 4; see *Re East India Dock Co.*, 38 Ch. D. 576; *Midland Co.* v. *Potteries R. Co.*, 6 Q. B. D. 36). Stock or shares (*Brereton* v. *Edwards*, 21 Q. B. Div. 499; see sect. 14, *post*); or an equitable interest in stock (*Horn* v. *Horn*, Amb. 78). Goods pawned by the debtor (*Young* v. *Lambert*, L. R. 3 P. C. 142). Goods over which the debtor has a lien (*Legge* v. *Evans*, 6 M. & W. 36; *Rogers* v. *Kennay*, 9 Q. B. 592). The copyright of a newspaper (*Ex p. Foss*, 2 De G. & J. 230). Goods sold for valuable consideration, though with the intention of defeating an execution (*Wood* v. *Dixie*, 7 Q. B. 892); goods validly mortgaged (*Scarlett* v. *Hanson*, 12 Q. B. Div. 213; *Re Opera, Limited*, 1891, 3 Ch. 260); unless in either of the last two cases the purchaser, or mortgagee, had notice of the writ being in the hands of the sheriff

(19 & 20 Vict. c. 97, s. 1). Goods over which a receiver has been appointed, unless with leave of the court (*Russell* v. *East Anglican R. Co.*, 3 Mac. & G. 104; see *Edwards* v. *Edwards*, 2 Ch. Div. 291). Goods which the debtor holds solely as trustee (*Fenwick* v. *Laycock*, 2 Q. B. 108; *Re Morgan, Pillgrem* v. *Pillgrem*, 18 Ch. Div. 93; see *Sykes* v. *Sykes*, L. R. 5 C. P. 113). 1 & 2 Vict. c. 110, s. 12.

The sheriff is not bound or able to levy under a *fi. fa.* whatever the value of the goods may be, unless the execution creditor first satisfies the landlord's rent (*Cocker* v. *Musgrove*, 9 Q. B. 230; *Risley* v. *Ryle*, 11 M. & W. 16), to the extent of one year's arrears (8 Anne, c. 14, s. 1; see 7 & 8 Vict. c. 96, s. 67), which is due at the time of taking possession under the writ (*Hoskins* v. *Knight*, 1 M. & S. 245; see *Wintle* v. *Freeman*, 11 Ad. & Ell. 539). As to cases within the County Courts Act, 1888, s. 160, see *Hughes* v. *Smallwood* (63 L. T. 198). As to the liability of the sheriff to the landlord, see Woodfall, 14th ed., 511 *et seq.* As to taxes, see 43 & 44 Vict. c. 19, s. 88. Landlord's rent. Taxes.

Where the goods have been seized but not sold, the judgment creditor may, as soon as the return has been filed, sue out a writ of *venditioni exponas* (R. S. C. Ord. 43, rr. 2, 5; see D. C. P. 861; Chitty's Archbold, 865). Where the judgment debtor is a beneficed clerk and has no goods in the bailiwick of the sheriff to whom the writ was directed, the creditor may as soon as the return is filed, sue out one or more writs of *fieri facias de bonis ecclesiasticis*, or of sequestration (R. S. C. Ord. 43, rr. 3, 4, and 5; see *Allen* v. *Williams*, 2 Sm. & G. 455; Bankruptcy Act, 1883, s. 52 (1); D. C. P. 863; Chitty's Archbold, 1176). Sale. Beneficed clerk.

As to execution against corporations and companies, see Chitty's Archb. 1052, 1070, 14th ed.; and as to execution against companies in liquidation, see Buckley, 235, 6th ed. Corporations and companies.

The Effect of a Judgment.

13. A judgment already entered up, or to be hereafter entered up, against any person in any of her Majesty's superior courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed of, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion or other interest, in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents and hereditaments; and every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue Judgment to operate as a charge on real estate.

1 & 2 Vict. c. 110, s. 13.

of this act or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing, under his hand, agreed to charge the same, with the amount of such judgment debt and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment; [*or in cases of judgments already entered up, or to be entered up, before the time appointed for the commencement of this act, until after the expiration of one year from the time appointed for the commencement of this act,*] nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up unless such judgment shall have been entered up one year at least before the bankruptcy; [*provided also, that as regards purchasers, mortgagees or creditors, who shall have become such before the time appointed for the commencement of this act, such judgment shall not affect lands, tenements or hereditaments, otherwise than as the same would have been affected by such judgment if this act had not passed:*] provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity, whereby protection is given to purchasers for valuable consideration without notice (*g*).

Charge not to be enforced until after expiration of a year.

Proviso as to purchasers.

(*g*) The words in *italics* have been repealed by 37 & 38 Vict. c. 96.

Provisions as to registration.

No judgments could by virtue of this act affect any lands until registered as prescribed by sect. 19, *post*, p. 461, where see note. And it was necessary to repeat the registration every five years (2 & 3 Vict. c. 11, s. 4; 18 & 19 Vict. c. 15, s. 6). Where these conditions were not complied with, a purchaser was not bound although he had notice (3 & 4 Vict. c. 82, s. 2; 18 & 19 Vict. c. 15, ss. 4, 5). And even where judgments were duly registered, they did not affect purchasers and mortgagees without notice, further than a judgment of one of the superior courts would have done before the act 1 & 2 Vict. c. 110, where such judgment had been duly docketed according to the law then in force (2 & 3 Vict. c. 11, s. 5).

As to judgments entered up between the 23rd July, 1860, and the 29th July, 1864, see 23 & 24 Vict. c. 38, *post*, p. 470.

Effect of 27 & 28 Vict. c. 112, on this section.

This section must be read in connection with 27 & 28 Vict. c. 112, s. 1 (*post*, p. 476). In several cases doubts have been expressed whether the later enactment repealed to any extent the earlier (*Re Newcastle*, 8 Eq. 706; *Re Cowbridge R. Co.*, 5 Eq. 413; *Cork* v. *Russell*, 13 Eq. 216; *Re Bailey*, 17 W. R. 394; *Hatton* v. *Haywood*, 9 Ch. 234). But it has been since held that this section remains in full operation, subject to this, that where delivery in execution is possible, no charge affects the land until the same has been actually delivered in execution (*Re Anthony*, *Anthony* v. *Anthony*, 1892, 1 Ch. 456; see *Re Leavesley*, 1891, 2 Ch. 5). Such delivery may be in the form of a delivery by the sheriff under a writ of elegit (*Guest* v. *Cowbridge R. Co.*, 6 Eq. 619; see *Mildred* v. *Austin*, 8 Eq. 220); or in the form of a sequestration (*Re Rush*, 10 Eq. 442); or in the form of equitable execution, *e.g.*, by means of a receivership order (*Hatton* v. *Haywood*, 9 Ch. 229). See also the note to 27 & 28 Vict. c. 112, s. 1, *post*, p. 477. Further, as against a purchaser for value, such writ or order must have been registered (51 & 52 Vict. c. 51). It would seem, however, that if the land cannot be delivered in execution, either legally

1 & 2 Vict. c. 110, s. 13.

or equitably, as in the case of an estate in remainder, no charge under this section can affect it (*Re Hamilton*, 31 Ch. Div. 294; *Cadman* v. *Cadman*, 33 Ch. Div. 400).

Order of Probate Court.

An order of the Probate Court for payment of money was not a charge on land within this section (*Pratt* v. *Bull*, 1 D. J. & S. 141; see *Crispin* v. *Cumano*, L. R. 1 P. & M. 622).

Decree of Divorce Court.

As to a decree of the Divorce Court for permanent alimony, see *Ex parte Holden*, 13 C. B. N. S. 641; 11 W. R. 437; *Sidney* v. *Sidney*, 1867, W. N. 248).

Lands in Middlesex and Yorkshire.

According to the decisions in the case of lands in Middlesex and Yorkshire, the charge under this section did not take effect until registration in the local registry (*Westbrook* v. *Blythe*, 3 El. & Bl. 737; *Johnson* v. *Holdsworth*, 1 Sim. N. S. 106; see *Hughes* v. *Lumley*, 4 El. & Bl. 274). Consider now in the case of lands in Middlesex, 54 & 55 Vict. c. 64, s. 6. The priority of judgments affecting lands in Yorkshire depends on local registration (*Neve* v. *Flood*, 33 Beav. 666; 47 & 48 Vict. c. 54, ss. 4, 14). Notice of an earlier unregistered judgment was held immaterial (*Benham* v. *Keane*, 3 D. F. & J. 318; see as to mortgages, *Rolland* v. *Hart*, 6 Ch. 678).

What lands are affected by judgments under this section.

It has been said that this section includes every possible interest in lands of every possible description, except perhaps, land held in ancient demesne (*Harris* v. *Davison*, 15 Sim. 133). The following interests in land have been held to be within it. Leaseholds assigned to the judgment debtor to secure an annuity (*Ib.*) Land charged with money covenanted to be paid to the debtor (*Russell* v. *M'Cullock*, 1 K. & J. 313; see *Younghusband* v. *Gisborne*, 1 De G. & S. 209). The interest of a mortgagee (*Clare* v. *Wood*, 4 Hare, 81). The interest of a *cestui que trust* in a mortgage investment of a trust fund (*Avison* v. *Holmes*, 1 J. & H. 530). The words referring to land over which the debtor has a disposing power, extend only to the beneficial interest of the debtor therein, such as the interest of an heir subject to the debts of his ancestor (*Kinderley* v. *Jervis*, 22 Beav. 1); and do not include lands comprised in a prior voluntary conveyance (*Beavan* v. *Oxford*, 6 D. M. & G. 509). A tenant in tail in possession has, under these words, been ordered to execute a disentailing deed to give effect to the charge under this section (*Lewis* v. *Duncombe*, 20 Beav. 398). As to the effect of a judgment on the lands of a corporation, see *Arnold* v. *Gravesend*, 2 K. & J. 574.

What are not affected.

This section does not extend to an ecclesiastical benefice (*Hawkins* v. *Gathercole*, 6 D. M. & G. 1; *Bates* v. *Brothers*, 2 Sm. & Giff. 509; *Long* v. *Storie*, 3 De G. & S. 308; *Metcalf* v. *York*, 1 M. & C. 547), or a share in the proceeds of land devised on an absolute trust for sale (*Thomas* v. *Cross*, 2 Dr. & Sm. 423), or land of which the debtor was mortgagee, but which has become vested by conveyance, in a purchaser or mortgagee for valuable consideration, and the debtor's mortgage paid off thereupon or previously (18 & 19 Vict. c. 15, s. 11; see *Greaves* v. *Wilson*, 25 Beav. 434).

Nature of the charge created by this section.

It has been said that that which formerly, by force of the Statute of Westminster, 13 Edw. 1, st. 1, c. 18, was a general charge upon lands, by force of this section became a specific charge (*Rolleston* v. *Morton*, 1 Dru. & War. 171, 195; Sugd. V. & P. 663, 11th ed.) So judgment creditors of an insolvent plaintiff, whose estates were sold by order of court, were necessary parties to the conveyance (*Hotham* v. *Somerville*, 9 Beav. 63). So also were judgment creditors of the heir of a devisee of land, which had been sold in a suit to administer the real estate of the testator (*Craddock* v. *Piper*, 14 Sim. 310). So also those of a prior purchaser who had entered into possession, but not paid in full, where the land was resold under an order of court in an action by the vendor (*Greycoat Hospital* v. *Westminster Commissioners*, 1 De G. & J. 531). The charge arising under this section is within Locke King's Acts (*Re Anthony*, *Anthony* v. *Anthony*, 1892, 1 Ch. 450). But it is an equitable charge; so it does not vest the rents in, or make them payable to, the creditor (*Seymour* v. *Lucas*, 1 Dr. & Sm. 177). So an equitable mortgagee has priority over a subsequent judgment creditor, although the latter may have acquired the legal seisin and possession of the land, under an *elegit*, without notice of the

1 & 2 Vict. c. 110, s. 13.

mortgage (*Whitworth* v. *Gaugain*, 1 Phil. 728; *Langton* v. *Horton*, 1 Hare, 561; see the cases as to charging orders quoted under sect. 14, *post*, p. 457). And it was held that a judgment was not such a charge on land as would, by means of registration in Middlesex, take precedence of an unregistered mortgage created before the act (*Cathrow* v. *Eade*, 1 Sm. & Giff. 423).

Proceedings in equity to enforce judgments against land under this section.

It has been held that the proceedings in equity to enforce the charge given by this section must be by the person to whom the money is payable under the judgment (*Crowther* v. *Crowther*, 4 W. R. 351).

Under this section, after a year from entering up his judgment, a creditor may enforce his equitable charge, although a year has not elapsed since registration (*Derbyshire R. Co.* v. *Bainbrigge*, 15 Beav. 146); but he cannot proceed before a year from the entering up of the judgment (*Smith* v. *Hurst*, 10 Hare, 30). And within the year the court declined to appoint a receiver (*Smith* v. *Hurst*, 1 Coll. C. C. 705); even where fraud was alleged (*Smith* v. *Hurst*, 10 Hare, 30); except where the debtor was entitled to a life interest (*Yescombe* v. *Landor*, 28 Beav. 80; see *Partridge* v. *Foster*, 34 Beav. 1). Upon a bill of foreclosure filed by a mortgagee after the bankruptcy of his mortgagor, a judgment creditor, who had entered up judgment against the mortgagor less than one year previously to the bankruptcy was properly made a defendant (*Harrison* v. *Pennell*, 6 W. R. 712).

There is a conflict of authority as to what is the right method of enforcing the charge, whether by sale (*Footner* v. *Sturgis*, 5 De G. & Sm. 736; *Bull* v. *Faulkner*, 1 De G. & Sm. 685; see *Ford* v. *Wastell*, 2 Phill. C. C. 591), or by foreclosure (*Jones* v. *Bailey*, 17 Beav. 582; see *Messer* v. *Boyle*, 21 Beav. 559). A judgment creditor, who has been in possession under an *elegit*, must account in the same manner as a mortgagee in possession (*Bull* v. *Faulkner*, 1 De G. & S. 685). Judgment creditors were not allowed successive periods of three months each to redeem, but one period of three months was given to them or any of them (*Radcliff* v. *Salmon*, 4 De G. & S. 526; *Stead* v. *Banks*, 5 De G. & S. 560; *Bates* v. *Hillcoat*, 16 Beav. 139). As to proceedings by a tenant by *elegit* to redeem a mortgage, see *Barnes* v. *Thrupp* (3 Jur. N. S. 1242; 6 W. R. 48).

As to equitable relief independently of this section, see note to 27 & 28 Vict. c. 112, s. 1, *post*, p. 477.

Contribution.

As to contribution, see 3 Rep. 11 b; *Hartly* v. *O'Flaharty*, Beatty, 61; and see 16 & 17 Car. 2, c. 5; *Averall* v. *Wade*, Lloyd & G. 252; *Handcock* v. *Handcock*, 1 Ir. Ch. R. N. S. 444.

Charge upon Stock, &c.

Stock and shares in public funds and public companies belonging to the debtor and standing in his own name to be charged by order of a judge.

14. If any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster, shall have any government stock, funds, or annuities (*h*), or any stock or shares of or in any public company in England (whether incorporated or not) (*i*) standing in his name in his own right, or in the name of any person in trust for him (*k*), it shall be lawful for a judge of one of the superior courts (*l*), on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in

his favour by the judgment debtor (*m*); provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order (*n*). 1 & 2 Vict. c. 110, s. 14.

The act 3 & 4 Vict. c. 82, s. 1, after reciting the above section, declares that the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent as well in any such stocks, funds, annuities or shares as aforesaid as also in the dividends, interest or annual produce of any such stock, funds, annuities or shares: and whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder or reversion in, to, or out of any such stock, funds, annuities or shares as aforesaid, which now are or shall hereafter be standing in the name of the accountant-general of the Court of Chancery, or the accountant-general of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: provided always, that no order of any judge as to any stock, funds, annuities or shares standing in the name of the accountant-general of the Court of Chancery or the accountant-general of the Court of Exchequer, or as to the interest, dividends or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stock, funds, annuities or shares or payment of the interest, dividends or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order. 3 & 4 Vict. c. 82, s. 1. Dividends, interest, etc. Stock, etc., in court.

In addition to the above powers, a judgment against a partner can now be enforced by an order charging his interest in the partnership (53 & 54 Vict. c. 39, s. 23). Partnership assets in the hands of a receiver may be charged to enforce a partnership debt (*Re Cardos*, 1888, W. N. 17). Orders charging partnership assets.

The judgment in respect of which a charging order is asked under 1 & 2 Vict. c. 110, s. 14, must be for an ascertained sum (*Wiggery* v. *Tepper*, 6 Ch. Div. 364; *Chadwick* v. *Holt*, 8 D. M. & G. 584); but the sum may be a sum payable at a future date (*Bagnall* v. *Carlton*, 6 Ch. D. 130). A judgment for costs is not sufficient, until they have been taxed (*Wiggery* v. *Tepper*, *sup.*; *Jones* v. *Williams*, 8 M. & W. 349; *contra*, *Burns* v. *Irving*, 3 Ch. D. 291). As to an order for payment of money to the credit of a cause, see *Ward* v. *Shakeshaft* (1 Dr. & Sm. 272). Judgment in respect of which charging order is made.

(*h*) Arrears of a government annuity are not chargeable (*Taylor* v. *Turnbull*, 4 H. & N. 495). Nor is a pension granted by the East India Co. (*Morris* v. *Manesty*, 7 Q. B. 674). As to a charging order on an annuity "payable out of the suitor's fund" by order of the Lord Chancellor, in pursuance of 46 Geo. 3, c. 128, see *Witham* v. *Lynch* (1 Exch. 391). What can be charged. Annuities.

(*i*) A banking co-partnership, which made returns to the Stamp Office pursuant to 7 Geo. 4, c. 46, was held to be a public company not incorporated within the meaning of this section (*Macintyre* v. *Connell*, 1 Sim. N. S. 225; see *Graham* v. *Connell*, 19 L. J. Ex. 361). It is doubtful whether a mining company on the cost-book principle is a public company within the meaning of this section (*Nicholls* v. *Rosewarne*, 6 C. B. N. S. 480; 7 W. R. 612). Public companies within this section.

(*k*) The following interests in stock, &c., can according to decided cases be charged under this section. A contingent equitable interest in stock (*Baker* v. *Tynte*, 29 L. J. Q. B. 233; *Cragg* v. *Taylor* (2), L. R. 2 Ex. 131); an equity of redemption in stock (*Re Royal Bank of Australia*, 25 L. J. Ch. What interest of judgment debtor can be charged.

1 & 2 Vict. c. 110, s. 14.

649; see *Fuller* v. *Earle*, 7 Ex. 796); stock in court to the credit of a lunatic debtor (*Horne* v. *Pountain*, 23 Q. B. D. 264); the interest of a legatee in stock standing in the name of the testator (*Errington* v. *Prior*, 10 I. L. R. 79); the interest of the debtor in stock held on trust for him and another (*South Western Co.* v. *Robertson*, 8 Q. B. D. 17; see *Fowler* v. *Churchill*, 11 M. & W. 57). In such last-mentioned case the order need not define the extent of the chargeable interest, the trustees being responsible for giving proper effect to the order (*South Western Co.* v. *Robertson*, *sup.*, where there was a clause of forfeiture on alienation; see *White* v. *O'Grady*, 2 Ir. Ch. R. 333; *Hodgens* v. *Hodgens*, I. R. 11 Eq. 439).

What cannot be charged.

The following cannot be charged under this section. Stock of a deceased debtor in the hands of his representative (*Finney* v. *Hind*, 4 Q. B. D. 102; *Wallace* v. *M'Cann*, 4 Ir. Eq. R. 522). Stock to which the debtor is entitled as executor, though he is also beneficially interested as legatee (*Taylor* v. *Turnbull*, 4 H. & N. 495; see *Hodgens* v. *Hodgens*, I. R. 11 Eq. 439). Stock forming part of an estate the proceeds of which after conversion are bequeathed to the debtor (*Dixon* v. *Wrench*, L. R. 4 Ex. 154). Stock or shares of which the debtor is only trustee (*Re Blakeley Ordnance Co.*, 25 W. R. 111; 35 L. T. 617; *Gill* v. *Continental Gas Co.*, L. R. 7 Ex. 332; see as to the old practice *Rogers* v. *Holloway*, 5 Man. & G. 292; *Fuller* v. *Earle*, 7 Ex. 796; *Cragg* v. *Taylor*, L. R. 1 Ex. 148); even where the shares were qualification shares standing in the name of a director, and which according to the articles of association of the company were to be held by him "in his own right" (*Cooper* v. *Griffin*, 1892, 1 Q. B. 740). Property of a married woman which she is restrained from anticipating (*Stanley* v. *Stanley*, 7 Ch. D. 589; *Smith* v. *Whitlock*, 34 W. R. 414). Cash in court to the credit of the judgment debtor (*Brereton* v. *Edwards*, 21 Q. B. Div. 488); but such cash can be charged under the general jurisdiction of the court (*Ib.*; see *Re Bell*, *Carter* v. *Stadden*, 54 L. T. 370; 34 W. R. 363). Cash in the hands of a trustee for the judgment debtor cannot be charged (*Robinson* v. *Pearce*, 7 Dowl. 93; see *Wallace* v. *M'Cann*, 4 Ir. Eq. R. 522). An order charging an equitable debt could not be obtained (*Horsley* v. *Cox*, 4 Ch. 92); but such a debt can be attached (*Wilson* v. *Dundas*, 1875, W. N. 232).

Practice.

(*l*) Charging orders may be made by any judge (R. S. C., Ord. 46, r. 1; see *Brereton* v. *Edwards*, 21 Q. B. Div. 488). In the Queen's Bench Division the order *nisi* may be made by a master (R. S. C., Ord. 54, r. 12). The writ in an action to enforce a charging order made under this section cannot be served out of the jurisdiction (*Mority* v. *Stephan*, 58 L. T. 850; 36 W. R. 779; see *Re Gethin*, I. R. 11 Eq. 512). See further as to the practice, Dan. Ch. Pr. 939; Chit. Arch. 919; *Brown* v. *Bamford* (9 M. & W. 42); *Graham* v. *Connell* (19 L. J. Ex. 361); *Robinson* v. *Burbidge* (9 C. B. 289).

Forms of order.

When the fund is large and the debt small an adequate part only of the fund should be charged (*Horne* v. *Pountain*, 23 Q. B. D. 267; see *Stanley* v. *Bond*, 8 Beav. 50). In the case of a lunatic debtor the order may provide that the charge should not be enforceable till the death of the lunatic or further order (*Re Leavesley*, 1891, 3 Ch. 1). For a form of order charging shares in a company, see *Re Connell* (35 L. J. Ch. 649); *Re Imperial Association* (1868, W. N. 80). For the case of a charging order against a corporation, see *A. G.* v. *Thetford* (8 W. R. 467). See further as to forms of orders, Seton, 423 *et seq.*, 5th ed.

Charge operates from date of order *nisi*.

A charging order, when made absolute, operates from the making of the order *nisi* (*Haly* v. *Barry*, 3 Ch. 452; *Brereton* v. *Edwards*, 21 Q. B. Div. 488; see *Warburton* v. *Hill*, Kay. 470). A decree for administration subsequent to the order *nisi* will not prevent it being made absolute (*Haly* v. *Barry*, *sup.*)

A charging order, after it has been made absolute, is not within the proviso in sect. 15 (*post*), and cannot be rescinded (*Jeffreys* v. *Reynolds*, 48 L. T. 358; *Drew* v. *Willis*, 1891, 1 Q. B. 450). A judgment creditor may, however, be restrained from proceeding on a charging order if improperly obtained (*Leese* v. *Martin*, 17 Eq. 224).

(*m*) The effect of a charging order depends on the validity of the judgment, not on the capacity of the judgment debtor to give a valid charge (*Re Leavesley*, 1891, 2 Ch. 1). So a charging order founded on a valid judgment against a lunatic was held good (*Ib.*; *Horne* v. *Pountain*, 23 Q. B. D. 264, as to which case see *Re Leavesley*, 1891, 2 Ch. 3). A charging order founded on a judgment for money lent to the judgment debtor during his infancy will have no effect at all (*Re Onslow*, 20 Eq. 677). A charging order may or may not according to the terms of the gift, determine an interest of the debtor, determinable on alienation (*Montifiore* v. *Behrens*, 1 Eq. 171; *Roffey* v. *Bent*, 3 Eq. 759; *Re Kelly, West* v. *Turner*, 59 L. T. 494; see *South Western Co.* v. *Robertson*, 8 Q. B. Div. 17). A charging order is not an execution within sect. 45 of the Bankruptcy Act, 1883 (*Re Hutchinson*, 16 Q. B. D. 515). Nor does it give the court jurisdiction to order a sale, but a separate action must be brought (*Leggot* v. *Western*, 12 Q. B. D. 287; see *Ricketts* v. *Ricketts*, 1891, W. N. 29). After an order has been made charging stock standing in the names of trustees, the bank is still bound to pay the dividends to the trustees, who alone are responsible for the application thereof (*Bristed* v. *Wilkins*, 3 Hare, 235; *Fowler* v. *Churchill*, 11 M. & W. 57, 323; *South Western Co.* v. *Robertson*, 8 Q. B. D. 17).

1 & 2 Vict. c. 110, s. 14.

Effect of charging order.

A charging order does not give a judgment creditor priority over a prior charge, legal or equitable, even if he has no notice of it (*Re Bell, Carter* v. *Stadden*, 54 L. T. 370; 34 W. R. 363; *Haly* v. *Barry*, 3 Ch. 452; *Brearcliff* v. *Dorrington*, 4 De G. & S. 122; see *Gill* v. *Continental Gas Co.*, L. R. 7 Ex. 338); and even if the mortgage was made after the judgment (*Scott* v. *Hastings*, 4 K. & J. 633; *Dunster* v. *Glengall*, 3 Ir. Ch. R. 47); and (in the case of stock held on trust) even if no notice was given by the mortgagee to the trustees (*Beavan* v. *Oxford*, 6 D. M. & G. 524, 532; *Kinderley* v. *Jervis*, 22 Beav. 28; *Scott* v. *Hastings*, *sup.*; see *Pickering* v. *Ilfracombe R. Co.*, L. R. 3 C. P. 235; *Robinson* v. *Nesbitt*, *id.* 264; overruling *Watts* v. *Porter*, 3 Ell. & Bl. 743). A surety who, under 19 & 20 Vict. c. 9, is entitled to be recouped for over contribution out of certain stock, has priority over a judgment creditor who has a charging order on such stock (*Silk* v. *Eyre*, I. R. 9 Eq. 393).

Effect as against mortgagees.

Where stock is in court to the credit of the debtor, a charging order, made by any judge of the High Court and duly notified to the paymaster-general, will bind it without any stop order (*Brereton* v. *Edwards*, 21 Q. B. Div. 488; S. C. Funds Rules, 99). A stop order may be obtained without any preliminary charging order having been made (*Hopewell* v. *Barnes*, 1 Ch. D. 630; *Shaw* v. *Hudson*, 48 L. J. Ch. 689). See further as to stop orders, R. S. C., Ord. 46, rr. 12 and 13, and the forms in Seton, 5th ed. 417 *et seq.*

Stop orders.

Where a fund in court had been recovered by the exertions of a solicitor, he was held entitled (in respect of his lien for costs) to priority over a judgment creditor of his client, who had obtained both a charging order and a stop order (*Haymes* v. *Cooper*, 33 Beav. 431).

Effect as against solicitor's lien.

(*n*) The proviso contained in this section does not prevent the creditor from obtaining a stop order to restrain the debtor from receiving dividends of stock accruing within the six months (*Watts* v. *Jefferyes*, 3 Mac. & G. 372; see *Bristed* v. *Wilkins*, 3 Hare, 235).

Final proviso.

Operation of Judges Orders.

15. [*And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities or shares hereby authorized to be charged for the benefit of the judgment creditor under an order of a judge, be*

Order of judge to be made in the first instance

1 & 2 Vict. c. 110, s. 15.

ex parte, and on notice to the bank or company to operate as a distringas.

it further enacted that] every order of a judge charging any government stock, funds or annuities, or any stock or shares in any public company, under this act, shall be made in the first instance ex parte, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain [*the Governor and Company of*] the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and [*that*] if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation, or person or persons, shall permit any such transfer to be made, then and in such case the corporation, or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and [*that*] no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, [*that*] unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit (*o*).

(*o*) See the note to preceding section. The words in italics have been repealed by 37 & 38 Vict. c. 96.

For the notice which has now been substituted for the old writ of distringas, see R. S. C., Ord. 46, r. 3 *et seq.*

[*Sect.* 16 *as to taking the body of a debtor was repealed by* 37 & 38 *Vict. c.* 96.]

Interest on Judgments.

1 & 2 Vict. c. 110, s. 17.

Judgment debts to carry interest.

17. Every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment [*or from the time of the commencement of this act in cases of judgments then entered up and not carrying interest,*] until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment (*q*).

The words in italics were repealed by 42 & 43 Vict. c. 59, s. 2.

(*q*) Formerly a judgment did not carry interest, but interest might be recovered in the shape of damages (*Gaunt* v. *Taylor*, 3 M. & K. 302).

A judgment given for securing an annuity carries interest under this section (*Knight* v. *Bowyer*, 4 De G. & J. 619). Where a judgment was entered by consent for a sum to be paid by half-yearly instalments, no interest was payable so long as the instalments were duly paid (*Caudery* v. *Finnerty*, 66 L. T. 684). A judgment of a county court does not carry interest (*R.* v. *Essex*, 18 Q. B. D. 704).

The interest payable under this section is a debt due from the judgment debtor (*Re Clagett*, 36 W. R. 653); and may be included in a bankruptcy notice on the judgment (*Re Lehmann*, 62 L. T. 941). As to when a covenant to pay interest at a higher rate than 4 per cent. is merged in a judgment, see *Re European R. Co., Ex p. Oriental Corporation* (4 Ch. Div. 33); *Popple* v. *Sylvester* (22 Ch. D. 98); *Re Sneyd, Ex p. Fewings* (25 Ch. Div. 338); *Arbuthnot* v. *Bunsilall* (62 L. T. 234). The interest given by this section runs, if the judgment is pronounced in court, from that date (R. S. C. Ord. 41, r. 3; Ord. 42, r. 16), otherwise from the date of the entering up (R. S. C. Ord. 41, rr. 3, 4; Ord. 42, r. 16).

The judgment carries interest until satisfaction. As to when a judgment at law is satisfied for the purpose of carrying interest, see *Sinclair* v. *G. E. R. Co.* (L. R. 5 C. P. 391).

Costs.

This section applies to judgments as well for costs as for the subject-matter of the action (*Pitcher* v. *Roberts*, 12 L. J. Q. B. 178; see *Newton* v. *Conyngham*, 17 L. J. C. P. 288); interest running in the absence of special order, from the date of the judgment (*Pyman* v. *Burt*, 1884, W. N. 100; *Landowners' Co.* v. *Ashford*, 33 W. R. 41; *Re London Wharfing Co.*, 53 L. T. 112; 33 W. R. 836; *Boswell* v. *Coaks*, 57 L. T. 742; 36 W. R. 65). The section does not apply where the costs are directed to be paid out of an estate, as in an administration action (*Re Marsden, Withington* v. *Neumann*, 40 Ch. D. 475; *A. G.* v. *Nethercote*, 11 Sim. 529; see 23 & 24 Vict. c. 127, s. 27). Nor does the section apply to costs given in a foreclosure action (*Eardley* v. *Knight*, 41 Ch. D. 537); but where in such a case the costs are ordered to be added to the security, then, independently of this section, interest at 4 per cent. runs from the date of the taxing master's certificate (*Ib.*; *Lippard* v. *Ricketts*, 14 Eq. 291).

See also as to payment as between solicitor and client of interest on costs, Solicitors' Remuneration Act, 1881, Order 7; *Blair* v. *Cordner* (19 Q. B. D. 516).

Where execution is delayed by an appeal, interest is given under R. S. C. Ord. 58, r. 19. As to interest where the judgment of a colonial court is reversed by the privy council, see *Rodger* v. *Comptoir d'Escompte* (L. R. 3 P. C. 465). See further the note as to interest generally, *ante*, p. 191.

Decrees and Orders in Equity.

Decrees and orders of courts of equity, &c., to have effect of judgments.

18. All decrees or orders of courts of equity, and all rules of courts of common law, [*and all orders of the Lord Chancellor or of the court of review in matters of bankruptcy,*] and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of

1 & 2 Vict. c. 110, s. 18.

money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys or costs, charges or expenses, shall be payable shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by courts of equity with respect to matters therein depending, [*and by the Lord Chancellor and the court of review in matters of bankruptcy,*] and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses are by such orders or rules respectively directed to be paid (*r*).

The words in *italics* were repealed by 37 & 38 Vict. c. 96.

(*r*) This section is extended to the equity court of Durham as to lands within its jurisdiction (18 & 19 Vict. c. 15, s. 2). As to enforcing a judgment of the Durham court against land outside its jurisdiction, see 52 & 53 Vict. c. 47, s. 3. As to the Lancaster court, see 13 & 14 Vict. c. 43, s. 24.

Cases under this section.

A decree ordering a defendant to pay a sum of money, interest and costs, when ascertained, was held to be within this section (*Beaufort* v. *Phillips*, 1 D. G. & Sm. 321). Also a judgment entered up under 6 & 7 Vict. c. 73, s. 43 (*Griffiths* v. *Hughes*, 16 M. & W. 809); but not a decree for an account and payment of what should be found due (*Chadwick* v. *Holt*, 8 D. M. & G. 584; *Garner* v. *Briggs*, 6 W. R. 378); nor an order for a foreclosure (*Burrows* v. *Holley*, 35 Ch. D. 123); nor the chief clerk's certificate finding money to be due to a party, though adopted by the judge (*Mansfield* v. *Ogle*, 4 D. G. & J. 38); nor a decree directing payment to the credit of a cause (*Ward* v. *Shakeshaft*, 1 Dr. & Sm. 269; *Ward* v. *Docker*, 5 Jur. N. S. 1287; compare *Re Leeds Bank*, 1 Ch. 150; *Johnson* v. *Burgess*, 15 Eq. 398; see *Gibbs* v. *Pike*, 9 M. & W. 351). As to enforcing a decree in the last-mentioned form, see R. S. C. Ord. 42, r. 4; *Re Coney*, *Coney* v. *Bennett*, 29 Ch. D. 993; *Re Whiteley*, *Whiteley* v. *Learoyd*, 56 L. T. 846; *De la Pole* v. *Dick*, 29 Ch. Div. 351.

A rule for taxation of costs, and an allocatur of the master, do not amount to a judgment within this section (*Shaw* v. *Neale*, 6 H. L. C. 581); nor a judge's order for payment of money obtained *ex parte* (*Rickards* v. *Patterson*, 8 M. & W. 313; see *Neale* v. *Postlethwaite*, 8 Dowl. P. C. 100).

Enforcement of judgment or orders.

Under R. S. C. Ord. 42, r. 3, a judgment for the payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any court whose jurisdiction is transferred by the Jud. Act, 1873, might have been enforced at the time of the passing thereof. And under R. S. C. Ord. 42, r. 24, every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect. Any person not a party to a cause or matter in whose favour any order is made may enforce such order by the same process as if he were a party, and a judgment or order may be enforced against him as if he were a party (R. S. C. Ord. 42, r. 26).

Orders in bankruptcy.

By sects. 93 and 94 of the Bankruptcy Act, 1883, the Court of Bankruptcy was united with the Supreme Court. And under the Bankruptcy Rules, 1886, No. 93, every order of the court in bankruptcy may be enforced as if it were a judgment to the same effect (See also r. 107).

Execution.

Every person to whom any sum of money or any costs shall be payable under a judgment shall, so soon as they are payable, be entitled to execution (R. S. C. Ord. 42, r. 17; see before this rule *Doe* v. *Barrell*, 10 Q. B. 531; *Doe* v. *Hampson*, 5 Dowl. & L. 484; *Wallis* v. *Sheffield*, 3 Jur. 1002; *Hill* v. *Brown*, 16 M. & W. 796). And where costs are given to be ascertained by taxation, a separate writ may be issued for them when taxed

(R. S. C. Ord. 42, r. 18; *Harris* v. *Jewell*, 1883, W. N. 216; see before this rule, *Jones* v. *Williams*, 8 M. & W. 349; *Hodgson* v. *Patterson*, 5 Scott, N. R. 76; *Cetti* v. *Bartlett*, 9 M. & W. 840). As to a judgment on a condition, see R. S. C. Ord. 42, r. 9; *Gibbs* v. *Flight* (13 C. B. 803). 1 & 2 Vict. c. 110, s. 18.

Under the Arbitration Act. 1889 (52 & 53 Vict. c. 49), a submission, unless a contrary intention is expressed therein, has the same effect as if it had been made an order of court (sect. 1), and an award may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect (sect. 12). Awards.

For the older cases as to enforcing awards under this section, see *Jones* v. *Williams* (11 Ad. & Ell. 175); *Dickenson* v. *Allsop* (13 M. & W. 722); *Fawcett* v. *E. C. R. Co.* (6 Dowl. & L. 54); *Mackenzie* v. *Sligo R. Co.* (9 C. B. 250); *Lambe* v. *Jones* (9 C. B. N. S. 478); *Lloyd* v. *Harris* (8 C. B. 63).

New Register.

19. No judgment of any of the said superior courts, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in [*bankruptcy or*] lunacy, shall by virtue of this act affect any lands, tenements or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name and the usual or last known place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and the court and title of the cause or matter in which such judgment, decree, order or rule, shall have been obtained or made, and the date of such judgment, decree, order or rule, and the account of the debt, damages, costs or monies thereby recovered or ordered to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order or rule; and such officer shall be entitled for any such entry to the sum of 5*s.*; and all persons shall be at liberty to search the same book on payment of the sum of 1*s.* (*s*). No judgment, decree, &c., to affect real estate otherwise than as before the act, until registered.

(*s*) The words "bankruptcy or" were repealed by 37 & 38 Vict. c. 96.

Prior to this act, judgments, in order to affect lands as to *bonâ fide* purchasers, had to be docketed under 4 & 5 Will. & Mary, c. 20, made perpetual by 7 & 8 Will. 3, c. 36, s. 3. These dockets have been closed, and judgments already docketed directed to be registered under 1 & 2 Vict. c. 110 (2 & 3 Vict. c. 11, ss. 1 and 2; see *Bedford* v. *Forbes*, 1 Carr. & K. 33). Dockets.

Registration under 1 & 2 Vict. c. 110, did not alter the rights of purchasers or mortgagees without notice (2 & 3 Vict. c. 11, s. 5; see *Westbrook* v. *Blythe*, 3 E. & B. 737; *Robinson* v. *Woodward*, 4 De G. & Sm. 562; *Hughes* v. *Lumley*, 4 E. & B. 274; *Benham* v. *Keane*, 3 D. F. & J. 318). Registration under this section.

Judgments are now registered at the central office (R. S. C. Ord. 61, r. 1). In addition to the particulars mentioned in the present section, the date when the memorandum is left must be entered (2 & 3 Vict. c. 11, s. 3). A registration was held good where the debtor was described by the wrong christian name in the title of the action, but by the right name

1 & 2 Vict. c. 110, s. 19.

in the register (*Beavan* v. *Oxford*, 3 Sm. & G. 11). It was held that the master had a discretion as to the particulars to be entered with which the court could not interfere (*Ex p. Ness*, 5 C. B. 155).

Vacating.

The registration of a writ or order affecting land, may be vacated pursuant to an order of the High Court or any judge thereof (S. L. Act, 1890, s. 19; see *Wells* v. *Gibbs*, 3 Beav. 399; *Ex p. Holden*, 13 C. B. N. S. 641).

Re-registration.

A judgment registered under this act is void as against purchasers, mortgagees, and creditors unless re-registered every five years (2 & 3 Vict. c. 11, s. 4). As to who are "creditors," see *Simson* v. *Morley* (2 K. & J. 71). The provisions as to re-registration operate for the benefit of all persons deriving title mediately or immediately from the debtor (*Benham* v. *Keane*, 1 J. & H. 685). The circumstance that a re-registration is not within five years from the previous registration does not make it ineffectual as against subsequent purchasers, &c. (18 & 19 Vict. c. 15, s. 6; *Beavan* v. *Oxford*, 6 D. M. & G. 492). Nor does a creditor who has once obtained priority over another by registration, lose that priority by omitting to re-register (*Beavan* v. *Oxford*, *sup.*; *Shaw* v. *Neal*, 6 H. L. C. 581). Where A. had priority over B., and B. had priority over C., but A.'s judgment was void for want of re-registration as against C., C. was paid in priority to B. to the amount of A.'s judgment, then B. was paid in full, then C. was paid the balance of his debt, then A. was paid (*Re Kensington*, *Bacon* v. *Ford*, 29 Ch. D. 527; see, however, *Beavan* v. *Oxford*, 25 L. J. Ch. 299).

Notice.

Notice to a purchaser, mortgagee, or creditor, of a judgment which is unregistered or not re-registered, does not invalidate any transaction completed before registration or re-registration as the case may be (3 & 4 Vict. c. 82, s. 2; 18 & 19 Vict. c. 15, ss. 4, 5; *Nortcliffe* v. *Warburton*, 10 W. R. 635; *Lee* v. *Green*, 6 D. M. & G. 155; see further as to notice, *Freer* v. *Hesse*, 22 L. J. Ch. 597).

As to the registration necessary where the lands are in a register county, see the cases quoted under the 1 & 2 Vict. c. 110, s. 13, *ante*, p. 453.

Judgments after 1860.

As to judgments entered up between the 23rd July, 1860, and the 29th July, 1864, see 23 & 24 Vict. c. 38, *post*, p. 470. And as to judgments entered up after the 29th July, 1864, see 27 & 28 Vict. c. 112, *post*, p. 476.

51 & 52 Vict. c. 51.

See now as to registration, the Land Charges Registration and Searches Act, *post*, p. 480.

[*Sect.* 20 *provided for the issue of new or altered writs to give effect to the provisions of this act, and was repealed by* 42 & 43 *Vict. c.* 59. *See now R. S. C. Ord.* 42, *r.* 14.]

Courts of Lancaster and Durham.

Sect. 21 *extended the provisions of this act to the common law courts of Lancaster and Durham, the jurisdiction of which was transferred to the High Court by the Jud. Act*, 1873, *s.* 16 (*t*).

Chancery palatine courts.

(*t*) See also 18 & 19 Vict. c. 15, ss. 1, 2, 3, 7, and 9.

By 13 & 14 Vict. c. 43, s. 24, all the remedies, authorities and provisions of 1 & 2 Vict. c. 110, 2 & 3 Vict. c. 11, and 3 & 4 Vict. c. 82, applicable to the superior courts of common law at Westminster, were extended to the Court of Chancery of Lancaster within the limits of the jurisdiction thereof, and orders of that court were directed to be registered. By 18 & 19 Vict. c. 15, s. 2, the provisions of ss. 18, 19, and 20 of 1 & 2 Vict. c. 110, were extended to the Chancery Court of Durham. The section further provided that no judgment or order of any court should bind land in either of the palatine counties unless registered in the proper palatine court.

By 18 & 19 Vict. c. 15, ss. 3 and 9, the provisions of 2 & 3 Vict. c. 11, ss. 3, 4, 5, and 7, and of 3 & 4 Vict. c. 82, s. 2, as explained or amended by 18 & 19 Vict. c. 15, were extended *mutatis mutandis* to the Chancery Courts of the two palatine counties, and the respective prothonotaries of the palatine courts were, for the purpose of registration, substituted for the senior master. 1 & 2 Vict. c. 110, s. 21.

Judgments of Inferior Courts.

For removal of judgment of inferior courts.

22. In all cases where final judgment shall be obtained in any action or suit in any inferior court of record, in which at the time of passing this act a barrister of not less than seven years' standing shall act as judge, assessor or assistant in the trial of causes, and also in all cases where any rule or order shall be made by any such inferior court of record as aforesaid whereby any sum of money or any costs, charges or expenses shall be payable to any person, it shall be lawful for the judges of any of her Majesty's superior courts of record at Westminster, or for any judge of any of the said courts at chambers, either in term or vacation, upon the application of any person who at the time of the commencement of this act shall have recovered, or who shall at any time thereafter recover such judgment, or to whom any money or costs, charges or expenses shall be payable by such rule or order as aforesaid, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, such record or rule or order, as the case may be, being respectively under the seal of the inferior court, and the signature of the proper officer thereof, to order and direct the judgment, or as the case may be, the rule or order of such inferior court, to be removed into the said superior court, and immediately thereupon such judgment, rule or order shall be of the same force, charge and effect as a judgment recovered in or a rule or order made by such superior court, and all proceedings shall and may be immediately had and taken thereupon or by reason or in consequence thereof, as if such judgment so recovered or rule or order so made had been originally recovered in or made by the said superior court, and all the reasonable costs and charges attendant upon such application and removal shall be recovered in like manner as if the same were part of such judgment or rule or order (*u*).

(*u*) The original reference in the above section to the Lancaster Court of Common Pleas has been repealed (42 & 43 Vict. c. 59), and is omitted. The original proviso at the end of the section was repealed by 18 & 19 Vict. c. 15, s. 7, which also provided that removed judgments should be registered and re-registered as if original judgments, and should be then binding to the same extent.

Removal of judgments.

Where a judgment is removed from an inferior court for execution under this act, the court will not inquire into the regularity of previous proceedings below (*Simons* v. *Wintz*, 8 Dowl. P. C. 646; *Williams* v. *Bolland*, 1 C. P. D. 227); but will set it aside if it was beyond the juris-

1 & 2 Vict. c. 110, s. 23.

diction of the inferior court (*Bridge* v. *Branch*, 1 C. P. D. 633). A judgment of an inferior court of equity may be removed (*Harvey* v. *Gilbard*, 7 Dowl. P. C. 616). See further, *Harvey* v. *Gilbard*, 7 Dowl. P. C. 525; *Kemp* v. *Parry*, 8 Jur. 576; Chitty's Archbold, 1569, 14th ed.

Judgments of palatine, county and other local courts.

Decrees and orders of the Chancery Court of Lancaster may be removed into the High Court (13 & 14 Vict. c. 43, s. 15; 17 & 18 Vict. c. 82, s. 10), and those of the Chancery Court of Durham (52 & 53 Vict. c. 47, s. 3). Judgments of the County Courts for an amount exceeding 20*l.* may be removed into the High Court (51 & 52 Vict. c. 43, s. 151; see *Austin* v. *Mills*, 9 Ex. 288; *Moreton* v. *Holt*, 10 Ex. 707; *Re Turner*, 12 W. R. 337); but where made in bankruptcy can be enforced as if orders of the High Court (46 & 47 Vict. c. 52, s. 100, see *ante*, p. 460). As to the removal from the Mayor's Court, see 20 & 21 Vict. c. 157, s. 48; *Paine* v. *Slater*, 11 Q. B. Div. 120; *Munday* v. *Pigott*, 1884, W. N. 57; from borough and local courts, see 35 & 36 Vict. c. 86; and from the stannary courts, see 18 & 19 Vict. c. 32, s. 9; *Harvey* v. *Gilbard*, *supra*.

Judgments extension.

See, as to enforcing in Scotland or Ireland judgments obtained in England in a superior court, 31 & 32 Vict. c. 54; or in an inferior court, 45 & 46 Vict. c. 31; and orders in bankruptcy obtained in England, 46 & 47 Vict. c. 52, s. 117.

Foreign judgments.

Where a court of competent jurisdiction has adjudicated a certain sum to be due, a legal obligation arises to pay that sum, on which an action of debt may be maintained. In this way judgments of foreign and colonial courts are enforced; and the same rule applies to inferior courts in this country, whether courts of record or not (*Williams* v. *Jones*, 14 M. & W. 633). As to actions brought upon foreign judgments, see notes to *Doe* v. *Oliver*, 2 Smith, L. C.; *Grant* v. *Easton*, 13 Q. B. Div. 302; *Vadala* v. *Lawes*, 25 Q. B. Div. 310.

---

2 & 3 Victoriæ, cap. 11.

An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens and Fiats in Bankruptcy (*x*). [4th June, 1839.]

(*x*) Sects. 1—5 of this Act are referred to *ante*, pp. 452, 461, 462, 463.

2 & 3 Vict. c. 11, s. 7.

Registry of Lis Pendens.

Purchasers not to be affected by any *lis pendens*, unless such suit is duly registered as directed by this act.

7. No lis pendens shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade or profession, of the person whose estate is intended to be affected thereby, and the court of equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such lis pendens; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and the provisions hereinbefore contained in regard to the re-entering of judgments every five years, and the fee payable to

the officer thereon, shall extend to every case of lis pendens which shall be registered under the provisions of this act (*a*). 2 & 3 Vict. c. 11, s. 7.

(*a*) *Lis pendens* affects a purchaser not because it amounts to notice, but because the law does not allow one party, *pendente lite*, to alienate the property in dispute so as to affect his opponent (*Bellamy* v. *Sabine*, 1 De G. & J. 578; *Price* v. *Price*, 35 Ch. D. 302). There should be no registration as a *lis pendens*, unless a claim is made in the proceeding against some specific property (*Ex p. Thornton*, 2 Ch. 178). A special case may be registered as a *lis pendens* (13 & 14 Vict. c. 35, s. 17), or an order under sect. 7 of the S. L. A. 1884 (see sub-sects. (5) and (6) of that section, *post*).

What is *lis pendens*.

In the following cases the proceeding was held to be a *lis pendens*: a suit to establish a will (*Garth* v. *Ward*, 2 Atk. 174); a redemption action by a mortgagor (*Ib.*); a foreclosure action by a mortgagee (*Winchester* v. *Paine*, 11 Ves. 194). A case where there are questions between co-defendants, may be a *lis pendens*, as regards a purchaser from one of them (*Tyler* v. *Thomas*, 25 Beav. 47; see *Bellamy* v. *Sabine*, 1 De G. & J. 566). When debts are charged upon real estate, a creditor's action to administer real and personal estate, if registered as a *lis pendens*, will give the plaintiff priority over the assign of any defendant entitled to real estate under the will, except when such assign had a right to suppose that such defendant was dealing with the property to pay debts (*Price* v. *Price*, 35 Ch. D. 304). When debts are not charged, registration of such an action will give priority, when, and only when, the real estate sought to be charged is sufficiently indicated; the above exception, however, applying in this case also (*Ib.* 305).

What is not *lis pendens*.

In the following cases the proceeding was held not to be a *lis pendens*. An action relating to money secured on the land (*Worsley* v. *Scarborough*, 3 Atk. 392; see, however, *Norris* v. *Stuart*, 16 Beav. 359). A partnership action, as against the real estate of one of the partners (*Ex. p. Thornton*, 2 Ch. 176). As regards chattels, a mere administration judgment, registered as a *lis pendens*, there being no receiver or injunction, does not interfere with an executor's power of disposition (*Berry* v. *Gibbons*, 8 Ch. 747, 750). After decree and before execution there is no *lis pendens* (*Kinsman* v. *Kinsman*, 1 R. & M. 617; *Worsley* v. *Scarborough*, 3 Atk. 392), unless the decree is only for an account, and is not final (*Worsley* v. *Scarborough*, *sup.*)

As to the doctrine of *lis pendens* generally, see *Bellamy* v. *Sabine* (1 De G. & J. 566); *Kinsman* v. *Kinsman* (1 R. & M. 617); and as to the protection afforded by registration, see *Beyfus* v. *Bullock* (7 Eq. 391). And as to negligence on the part of a solicitor for not registering a *lis pendens*, see *Plant* v. *Pearman* (20 W. R. 314).

Satisfaction.

Satisfaction may be entered as to a registered *lis pendens* under 23 & 24 Vict. c. 115, s. 2, *post*, p. 476; and the court may order the vacating of the registration of a *lis pendens* where the suit has determined, or where the court is satisfied that the litigation is not being prosecuted *bonâ fide* (30 & 31 Vict. c. 47, s. 2). As to how application should be made under the last act, see *Clutton* v. *Lee* (7 Ch. D. 541, n.); *Pooley* v. *Bosanquet* (*Ib.*); *Jervis* v. *Berridge* (23 W. R. 43). Registration against a person not party to the action may be vacated (*Schofield* v. *Solomon*, 52 L. T. 679).

Registry of Crown Debts.

Recognizances entered into not to affect purchasers, unless

8. No judgment, statute or recognizance which shall hereafter be obtained or entered into in the name or upon the proper account of her Majesty, or inquisition by which any debt shall be found due to her Majesty, or obligation or specialty

2 & 3 Vict. c. 11, s. 8.

duly registered as directed by this act.

33 Hen. 8, c. 39.

13 Eliz. c. 4.

which shall hereafter be made to her Majesty, in the manner directed by an act passed in the thirty-third year of the reign of his late Majesty King Henry the Eighth, intituled "The Erection of the Court of Surveyors of the King's Lands, and the Names of the officers there, and their Authority," or any acceptance of office which shall hereafter be accepted by officers whose lands shall thereby become liable for the payment and satisfaction of arrearages under the provisions of the act passed in the thirteenth year of the reign of her late Majesty Queen Elizabeth, intituled "An Act to make the Lands, Tenements, Goods and Chattels of Tellers, Receivers, et cætera, liable to the Payment of their Debts," shall affect any lands, tenements, or hereditaments, as to purchasers or mortgagees, unless and until a memorandum or minute, containing the name and the usual or last place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and also in the case of any judgment the court and the title of the cause in which such judgment shall have been obtained, and the date of such judgment, and the amount of the debt, damages and costs thereby recovered, and also in the case of a statute or recognizance the sum for which the same was acknowledged, and before whom the same was acknowledged, and the date of the same, and also in the case of an inquisition the sum thereby found to be due, and the date of the same, and also in the case of an obligation or specialty the sum in which the obligee* shall be bound, or for which the obligation or specialty shall be made, and the date of the same, and also in the case of acceptance of office, the name of the office, and the time of the officer accepting the same, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book, to be intituled "The Index to Debtors and Accountants to the Crown," in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, statute or recognizance, inquisition, obligation or specialty, or the acceptance of any office; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book, and also the other book to be kept according to the provisions of the said recited act of the first and second years of the reign of her present Majesty, or either of the said books, on payment of the sum of one shilling, whether one only or both of the said books shall be searched, and no multiplication of books is to increase the fee (*b*).

* *Sic*, query obligor.

Registry to be open to inspection.

Who are accountants to the crown.

33 Hen. 8, c. 39.

13 Eliz. c. 4.

(*b*) A recognizance by a guardian is not a debt due to the crown (*Ex p. Usher*, 1 Rose, 366). The exact form of the bond under 33 Hen. 8, c. 39, was not material (*R.* v. *Ellis*, 4 Exch. 652).

A bond entered into by the committee of a lunatic's estate has the same force as a bond under 33 Hen. 8, c. 39 (*R.* v. *Chambers*, 11 M. & W. 776; 2 Coop. Temp. Colt, 69, n.)

The statute 13 Eliz. c. 4, enumerates a great many officers of the crown and other persons. Money "imprest for the use of the crown" under

that statute is money advanced to be employed for the use of the crown (6 Price, 424). The following persons have been held accountants to the crown under that statute. A deputy commissary-general to the forces abroad (*R.* v. *Rawlings*, 12 Price, 834; *R.* v. *Fernandez*, *ib.* 862). A commissioner directed by statute to pay money into the bank subject to the orders of the king (*Wilde* v. *Fort*, 4 Taunt. 334). An agent for a fire insurance office in respect of money received for duty (*R.* v. *Wrangham*, 1 Tyr. 383). A receiver of customs is not within the statute (6 Geo. 4, c. 105, s. 13; *Ib.* c. 106, s. 7). Nor is a collector of assessed taxes (*Casberd* v. *Ward*, 6 Price, 411). As to bonds by receivers of customs, see 39 & 40 Vict. c. 36, ss. 165—167; and as to bonds by tax collectors, see 43 & 44 Vict. c. 19, ss. 74—77, 118, 119. A clerk of the patents under 3 & 4 Will. 4, c. 84, was held accountable for moneys received by him (*A. G.* v. *Edmunds*, 6 Eq. 381). Any person receiving money of the crown becomes an immediate debtor to the crown (*Re West London Bank*, 38 Ch. D. 367).

2 & 3 Vict. c. 11, s. 8.

Before this act a bond under 33 Hen. 8, c. 39, bound all lands of the obligor over which he had a disposing power at the time he entered into the bond, even as against a subsequent purchaser for value (*Ellis* v. *R.*, 6 Exch. 921). As to its effect against estates tail, see *Anderson's case* (7 Rep. 21); *Cecil's case* (*Ib.* 19). The lien of the crown under 13 Eliz. c. 4, attached from the time when the owner of the lands became an accountant, so that a sale after acceptance of office might be defeated by a subsequent debt to the crown (*Nicholls* v. *Howe*, 2 Vern. 389; *R.* v. *Sarum*, Moore, 126; 25 Geo. 3, c. 35). Consequently the plea of being a purchaser for valuable consideration, without notice, would not avail against the crown; and a purchaser, though thus favourably circumstanced, could not use an attendant term as a protection against the crown (*R.* v. *Smith*, Sugd. V. & P. 673, 778, 1098, 11th ed.; *How* v. *Nichol*, Pr. Ch. 125; see *R.* v. *St. John*, 2 Price, 317; *R.* v. *Hollier*, 2 Price, 394). Where the term never was held in trust for the crown debtor, it might be used as a defence against the crown debt (*R.* v. *Lamb*, 13 Price, 649; M'Clel. 402).

When lien of crown attaches.

In the case of debtors to the crown by simple contract the lien of the crown as against purchasers for value only attached from the time of the debt being put on record (*Casberd* v. *Ward*, 6 Price, 411). So also in the case of a bond not within 33 Hen. 8, c. 39 (*A. G.* v. *Andrew*, Hard. 23).

The following among other interests in land may be taken under an extent:—freeholds (*Hatton's case*, 10 Rep. 55); leaseholds (*Fleetwood's case*, 8 Rep. 171); rent-charges (*Lillingston's case*, 7 Rep. 37); an equity of redemption (*R.* v. *Coombes*, 1 Price, 207; *Fector* v. *Philpot*, 12 Price, 197); lands held on trust for the debtor (*A. G.* v. *Sands*, Hard. 495; *Devonshire's case*, 11 Rep. 92; 13 Eliz. c. 4, s. 5); lands *bonâ fide* settled before the lien of the crown attached, but with a power of revocation (*Coke's case*, Godb. 289). As to the liability of the heir of a crown debtor, see Dyer, 67. Copyholds cannot be taken under an extent (*R.* v. *Budd*, Parker, 190); nor property which had been *bonâ fide* assigned to other creditors prior to the time when the debt to the crown was incurred (*Spears* v. *Lord Advocate*, 6 Cl. & Fin. 180, 189; see *Scott* v. *Scholey*, 8 East, 467; *R.* v. *Sanderson*, 1 Wight. 51; *R.* v. *Lee*, 6 Price, 369). As to the priority of the crown under an extent, see *A. G.* v. *Leonard* (38 Ch. D. 622).

What land may be taken under an extent.

As to how far possible crown debts were an objection to title, see *Poole* v. *Shergold* (1 Cox, 160); *Wilde* v. *Forte* (4 Taunt. 334).

On the subject of crown debts, see West on Extents, 8vo. 1817; Manning's Practice of the Court of Exchequer, 8vo. 1827; 5 Jarm. Convey. by Sweet, pp. 64 f, 79; Butl. Co. Litt. 209 a, 18th ed.; Fisher's Digest, tit. Extent.

Before the above act searches for crown liabilities were made at the Exchequer Office, and amongst the bonds of the receiver-general at the Tax Office (2 Real Prop. Rep. 12.)

Old mode of searching for crown debts.

With respect to judgments, &c. obtained on or before 5th July, 1865, the provisions in 2 & 3 Vict. c. 11, as amended by 18 & 19 Vict. c. 15 (See *ante*, p. 461), were extended to every such judgment, statute, recognizance,

~~2 & 3 Vict. c. 35, s. 22.~~

2 & 3 Vict. c. 11, s. 8.

inquisition, obligation, specialty or acceptance of office, as is by sect. 8 of the first-mentioned act required to be registered (22 & 23 Vict. c. 35, s. 22).

28 & 29 Vict. c. 104, ss. 48, 49.

Future crown debts, &c., not to affect land till writ of execution issued and registered.

By 28 & 29 Vict. c. 104, s. 48, crown judgments, &c. obtained or made after 5th July, 1865, do not affect land unless a writ of extent, or of *diem clausit extremum*, or other writ or process of execution in pursuance of or in relation to such judgment, &c., has been issued and registered before the execution of the conveyance and the payment of the purchase-money.

23 & 24 Vict. c. 115 (*post*, p. 474), provides for the entry of satisfaction on the registry of crown debts. The existence of crown debts incurred before the 4th June, 1839, must be ascertained by the old mode (*ante*, p. 467). For the registration of crown debts since that date, provision was made by 28 & 29 Vict. c. 104, s. 49. As to present searches for crown debts, see Conv. Act, 1882, s. 2 (*post*). See also Dart, V. & P. 539, 562, 6th ed.

Registry of a Quietus.

Quietus to debtors or accountants to the crown to be registered.

9. Whenever a quietus shall be obtained by a debtor or accountant to the crown, and an office copy thereof shall be left with the senior master of the said Court of Common Pleas, together with a certificate, signed by the accountant-general, that the same may be registered, the said master shall forthwith enter the same in the said book of debtors and accountants to the crown, in alphabetical order, by the name of the person whose estate is intended to be discharged by such quietus, with the date, and shall for any such entry be entitled to a fee of two shillings and sixpence (*c*).

(*c*) Formerly, where a vendor was a debtor or accountant to the crown, the title was not good until a *quietus* was entered up on record (See *Wilde* v. *Fort*, 4 Taunt. 334). And a purchaser could not be compelled to take the title, although the crown consented to the payment of the purchase-money into the Exchequer on account of the debt (*Brakespear* v. *Innes*, Sugd. V. & P. 1009, 11th ed.; see *Ex p. Fleetwood*, 4 M. & G. 640).

Discharge of Crown Debtor's Estate.

For discharge of the estates of debtors or accountants to the crown in certain cases.

10. It shall be lawful for the treasury, upon payment of such sums of money as they may think fit to require into the receipt of her Majesty exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the crown, or upon such other terms as they may think proper, to certify that any lands, tenements or hereditaments of any such crown debtor or accountant shall be held by the purchaser or mortgagee or intended purchaser or mortgagee thereof, his or their heirs, executors, administrators and assigns, wholly exonerated and discharged from all further claims of her Majesty, for or in respect of any debt, claim or liability, present or future, of the debtor or accountant to whom such lands, tenements or hereditaments belonged, or, in cases of leases for fines, to certify that the lessees, their heirs, executors, administrators and assigns,

shall hold so exonerated and discharged, without prejudice to the rights and remedies of the crown against the reversion of the lands, tenements or hereditaments comprised in any such leases, and the rents and covenants reserved and contained by and in the same; and thereupon the same lands, tenements or hereditaments shall respectively be held accordingly wholly exonerated and discharged as aforesaid, but in the cases of leases without prejudice as aforesaid (*d*). 2 & 3 Vict. c. 11, s. 10.

(*d*) The preliminary recital in this section, and some unimportant words describing the treasury and the crown in sects. 8, 10, and 11, have been repealed by 53 & 54 Vict. c. 51.

Part Discharge.

11. Any such certificate, or the discharge of any such lands, tenements or other hereditaments by virtue of this act, shall in nowise impeach, lessen or affect the right or power of her Majesty to levy the whole of any debt or demand which may at any time be due from any such debtor or accountant to the crown out of or from any other lands, tenements or hereditaments which would have been liable thereto in case no such certificate had been granted and no such discharge had been obtained (*e*). Discharge of part of the estate of a debtor or creditor to the crown not to affect claim of the crown on other lands liable.

(*e*) By 1 & 2 Geo. 4, c. 121, s. 10, where an estate is sold under a writ of extent, or by the Court of Chancery or Exchequer, and the purchase-money is paid into the receipt of the king's exchequer, that will absolve the purchaser.

Ireland.

14. This act shall not extend to Ireland (*f*). Act not to extend to Ireland.

(*f*) The provisions of the above act, with some alterations, were extended to Ireland by 7 & 8 Vict. c. 90.

18 & 19 Victoriæ, cap. 15.

An Act for the better Protection of Purchasers against Judgments, Crown Debts, Cases of Lis pendens, and Life Annuities or Rent-charges (*a*). [26th April, 1855.]

(*a*) Other sections of this act are noticed *ante*, pp. 448, 452, 460, 462, 463.

12. And whereas by reason of the repeal in the last session of parliament of the act of the fifty-third year of King George the Third, chapter one hundred and forty-one, requiring the enrolment of life annuities or rent-charges, purchasers are no 18 & 19 Vict. c. 15, s. 12.

Life annuities and rent-charges not to

18 & 19 Vict. c. 15, s. 12.

affect lands as to purchasers, &c., until memorandum left with senior master.

longer enabled to ascertain by search what life annuities or rent-charges may have been granted by their vendors or others: be it therefore enacted by the authority aforesaid as follows: any annuity or rent-charge granted after the passing of this act, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until a memorandum or minute containing the name, and the usual or last known place of abode, and the title, trade, or profession, of the person whose estate is intended to be affected thereby, and the date of the deed, bond, instrument or assurance, whereby the annuity or rent-charge is granted, and the annual sum or sums to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars aforesaid in a book in alphabetical order by the name of the person whose estate is intended to be affected by the annuity or rent-charge, together with the year and the day of the month when every such memorandum or minute is so left with him, and he shall be entitled for every such entry to the sum of two shillings and sixpence, and all persons shall be at liberty to search the same book, together with the other books or registers in the office, on payment of the sum of one shilling (*b*).

(*b*) An annuity, even if not registered under this section, will be good as against a subsequent incumbrancer taking with notice, and against the trustee in bankruptcy of the grantor (*Greaves* v. *Tofield*, 14 Ch. D. 563).

Annuities, &c., given by will excepted from act.

14. The provisions of this act shall not extend to require the registry of annuities or rent-charges given by will.

---

23 & 24 Victoriæ, cap. 38.

An Act to further amend the Law of Property.

[23rd July, 1860.]

23 & 24 Vict. c. 38, s. 1.

Be it enacted as follows:

Judgments.

Writs of execution of judgments to be registered.

1. Whereas it is desirable to place freehold, copyhold and customary estates on the same footing with leasehold estates, in respect of judgments, statutes and recognizances as against purchasers and mortgagees, and also to enable purchasers and mortgagees of estates, whether freehold, copyhold or customary or leasehold, to ascertain when execution has issued on any judgment, statute or recognizance, and to protect them against

delay in the execution of the writ: be it therefore enacted, that no judgment, statute or recognizance to be entered up after the passing of this act shall affect any land (of whatever tenure) as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee (whether such purchaser or mortgagee have notice or not of any such judgment, statute or recognizance), unless a writ or other due process of execution of such judgment, statute or recognizance shall have been issued and registered as hereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him: provided always, that no judgment, statute or recognizance to be entered up after the passing of this act, nor any writ of execution or other process thereon, shall affect any land of whatever tenure as to a *bonâ fide* purchaser or mortgagee, although execution or other process shall have issued thereon, and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered (*a*). 23 & 24 Vict. c. 38, s. 1.

(*a*) As to judgments entered up before the 23rd July, 1860, see the previous acts, *ante*, pp. 461 *et seq.* As to judgments entered up after the 29th July, 1864, see 27 & 28 Vict. c. 112, *post*, p. 476. As to judgments after 1st January, 1889, see 51 & 52 Vict. c. 51, *post*, p. 480.

Having regard to sections 5 and 6 of the last-mentioned act, it would seem that registration under the above section of any writ or process has no effect since 1st January, 1889.

Under the above section, a registered judgment creditor who had issued execution, but never executed the same, was a proper party to a foreclosure suit instituted more than three months after registration of execution (*Appleton* v. *Sturgis*, 10 W. R. 312). The section applied to property of the judgment debtor which was not extendible; and, as against a purchaser, a judgment would not affect an equity of redemption unless a writ of execution was issued before completion (*Wallis* v. *Morris*, 12 W. R. 997).

The first five clauses of this act do not extend to Ireland (sect. 15).

2. The registry hereinbefore required of any writ of execution, or other due process on any judgment, statute or recognizance, in order to bind a purchaser or mortgagee, shall be made by a memorandum or minute referring to the judgment, statute or recognizance already registered, so as to connect the registry of the writ of execution or other process therewith; such memorandum or minute to be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars in a book in alphabetical order by the name of the person in whose behalf the judgment, statute or recognizance upon which the writ of execution or other process issued was registered, and also the year and the day of the month when every such memorandum or minute is left with him, and such officer shall be entitled for any such registry to the sum of five shillings; and all persons shall be at liberty to search the same book, in addition to all the other books in the same office, on payment of the sum of one shilling only: and all the provisions in this act in regard to writs of execution or other Mode of registering.

23 & 24 Vict. c. 38, s. 2.

process and the registry thereof, or otherwise relating thereto, shall extend, mutatis mutandis, to writs of execution or other due process issuing on judgments of the several Courts of Common Pleas of the county palatine of Lancaster, and of pleas of the county palatine of Durham; but none of these provisions are to extend to Ireland (*b*).

Double search necessary.

(*b*) As the writ of execution is to be registered in the name of the judgment *creditor*, two searches are necessary in the case of judgments falling within this act, viz.: first, in the register of judgments in the name of the debtor; and, secondly, in the register of executions in the name of the creditor.

Provision for protection of heirs and executors against unregistered judgments.

3. And whereas by an act passed in the fourth and fifth years of their late Majesties King William and Queen Mary, intituled "An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas and Exchequer in Westminster," it was enacted, that no judgment not docketed and entered in books in the manner thereby provided should affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors or administrators in their administration of their ancestors', testators' or intestates' estates: And whereas by several later acts judgments are required to be registered with more particulars than were required by the said recited act; and it is thereby enacted, that judgments not so registered shall not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until the same shall be registered in manner thereby required; and in obedience to a direction in one of the same acts contained the dockets existing under the said first-recited act have been finally closed: And whereas the said several later acts do not expressly enact that judgments not docketed as thereby required shall not have any preference against heirs, executors or administrators in their administration of their ancestors', testators' or intestates' estates, in consequence whereof such heirs, executors or administrators have been held to have lost the protection which they enjoyed under the said first recited act, and it is expedient that the same should be restored; be it therefore declared and enacted, that no judgment which has not already been or which shall not hereafter be entered or docketed under the several acts now in force, and which passed subsequently to the said act of the fourth and fifth years of King William and Queen Mary, so as to bind lands, tenements or hereditaments as against purchasers, mortgagees or creditors, shall have any preference against heirs, executors or administrators in their administration of their ancestors', testators' or intestates' estates (*c*).

(*c*) In consequence of the decision in *Fuller* v. *Redman* (26 Beav. 600), the above section was passed.

Where judgments had been recovered against a deceased testator, but had never been registered, they were not entitled to priority over simple contract debts (*Re Turner*, 12 W. R. 337). And where a judgment was

signed in 1854, but not registered until after the death of the debtor, which happened after the passing of this act, the judgment creditor was not entitled to preference (*Kemp* v. *Waddingham*, L. R. 1 Q. B. 355). 23 & 24 Vict. c. 38, s. 3.

But judgments against executors and administrators need not be registered to retain their priority over simple contract debts (*Jennings* v. *Rigby*, 33 Beav. 198). And in the case of a person dying since 1870, an unregistered judgment against an administratrix was entitled to priority over both specialty and simple contract debts (*Re Williams*, 15 Eq. 270).

Judgments as against heirs and executors to be re-registered.

4. No judgments which since the passing of an act 1 & 2 Vict. c. 110 (*d*) (being one of the acts hereinbefore referred to), have been registered under the provisions therein contained, or contained in the later act of the second and third years of Queen Victoria, chapter eleven (*e*), as explained and amended by the act of the session of the eighteenth and nineteenth years of Queen Victoria, chapter fifteen (*f*) (being two other of the acts hereinbefore referred to), or which shall hereafter be so registered, shall have any preference against heirs, executors or administrators in their administration of their executors' (*g*), testators' or intestates' estates, unless at the death of the (*h*) testator or intestate five years shall not have elapsed from the date of the entry thereof on the docket or from the only or last re-registry thereof, as the case may be, which re-registry from time to time is hereby authorized to be made in manner directed by the said act of the second and third of Queen Victoria, as explained and amended by the act of the eighteenth and nineteenth of Queen Victoria; but it shall be deemed sufficient to secure such preference as aforesaid, if such a memorandum as was required in the first instance is again left with the senior master of the Common Pleas within five years before the death of the (*h*) testator or intestate, although more than five years shall have expired by effluxion of time since the last previous registration, before such last-mentioned memorandum or minute was left; and so *toties quoties* upon every re-registry (*i*).

(*d*) See *ante*, p. 461.
(*e*) See *ante*, p. 461.
(*f*) See *ante*, p. 462.
(*g*) Clearly a mistake for "ancestors."
(*h*) The word "ancestor" seems to have been omitted.
(*i*) This section is not retrospective. So that where a debtor died before the passing of the act, a judgment, which had not been re-registered within five years before his death, retained its priority (*Evans* v. *Williams*, 2 Dr. & Sm. 324).

Extent of the word "judgment."

5. In the construction of the previous provisions the term "judgment" shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment (*k*).

(*k*) The other sections of this act are inserted in other parts of this work (See *ante*, p. 176, and *post*).

23 & 24 Victoriæ, cap. 115.

An Act to simplify and amend the Practice as to the Entry of Satisfaction on Crown Debts and on Judgments.

[28th August, 1860.]

23 & 24 Vict. c. 115, s. 1.

Be it enacted as follows:

1. All the powers, provisions and regulations, concerning bonds and other securities relating to the customs contained in sections one hundred and ninety-five, one hundred and ninety-six, and one hundred and ninety-seven, of the act passed in the session of parliament holden in the sixteenth and seventeenth years of her Majesty's reign, chapter one hundred and seven (*a*), shall, mutatis mutandis, be deemed to extend and shall be applied to all bonds and other securities entered into or given to her Majesty, her heirs or successors: provided always, that in every case in which under the provisions of the said sections any certificate is required to be signed or any other matter authorized to be done by the commissioners of customs, or any number of them, any such certificate or matter in relation to any bond or other security concerning or incident to any public department shall respectively be signed and done by the respective commissioners or other principal officers of such department, or any two of them respectively, or if there shall be only one such commissioner or principal officer then by him, as the case may be, or if there shall be no such commissioner or other principal officer then by the commissioners of her Majesty's treasury or any two of them.

Provisions of sects. 195, 196 and 197 of 16 & 17 Vict. c. 107, extended to all bonds to the crown.

(*a*) Sect. 195. All bonds and other securities entered into by any person or persons for the performance of any condition, order or matter relative to the customs or incident thereto, shall be valid in law, and upon breach of any of the conditions thereof may be sued and proceeded upon in the same manner as any bond expressly directed, or given by or under the provisions of any act relating to the customs, and all bonds relating to the customs or for the performance of any condition or matter incident thereto shall be taken to or for the use of her Majesty, and all such bonds, except such as are given for securing the due exportation of or payment of duty upon warehoused goods, may, after the expiration of three years from the date thereof or from the time, if any, limited therein for the performance of the condition thereof, be cancelled by or by the order of the commissioners of customs, and all bonds given under the provisions of this or any act relating to the customs by persons under twenty-one years of age shall be valid.

All bonds, &c., valid.

Bonds to be taken to the use of her Majesty.

Bonds of minors valid.

Sect. 196. If any bond given under the provisions of this or any act relating to the customs, or in respect of any matter under the control or management of the commissioners of customs shall have been registered in the Court of Common Pleas in England, or in the office of the registrar of judgments in Ireland, and the condition of such bond shall have been satisfied, the commissioners of customs, by certificate under the hands of any two or more of them, may authorize the proper officer of the said court or office of registrar of judgments, as the case may be, to enter up

How bonds may be discharged.

satisfaction on the record of such bond or obligation, and such certificate may be in the form or to the effect following :— 23 & 24 Vict. c. 115, s. 1.

This is to certify that the following bond has been satisfied and cancelled.

Name or names of the obligor or obligors.	Date of bond.	Penalty.	Condition.	Where registered.

Given under our hands this —— day of ——, 18—.

} Commissioners of Customs.

To the Senior Master or other proper officer of the Court of Common Pleas [*if in England*], or to the Registrar of Judgments [*if in Ireland, as the case may be*].

And upon the receipt of such certificate such officer is required to enter up satisfaction accordingly, whereupon the bond or obligation shall be discharged, and the land thereby affected shall be released and exonerated from all claims in respect thereof.

Exoneration of estates of obligors.

Sect. 197. When any bond entered into under the provisions of this or any act relating to the customs, or for the performance of any condition, order or matter incident or relative to the customs, shall have been registered in the Court of Common Pleas in England, under the act of the second year of the reign of her present Majesty, chapter eleven, or in the office of the registrar of judgments in Ireland, under the act of the seventh and eighth years of the reign of her said Majesty, chapter ninety, and it shall be deemed necessary in the discretion of the commissioners of customs, to exonerate the whole or any part of the lands of any obligor of such bond from liability in respect thereof, the commissioners of customs, by certificate or certificates under the hands of any two or more of them, may, first requiring the consent of any co-obligor if they shall deem it necessary, exonerate and discharge such lands or any part thereof, as the case may require, and such certificate may be in the form or to the effect following :—

Form of certificate of exoneration.

By a bond or obligation bearing date the —— day of ——, 186—, [*name of obligor seeking exoneration,*] of [*residence and description of obligor*], became bound to her Majesty, her heirs and successors, in the sum of ——, conditioned as therein mentioned, and the said bond was on the —— day of ——, 186—, duly recorded in the Court of Common Pleas, [*if in England,*] or filed in the office of the registrar of judgments, [*if in Ireland,*] in pursuance of the act [*state the act under which the bond was registered*]. This is to certify that all the estates, lands, tenements and hereditaments [*if the whole are to be discharged*] or [*here set out the particular lands, tenements and hereditaments exonerated, if part only are to be discharged, adding the following words,*] being part of the estate, lands, tenements and hereditaments of the said [*name of obligor seeking exoneration,*] are wholly exonerated and discharged from all claims of her Majesty, her heirs or successors, or of the commissioners of customs on her or their behalf in respect of such bond or obligation. Given under our hands this —— day of ——, 186—.

(Signed)

} Commissioners of her Majesty's Customs.

Certificates to be sufficient evidence of exoneration.

And the lands mentioned in such certificate or certificates shall thereupon be held wholly exonerated and discharged from all liability in respect of such bond or obligation, and every such certificate shall be accepted by all persons and in all courts as sufficient evidence of the exoneration of the lands therein described.

The above sections of 16 & 17 Vict. c. 107 were repealed by 39 & 40 Vict. c. 36, s. 288, and re-enacted almost verbatim by sects. 165, 166, 167 of the last-mentioned act.

23 & 24 Vict. c. 115, s. 2.

As to entry of satisfaction on judgments.

2. The senior master of the Court of Common Pleas at Westminster (*b*) may, upon the filing with him of an acknowledgment in the form or to the effect following, be at liberty to enter a satisfaction or discharge as to any registered judgment, pending suit, lis pendens, decree, order, rule, annuity or rent-charge, or writ of execution, and such officer shall be entitled for any such registry of satisfaction or discharge to the sum of two shillings and sixpence, and no more; and such senior master may issue certificates of the entry of any satisfaction or discharge, and may charge the sum of one shilling for every such certificate.

Form of Acknowledgment of Satisfaction..

Satisfaction is acknowledged between *A. B.* and *C. D.* as to a —— dated the —— day of ——, 186—, for the sum of £——, a memorandum of which said —— was left with the senior master of the Court of Common Pleas at Westminster, on the —— day of ——, 186—, to affect the estate of ——, and [if so] on the writ of execution thereon, dated the —— day of ——, 186—, a memorandum of which was left with the said master on the —— day of ——, 186—.

And —— [*or* the executor or administrator of] do hereby expressly nominate and appoint ——, of ——, attorney-at-law, to witness and attest the execution of this acknowledgment of satisfaction.

Signed by the said ——, in the presence of me, the undersigned ——, one of the attorneys of her Majesty's Court of ——, at Westminster, and I hereby declare myself to be the attorney for and on behalf of the said ——, expressly named by ——, and attending at ——, request to inform him of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by ——), and I also declare that I subscribe my name as witness hereto as such attorney.

} *A. B.*, the above-named ——, [*or F. G.*, executor or administrator of] the —— day of ——, 186—.

(*b*) Now the Registrar of Judgments, see R. S. C., Ord. 61, r. 22.

Satisfaction of a judgment or order in Chancery may be entered, either under this act, or by consent by an order on petition at the Order of Course Office (D. C. P. 843; D. C. F. 368). Satisfaction of a judgment in the Queen's Bench may be entered, either under this act, or by an order of a master obtained in the same manner as an order under R. S. C., Ord. 61, rr. 26 and 27; (Cent. Off. Pr. R. (17)).

---

27 & 28 Victoriæ, cap. 112.

An Act to amend the Law relating to future Judgments, Statutes and Recognizances. [29th July, 1864.]

27 & 28 Vict. c. 112.

Whereas it is desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, statutes, and recognizances: Therefore be it enacted as follows:

Future judgments, &c.,

1. No judgment, statute, or recognizance to be entered up

after the passing of this act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognizance (*a*).

27 & 28 Vict. c. 112, s. 1.

not to affect land until land delivered in execution.

(*a*) As to judgments entered up before the 23rd July, 1860, see 1 & 2 Vict. c. 110, s. 13, *ante*, p. 415; and as to judgments entered up between the 23rd July, 1860, and the 29th July, 1864, see 23 & 24 Vict. c. 38, s. 1, *ante*, p. 470.

Judgments before this act.

The present section must be read in connection with 1 & 2 Vict. c. 110, s. 13 (*ante*, p. 451), where see note as to the joint result of the two sections.

The following have been held to amount to actual delivery in execution within this section, viz.:—The return of the sheriff to a writ of elegit, the land not having been entered on (*Champneys* v. *Burland*, 19 W. R. 148); delivery of the seisin before the return (*Re Hobson*, 55 L. T. 255); sequestration (*Re Rush*, 10 Eq. 442); or the appointment of a receiver (*Hatton* v. *Haywood*, 9 Ch. 229). But not (as regards freeholds) the mere issue of an elegit which cannot be executed, because the land is already taken under a prior elegit (*Re Cowbridge R. Co.*, 5 Eq. 413; *Hatton* v. *Haywood*, 9 Ch. 229), nor (as regards an equitable interest in leaseholds), the issue and registration of a *fi. fa.* (*Backhouse* v. *Siddle*, 38 L. T. 487).

Actual delivery in execution.

For the purpose of enforcing a judgment as against the debtor's land, the appointment of a receiver may be made under the general jurisdiction of the court (*Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275), but only where the proper parties are before the court (*Re Shephard, Atkins* v. *Shephard*, 43 Ch. Div. 131) It is not necessary to sue out an elegit previously (*Ex p. Evans, Re Watkins*, 13 Ch. Div. 252; *Re Pope*, 17 Q. B. Div. 753). The appointment may be made (1) where legal delivery in execution is impossible owing to a legal impediment, such as a legal mortgage (*Anglo-Italian Bank* v. *Davies*, *sup.*; *Smith* v. *Cowell*, 6 Q. B. Div. 75), or the legal estate being in trustees (*Wells* v. *Kilpin*, 18 Eq. 298; *Tillett* v. *Pearson*, 43 L. J. Ch. 93; 22 W. R. 209); or (2) where such an appointment is a more convenient mode of execution than an elegit (*Re Pope*, 17 Q. B. Div. 749; *Re Coney, Coney* v. *Bennett*, 29 Ch. D. 993; see *Manchester Banking Co.* v. *Parkinson*, 22 Q. B. Div. 173), as when the land is subject to an equitable mortgage (*Re Pope*, *sup.*), or the debtor is a mortgagee (*Chatterton* v. *Watney*, 17 Ch. Div. 261). It has been held that a receiver cannot be appointed of a remainder in real estate (*Re Hamilton*, 31 Ch. Div. 294; see *Cadman* v. *Cadman*, 33 Ch. Div. 400). See, however, the cases where a receiver was appointed of a contingent reversionary annuity charged on land (*Re Cooper*, 60 L. T. 95), and of reversionary interests in personalty (*Fuggle* v. *Bland*, 11 Q. B. D. 711; *Macnicoll* v. *Parnell*, 35 W. R. 773; see *Beamish* v. *Stephan*, 18 L. R. Ir. 319).

Equitable execution.

A receiver has been appointed in a fresh action commenced for the purpose (*Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275). But the appointment may now be made on an interlocutory application in the original action (*Smith* v. *Cowell*, 6 Q. B. Div. 75; *Salt* v. *Cooper*, 16 Ch. Div. 544).

A judgment for payment of money can be enforced by the creditor against the land of the debtor in the following ways:—

Modes of enforcing judgments against land.

(1) Out of the rents and profits, by seizure under a writ of elegit (*Re Pope*, 17 Q. B. Div. 745), or by obtaining an order for a receiver (*Re Pope*, *sup.*; see note on equitable execution, *sup.*); or, if the judgment is for payment within a limited time, by a writ of sequestration (R. S. C. Ord. 43, r. 6; *Willcock* v. *Terrell*, 3 Ex. Div. 333; *Re Rush*, 10 Eq. 442). To protect his title as against a subsequent purchaser for value, the creditor must register the writ or order under 51 & 52 Vict. c. 51, ss. 5, 6 (*post*, p. 480). He must also, in the case of land in Yorkshire register the writ or order (47 & 48 Vict. c. 54, ss. 4, 14) in the county registry.

(2) Where the land has been "delivered in execution," the creditor

27 & 28 Vict. c. 112, s. 1.

may, after registering the writ or other process of execution under sect. 3 of this act (*post*), obtain a sale under sect. 4.

(3) Where the land has been "delivered in execution," but not before, the charge created by 1 & 2 Vict. c. 110, s. 13, will arise (*Hatton* v. *Haywood*, 9 Ch. 229), and may be enforced (See note to 1 & 2 Vict. c. 110, s. 13, *ante*, p. 452). For the purpose of enforcing the charge, the registration of the judgment prescribed by sect. 19 of 1 & 2 Vict. c. 110, was rendered unnecessary by 27 & 28 Vict. c. 112, s. 3. See, however, in the case of writs or orders registered under 51 & 52 Vict. c. 51, the language of sect. 5 (4) of that act.

(4) Where owing to a prior elegit (*Re Cowbridge R. Co.*, 5 Eq. 413; see *Guest* v. *Cowbridge R. Co.*, 6 Eq. 619), or to a prior legal mortgage (*Beckett* v. *Buckley*, 17 Eq. 435), the land cannot be delivered, a judgment creditor who has issued an elegit, may bring an action for redemption to remove the legal difficulty (*Thornton* v. *Finch*, 4 Giff. 515; see *Neate* v. *Marlborough*, 3 My. & Cr. 416; *Godfrey* v. *Tucker*, 33 Beav. 280), and thus enable himself subsequently either to foreclose (*Beckett* v. *Buckley*, 17 Eq. 435), or to sell under 27 & 28 Vict. c. 112 (*Ib.*; *Re Cowbridge R. Co.*, 5 Eq. 417). In the redemption action he might possibly obtain a sale under sect. 25 of the Conv. Act, 1881. As to tacking against a judgment creditor who is redeeming, see *Champneys* v. *Burland* (19 W. R. 148).

As to making judgment creditors of the mortgagor parties to a foreclosure action, see *Mildred* v. *Austin* (8 Eq. 220); *Re Bailey* (17 W. R. 393); *Cork* v. *Russell* (13 Eq. 210).

As to enforcing judgments generally, see R. S. C. Ord. 42, and note, *ante*, p. 460.

Interpretation of terms.

2. In the construction of this act the term "judgment" shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment; and the term "land" shall be taken to include all hereditaments, corporeal or incorporeal, or any interest therein; and the term "debtor" shall be taken to include husbands of married women, assignees of bankrupts, committees of lunatics, and the heirs or devisees of deceased persons.

Writs of execution to be registered in manner prescribed by 23 & 24 Vict. c. 38.

3. Every writ or other process of execution of any such judgment, statute, or recognizance, by virtue whereof any land shall have been actually delivered in execution, shall be registered in the manner provided by an act passed in the session of the twenty-third and twenty-fourth years of her present Majesty, intituled "An Act to further amend the Law of Property," but in the name of the debtor against whom such writ or process is issued, instead of, as under the said act, in the name of the creditor; and no other or prior registration of such judgment, statute, or recognizance shall be or be deemed necessary for any purpose; and no reference to any such prior registration shall be required to be made in or by the memorandum or minute of such writ or other process of execution which shall be left with the senior master of the Court of Common Pleas for the purpose of such registry (*b*).

(*b*) Registration is only necessary with a view to a sale under sect. 4 (*Re Pope*, 17 Q. B. Div. 752). The writ may be registered prior to the date of the sheriff's return (*Champneys* v. *Burland*, 19 W. R. 148).

27 & 28 Vict. c. 112, s. 4.

Creditor to whom land delivered in execution entitled to obtain summary order from Court of Chancery for sale.

4. Every creditor (*c*) to whom any land of his debtor shall have been actually delivered in execution (*d*) by virtue of any such judgment (*e*), statute, or recognizance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper (*f*); and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable.

Plaintiff in administration suit not a creditor.

(*c*) Where an order was made in an administration suit for payment into court, and sequestration issued at the instance of the plaintiffs, it was held, that the plaintiffs were not creditors within this section (*Johnson* v. *Burgess*, 15 Eq. 398).

Actual delivery necessary.

(*d*) As to what is delivery in execution, see note to sect. 1 (*ante*, p. 477). A sale has been refused where there had been no delivery (*Re Cowbridge R. Co.*, 5 Eq. 413; see *Guest* v. *Cowbridge R. Co.*, 6 Eq. 619; *Re Newcastle*, 8 Eq. 700; *Kidd* v. *Tallentire*, 1877, W. N. 21). A receiver cannot be appointed on a petition under this section (*Re Nixon*, 1886, W. N. 191).

(*e*) This section does not apply to judgments entered up before the passing of the act (*Re Isle of Wight Co.*, 34 L. J. Ch. 194).

Lands of a railway company.

(*f*) An order was made under this section for the sale of lands of a railway company (*Re Bishop's Waltham R. Co.*, 14 W. R. 1008); on appeal, the court expressed an opinion that the railway was not saleable, and directed inquiries as to the nature of the company's interest (*S. C.*, 2 Ch. 382). Superfluous lands belonging to a railway company have been ordered to be sold (*Re Calne R. Co.*, 9 Eq. 658; *Re Hull and Hornsea R. Co.*, 2 Eq. 262; *Ex p. Grissell*, 2 Ch. 385; *Re Ogilvie*, 7 Ch. 174; *Re Hull and Barnsley R. Co.*, 40 Ch. D. 119). Debenture holders have not under 30 & 31 Vict. c. 127, s. 23, a charge on surplus land in priority to creditors selling under the present section (*Re Hull and Barnsley R. Co., sup.*) As to schemes of arrangement by railway companies and the restraining of actions and executions in such a case, see 30 & 31 Vict. c. 127; *Re Cambrian R. Co.* (3 Ch. 278); *Re Potteries, &c. R. Co.* (5 Ch. 67).

Inquiries.

Inquiries were dispensed with where sufficient evidence was adduced at the hearing of the petition (*Re Bithray*, 61 L. T. 383; 38 W. R. 60; *Re Calne R. Co.*, 9 Eq. 658). For general form of order with inquiries, see Seton, pp. 1137 *et seq.*; *Re Cowper* (60 L. T. 95; 37 W. R. 330); *Re Holder* (1890, W. N. 55); *Howson* v. *Trant* (21 W. R. 781). As to inquiries where an official liquidator petitioned for sale of the lands of a contributory, see *Re Kirby* (14 L. T. 615); and as to inquiries in other cases, see *Ex p. Clark* (6 N. R. 335). For forms of petitions for sale of lands delivered in execution under an elegit, and of lands taken under a writ of sequestration, see Dan. Ch. Forms, 415, 4th ed.

Where there are other creditors, notice of sale

5. If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognizance is a charge on such land, the creditor entitled to the benefit of such charge

37 & 38 Vict. c. 112, s. 5.

(whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities (*g*).

to be served upon them.

(*g*) The priorities of judgment creditors *inter se* are determined by the date at which the writs issued upon their judgments are placed in the hands of the sheriff (*Guest* v. *Cowbridge R. Co.*, 6 Eq. 619).

Parties claiming interest through debtor bound by order for sale.

6. Every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon.

Extent of act.

7. This act shall not extend to Ireland.

---

51 & 52 Victoriæ, cap. 51.

An Act for registering certain Charges on Land, and for facilitating Searches for them. [24th December, 1888.]

51 & 52 Vict. c. 51, s. 1.

Be it enacted as follows:

Part I.—Introductory.

Short title.

1. This act may be cited as the Land Charges Registration and Searches Act, 1888.

Commencement.

2. This act shall come into operation on the first day of January one thousand eight hundred and eighty-nine, which day is in this act referred to as the commencement of this act: Provided that any rules under this act may be made, and any other thing for the purpose of bringing this act into operation may be done, at any time after the passing thereof, but any such rules or thing shall not take effect until the commencement of this act.

Extent.

3. This act shall not extend to Scotland or Ireland.

Interpretation.

4. In this act:

"Land" includes lands, messuages, tenements, and hereditaments corporeal and incorporeal of any tenure.

"Purchaser for value" includes a mortgagee or lessee, or other person who for valuable consideration takes any interest in land or in a charge on land, and "purchase" has a meaning corresponding with purchaser.

"Person" includes a body of persons corporate or unincorporate.

"Prescribed" means prescribed by any general rules made in pursuance of this act.

"Act of Parliament" includes local and personal act. 51 & 52 Vict. c. 51, s. 4.

"Land charge" means a rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any act of parliament, for securing to any person either the moneys spent by him or the costs, charges, and expenses incurred by him under such act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an act of parliament, and a charge under the thirty-fifth section of the Land Drainage Act, 1861, or under the twenty-ninth section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot (*a*). 24 & 25 Vict. c. 133. 46 & 47 Vict. c. 61.

"Deed of arrangement" has the same meaning as in the Deeds of Arrangement Act, 1887. 50 & 51 Vict. c. 57.

"Judgment" does not include an order made by a court having jurisdiction in bankruptcy in the exercise of that jurisdiction, but, save as aforesaid, includes any order or decree having the effect of a judgment.

(*a*) The charge arising under 38 & 39 Vict. c. 55, s. 257, for repayment of expenses incurred by a local authority is not a "land charge" within this act, and need not be registered (*R.* v. *Land Registry*, 24 Q. B. Div. 178).

Part II.—Registration of Writs and Orders affecting Land.

Register of writs and orders affecting land.

5.—(1.) There shall be established and kept at the Office of Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land (*b*).

(2.) Every entry made in pursuance of this section shall be made in the name of the person whose land is affected by the writ or order registered.

(3.) The registration of a writ or order in pursuance of this act shall cease to have effect at the expiration of five years from the date of the registration; but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of the renewal.

(4.) Registration of a writ or order in pursuance of this section shall have the same effect as, and make unnecessary, registration thereof in the Central Office of the Supreme Court of Judicature in pursuance of any other act.

(*b*) A writ or order affecting land may be vacated pursuant to an order of the High Court or any judge thereof (S. L. A. 1890, s. 19, *post*; see *Cook* v. *Cook*, 15 P. D. 116).

Protection of

6. Every such writ and order as is mentioned in section five,

51 & 52 Vict. c. 51, s. 6.

and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land unless the writ or order is for the time being registered in pursuance of this act.

purchasers against non-registered writs and orders.

Provided that—

(a) where the writ or order is at the commencement of this act registered in pursuance of the act of the session held in the twenty-seventh and twenty-eighth years of her Majesty, chapter one hundred and twelve, intituled "An Act to amend the law relating to future judgments, statutes, and recognizances (*c*)," nothing in this section shall affect the operation of such writ or order until the expiry of the period for which it is so registered;

(b) where the proceeding in which the writ or order was issued or made is for the time being registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration (*d*).

(*c*) See *ante*, p. 476.
(*d*) As to registering a *lis pendens*, see *ante*, p. 464.

Part III.—Registration of Deeds of Arrangement.

Register of deeds of arrangement affecting land.

7. A register (in this act called the register of deeds of arrangement affecting land) shall be kept at the Office of Land Registry, and deeds of arrangement may be registered therein, in the prescribed manner, in the name of the debtor.

Registration of deeds of arrangement.

8. A deed of arrangement may be registered in the register of deeds of arrangement affecting land on the application of a trustee of the deed, or of a creditor assenting to or taking the benefit of the deed, and the registration may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

Protection of purchasers against unregistered deeds of arrangement.

9. Every deed of arrangement, whether made before or after the commencement of this act, shall be void as against a person who, after the commencement of this act, becomes a purchaser for value of any land comprised therein or affected thereby, unless and until such deed is registered in the register of deeds of arrangement affecting land: Provided that nothing in this section shall affect any deed of arrangement made before the commencement of this act until the expiration of one year from the commencement of this act if registered within that year.

Part IV.—Registration of Land Charges.

Registry of land charges.

10. A register, in this act called the register of land charges, shall be kept at the Office of Land Registry, and land charges may be registered therein in the prescribed manner:—

(1.) In the case of freehold land, in the name of the person

beneficially entitled to the first estate of freehold at the time of the creation of the land charge: 51 & 52 Vict. c. 51, s. 10.

(2.) In the case of copyhold land, in the name of the tenant on the court rolls at the time of the creation of the land charge.

Provided that where the person by or on behalf of whom the application was made pursuant to which the land charge was created was beneficially entitled to a lease for lives or a life at a rent or to a term of years the land charge shall be registered also in the name of that person.

Expenses.

11. The expenses incurred by the person entitled to a land charge created before the commencement of this act in causing the charge to be registered in the register of land charges shall be deemed to form part of such land charge, and shall be recoverable by him accordingly on the day for payment of any part of such land charge next after such expenses are incurred.

Protection of purchasers against unregistered charges.

12. A land charge created after the commencement of this act shall be void as against a purchaser for value of the land charged therewith, or of any interest in such land, unless and until such land charge is registered in the register of land charges in the manner mentioned in this act.

Non-registered land charge existing at commencement of this act.

13. After the expiration of one year from the first assignment by act *inter vivos*, occurring after the commencement of this act, of a land charge created before the commencement of this act, the person entitled thereto shall not be able to recover the same, or any part thereof, as against a purchaser for value of the land charged therewith or of any interest in such land, unless such land charge is registered in the registry of land charges in the manner mentioned in this act prior to the completion of the purchase.

Vacation of entry.

14. The registration of a land charge may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

Part V.—Supplemental.

Index to registers.

15. An alphabetical index in the prescribed form shall be kept at the Office of Land Registry of all entries made in any register kept at that office pursuant to this act.

Searches.

16. Any person may search in any register or index kept in pursuance of this act on paying the prescribed fee (*e*).

(*e*) See, generally, as to searches for judgments, writs, or orders, Elphinstone and Clark on Searches.

Official searches.

17. The provisions as to searches in the Central Office, requisitions, certificates, officers, clerks, persons, and for the protection of solicitors, trustees, agents, and other persons in a fiduciary position contained in the second section to the Conveyancing Act, 1882, except so much of those provisions as relates to the making 45 & 46 Vict. c. 39.

51 & 52 Vict. c. 51, s. 17.

of general rules, shall apply to searches in any register or index kept in pursuance of this act in the register of *lis pendens*, the register of deeds of arrangement affecting land, and the register of land charges, in the same manner as if this act had been described in Part I. of the First Schedule to the Conveyancing and Law of Property Act, 1881.

44 & 45 Vict. c. 41.

General rules.

18. The Lord Chancellor may at any time after the passing of this act, and from time to time, with the concurrence of the Commissioners of her Majesty's Treasury as to fees, make such general rules as may be required for carrying this act into effect (*f*).

(*f*) The following rules have been issued :—

Rule 1.—The several registers established by the act shall contain the following particulars respectively, or such other particulars as the registrar shall from time to time determine :—

1. The register of writs and orders shall contain: (*a*) The name, address, and description of the person whose land is affected. (*b*) The date and nature of the writ or order, and the court, and the action or matter, by and in which the writ or order was issued or made. (*c*) The date of registration, and of any renewal of registration. (*d*) The name and address of the applicant or of the solicitor (if any) making the application.
2. The register of deeds of arrangement shall contain: (*a*) The name, address, and description of the person whose land is affected. (*b*) The date of the deed and the names of the parties, provided that where the creditors are numerous it shall not be necessary to specify more than three. (*c*) The date of registration. (*d*) The name and address of the applicant or of the solicitor (if any) making the application.
3. The register of land charges shall contain: (*a*) The name, address, and description, and capacity (that is to say, whether—(i.) beneficially entitled to the first estate of freehold; (ii.) tenant on the court rolls; or (iii.) beneficially entitled to a lease for lives or a life at a rent or for years) of the person in whose name the registration is made. (*b*) The date of the charge, the statute under which it is made, and the parish in which the land charged is situated. (*c*) The date of registration. (*d*) The name and address of the applicant or of the solicitor (if any) making the application.

Rule 2.—Every application for registration shall, unless made by a solicitor, be supported by the statutory declaration of the applicant as to the truth of the particulars set forth in it.

Rule 3.—The alphabetical index shall consist of the registers themselves, all entries in such registers being made alphabetically in the manner now used in the register of judgments in the Central Office of the High Court of Justice, or in such other manner as the registrar shall from time to time determine.

Rule 4.—Application for registration, searches (official and otherwise), and official certificates shall be made on, and shall furnish the particulars set forth in, the several forms for those purposes given in the schedule hereto, or in such other forms as the registrar shall from time to time determine.

Rule 5.—Forms shall be sold at the office of Land Registry.

Rule 6.—Certificates of official searches shall be marked with the stamp of the Search Department of the Land Registry, and shall be issued as soon as possible after receipt of the applications.

Rule 7.—In any case of modification or cancellation of entries on the register, such evidence in respect thereof as the registrar shall from time to time think necessary, shall be required.

Rule 8.—These rules may be cited as the Land Charges Rules, 1889.

January 1, 1889. HALSBURY, C.

For the forms and fees, see W. N. 12 Jan. 1889.

AMENDMENT OF THE LAW OF REAL PROPERTY.

8 & 9 Victoriæ, cap. 106.

An Act to amend the Law of Real Property.

[4th August, 1845.]

[*Sect.* 1 *repealed so much of* 7 & 8 *Vict. c.* 76, *as abolished contingent remainders. As to these remainders, see now* 8 & 9 *Vict. c.* 106, *s.* 8, *post*, p. 490, *and* 40 & 41 *Vict. c.* 33, *post*, p. 491.] 8 & 9 Vict. c. 106.

Grant.

2. After the said first day of October, one thousand eight hundred and forty-five, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery (*a*). The immediate freehold of corporeal tenements to lie in grant as well as in livery.

(*a*) A remainder, reversion, and incorporeal hereditaments were not the subjects of a feoffment, for a feoffment operates on the possession which the owners of such estates had not to convey; hence remainders, reversions and incorporeal hereditaments were said to lie in *grant*, which was the mode of conveyance at the common law of those estates which did not lie in livery or of which livery could not be given. The object proposed by this section was to impart to *corporeal* hereditaments, that is, to hereditaments which lie in livery only, the capacity of being transferred by deed. Object of this section.

Prior to the passing of 4 & 5 Vict. c. 21, the usual mode of conveying corporeal hereditaments was by lease for a year and re-lease, the lease being executed for the purpose of giving to the purchaser that seisin without which the re-lease would have been ineffectual. The lease was rendered unnecessary by 4 & 5 Vict. c. 21. This section in effect substituted a grant for a re-lease (See Williams on Real Property, pp. 189, 196, 14th ed.) 4 & 5 Vict. c. 21.

The word "grant" is not required in a deed of grant (Conv. Act, 1881, s. 49, *post*). Conv. Act, 1881.

By the term *immediate freehold* is meant the first of all the estates of freehold; for example, when A. is tenant for life, remainder to B. for life, in tail or in fee, B. has an *estate of freehold*, but A. has the *immediate freehold* (1 Preston's Convey. 48). Immediate freehold.

The latter part of the section relating to stamp duties was repealed by 13 & 14 Vict. c. 97, s. 6, and is accordingly omitted.

8 & 9 Vict. c. 106, s. 3.

CERTAIN ACTS TO BE VOID UNLESS BY DEED.

Feoffments, partitions, exchanges, leases, assignments and surrenders required (subject to certain exceptions) to be by deed.

3. A feoffment, made after the said first day of October, one thousand eight hundred and forty-five, other than a feoffment made under a custom by an infant (*b*), shall be void at law, unless evidenced by deed, and a partition and an exchange (*c*) of any tenements or hereditaments not being copyhold, and a lease, required by law to be in writing (*d*), of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments (*e*), and a surrender in writing (*f*) of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said first day of October, one thousand eight hundred and forty-five, shall also be void at law, unless made by deed: provided always, that the said enactment so far as the same relates to a release (*g*) or a surrender shall not extend to Ireland.

(*b*) By the custom of gavelkind an infant on attaining the age of fifteen years may alien lands by feoffment, livery of seisin being made in person and not by attorney (Robinson on Gavelkind, 248—250, 3rd ed.)

Partition.

(*c*) At common law coparceners might have made partition of things lying in livery or grant by parol without deed, and tenants in common might have made partition of things lying in livery by parol without deed, if they afterwards perfected the partition by livery of seisin (Litt. s. 250; Co. Litt. 169 a). So, too, joint tenants for years might have made partition by parol without deed (Co. Litt. 187 a). But joint tenants of freeholds, whether corporeal or incorporeal, and tenants in common of incorporeal hereditaments, could not have made partition without deed (Co. Litt. 169 a). Since the Statute of Frauds, 29 Car. 2, c. 3, a writing was in all cases necessary, but a deed was required only in cases in which it was necessary before that statute (1 Martin's Conv. by Davidson, 417, 418; 1 Byth. Conv. by Jarman, 193). As to the partitions of copyholds, see 4 & 5 Vict. c. 35, s. 85; *Jope* v. *Marshead*, 6 Beav. 213; *Dillon* v. *Coppin*, 4 Beav. 217, n.; *Bolton* v. *Ward*, 4 Hare, 530.

Exchange.

An exchange since the Statute of Frauds, 29 Car. 2, c. 3, must, if it relate to land for a larger interest than a term of three years, be in writing, and if the things whereof the exchange is made lie in grant, *i.e.*, if they consist of reversions, rents or other incorporeal hereditaments, or if they lie in several counties, it must be by deed (Co. Litt. 51 b).

Leases.

(*d*) By the Statute of Frauds every lease of corporeal hereditaments for a term exceeding three years from the making thereof, and for a less term where the rent did not amount to two-thirds of the value, was required to be in writing (29 Car. 2, c. 3, ss. 1, 2); but as a lease for years of corporeal hereditaments might be created by a writing not under seal, questions frequently arose whether an instrument relating to the creation of such an interest was an actual demise or an agreement for a future demise (See 5 Davidson's Conv. 7—13, 3rd ed.) The distinctions upon this subject had become very refined (1 Platt on Leases, 579—611).

Result of present section.

The result of the present section was that in all cases where writing had been previously required a lease was void at law unless made by deed. Even at law, however, the courts held (overruling *Stratton* v. *Pettit*, 16 C. B. 420), that an instrument void as a lease might be good as an agreement (*Bond* v. *Rosling*, 1 Best & Sm. 371; 30 L. J. Q. B. 227; see *Rollason* v. *Leon*, 7 H. & N. 73); so that an action could be brought against the intended tenant either for not accepting a lease (*Ib.*), or for not complying with a stipulation contained in the agreement (*Martin* v. *Smith*, L. R.

9 Ex. 50; *Adams* v. *Clutterbuck*, 10 Q. B. D. 403); or against the intended landlord for having no title to grant a lease (*Stranks* v. *St. John*, L. R. 2 C. P. 376). And in equity specific performance could be obtained of an agreement which was void at law as a lease (*Parker* v. *Taswell*, 2 De G. & J. 559). As regards the estate taken by a person entering under an instrument void under this act as a lease, it was settled at law (before the Jud. Act, 1873) that he held as tenant from year to year upon the terms of the instrument, so far as applicable to such a tenancy; the tenancy, being determinable, during the term mentioned in the instrument, by the usual half year's notice, but expiring without notice at the end of such term (*Tress* v. *Savage*, 4 Ell. & Bl. 36; see *Lee* v. *Smith*, 9 Exch. 662; *Wood* v. *Beard*, L. R. 2 Ex. D. 37). Since the Jud. Act, 1873, it has been held that a tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as if the lease had actually been granted (*Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Swain* v. *Ayres*, 21 Q. B. Div. 289; *Lowther* v. *Heaver*, 41 Ch. Div. 264). But in such a case, if the value of the property exceed 500*l*., the county court, having no jurisdiction to order specific performance, cannot order payment of rent (*Foster* v. *Reeves*, 1892, 2 Q. B. 255).

8 & 9 Vict. c. 106, s. 3.

This provision as to leases did not apply to agreements for the lease of tolls under the General Turnpike Act, 3 Geo. 4, c. 126, s. 57 (*Shepherd* v. *Hodsman*, 18 Q. B. 316).

By 7 & 8 Vict. c. 76, s. 4 (in force from and after the 31st of December, 1844, and repealed by 8 & 9 Vict. c. 106, from the 1st of October, 1845), it was enacted, that no lease in writing of any freehold, copyhold or leasehold land should be valid, unless the same should be made by deed, but that any agreement in writing to let any such lands should be valid and take effect as an agreement to execute a lease (See *Burton* v. *Revell*, 16 M. & W. 307; *Arden* v. *Sullivan*, 19 L. J. Q. B. 268).

Cases of agreements to let under 7 & 8 Vict. c. 76, s. 4.

A lease of incorporeal hereditaments must be under seal (*Gardiner* v. *Williamson*, 2 B. & Ad. 336; see *Bird* v. *Higginson*, 3 Ad. & El. 83; *Holford* v. *Pritchard*, 3 Exch. 793).

(*e*) The Statute of Frauds required that all assignments of leases should be by deed or note in writing, signed by the party assigning or his agent (29 Car. 2, c. 3, s. 3).

Assignments.

Where a person holding for a term of less than a year let by parol for the remainder of his term, the parol lease was held not to be an assignment but to bind the parties, who intended to create the relation of landlord and tenant, and to pass the interest by lease (*Pollock* v. *Stacey*, 9 Q. B. 1035; see *Debenham* v. *Digby*, 21 W. R. 359).

(*f*) The Statute of Frauds required that every surrender should be by deed or note in writing duly signed (29 Car. 2, c. 3, s. 3). This section refers to a surrender *in writing*, and does not include a surrender by operation of law. As to what is a surrender by operation of law, see *Lyon* v. *Read* (13 M. & W. 305, 306); *Kingston's Case* (2 Smith, L. C. 917, 9th ed.)

Surrenders.

(*g*) The word "release" appears to be inserted by mistake instead of "lease." Every lease in Ireland required by law to be in writing, must be by deed (*Gilman* v. *Crowley*, 7 I. C. L. R. (N. S.) 557).

Operation of certain Instruments Limited.

4. A feoffment, made after the said first day of October, one thousand eight hundred and forty-five, shall not have any tortious operation (*h*); and an exchange or a partition of any tenements or hereditaments, made by deed, executed after the said first day of October, one thousand eight hundred and forty-five, shall not imply any condition in law; and the word "give" or the word "grant," in a deed executed after the same day, shall not imply any covenant in law, in respect of

Feoffments not to operate by wrong, nor exchanges or partitions to imply any condition, or give and grant any covenant.

8 & 9 Vict. c. 106, s. 4.

any tenements or hereditaments (*i*), except so far as the word "give" or the word "grant" may, by force of any act of parliament, imply a covenant (*j*).

Tortious operation of feoffment.

(*h*) A feoffment had the effect of barring or destroying contingent remainders depending upon particular estates (*Archer's case*, 1 Rep. 66 b). A feoffment also destroyed powers appendant and powers in gross, but not powers collateral. A feoffment was the only conveyance by which a tenant for years, by elegit, statute merchant or staple or a copyholder, could create an estate of freehold by disseisin (Co. Litt. 49; 2 Sand. on Uses, 14, 15). In consequence of the new enactment, a feoffment in fee simple, made by a tenant for life, will merely convey his life interest, and will not be a cause of forfeiture; and a feoffment by a lunatic or idiot will be void and not merely voidable, as formerly (See Shelford on Law of Lunatics, 335, 336, 2nd edit.)

Covenant implied by words "grant," "give,"

(*i*) As to the conditions implied on exchanges and partitions, see 4 Cruise, Dig. tit. 32, c. 6, 20. The operation of the words "grant" and "give" in creating an implied warranty of title in conveyances of estates in fee simple, in gifts in tail, in leases for life, and in leases for years, is fully discussed by Mr. Butler in his note to Co. Litt. 384 a (See 4 Cruise, Dig. tit. 32, c. 24; and see 1 Davidson, Conv. 70, 103, 3rd. ed.; *Doe* v. *Prince*, 20 L. J. C. P. 223).

"demise."

An action of covenant will lie by the lessee against the lessor upon the word "demise" in a lease, that word importing a covenant in law on the part of the lessor that he has a good title, and that the lessee shall quietly enjoy during the term (*Burnett* v. *Lynch*, 5 B. & C. 609; *Walker* v. *Bartlett*, 18 C. B. 845; *Mathew* v. *Blackmore*, 1 H. & N. 766). But there is no implied covenant if there is an express covenant for quiet enjoyment (*Line* v. *Stephenson*, 5 Bing. N. C. 183; *Merrill* v. *Frame*, 4 Taunt. 329; *Hinde* v. *Gray*, 1 M. & G. 195; *Granger* v. *Collins*, 6 M. & W. 458; *Lessenbury* v. *Evans*, 3 M. & G. 210; *Dennett* v. *Atherton*, L. R. 7 Q. B. 316). In a contract for the demise of land, a promise of quiet enjoyment during the term is implied by law (*Hall* v. *City of London Co.*, 2 Best & S. 737). Where land is demised by *parol* without any actual covenant, the law implies a covenant for quiet enjoyment during the term, but not a covenant for good title (*Bandy* v. *Cartwright*, 8 Exch. 913; see *Robinson* v. *Kilvert*, 41 Ch. Div. 96).

Where the defendant executed a written agreement not under seal to let lands to the plaintiff, he had impliedly agreed to grant a valid lease (*Stranks* v. *St. John*, L. R. 2 C. P. 376).

As to the covenants implied under sect. 7 of the Conveyancing Act, 1881, see *post*.

Exception as to acts of parliament.

(*j*) In the conveyance of lands to be made by the promoters of the undertaking under the Lands Clauses Consolidation Act, or the special act, the word "grant" implies certain covenants by them for title, except so far as the same shall be limited by express words contained in any such conveyance (8 & 9 Vict. c. 18, s. 132).

The words "grant, bargain and sell, operated as covenants for title in deeds of bargain and sale of lands lying in the East and North Ridings of Yorkshire by stat. 6 Ann. c. 62, s. 30; 8 Geo. 2, c. 6, s. 35. Both the last-mentioned acts have been repealed by 47 & 48 Vict. c. 54, s. 51.

Strangers to Deeds.

Strangers may take immediately under an indenture, and a

5. Under an indenture, executed after the first day of October, one thousand eight hundred and forty-five, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant, respecting any tenements or

hereditaments, may be taken, although the taker thereof be not named a party to the same indenture; also, a deed, executed after the said first day of October, one thousand eight hundred and forty-five, purporting to be an indenture, shall have the effect of an indenture, although not actually indented (*k*).

8 & 9 Vict. c. 106, s. 5. Deed purporting to be an indenture shall take effect as such.

(*k*) It was necessary to name as parties to an indenture all persons who are intended to take an immediate estate or benefit by it (Co Litt. 231 a). This rule did not extend to remainders (Co. Litt. 231 a, 259 b), nor, it was said, to uses or the benefit of a trust (2 Prest. Conv. 394). This section does not enable the benefit of a covenant to be taken by a party not existing at the date of the deed (*Kelsey* v. *Dodd*, 52 L. J. Ch. 34, 39).

Before this act a practical distinction between an indenture and a deed poll was, that no person could take an immediate estate or benefit under an indenture, unless he was named as a party to it; but any person could take an immediate estate or benefit under a deed poll, inasmuch as it is addressed to all the world (Co. Litt. 26 a, 231; Burton's Real Prop. 442, n.; 2 Prest. Conv. 394 *et seq.*; 1 Martin's Conv. 324). Another practical distinction between a deed poll and an indenture was, that a covenant entered into by a deed poll with any covenantee named in the deed was valid; but a covenant in an indenture entered into with a person not a party could not be sued on by that person (*Greene* v. *Hoare*, Salk. 197; *Berkley* v. *Hardy*, 5 B. & C. 353; *Southampton* v. *Browne*, 6 B. & C. 718). But a person not a party to a deed might covenant with one who was, and would be bound by executing the deed (*Salter* v. *Kidgly*, Carth. 76; 2 Prest. Conv. 415).

Alienation of Contingent Interests.

6. After the first day of October, one thousand eight hundred and forty-five, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments (*l*) of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry (*m*), whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but no such disposition shall, by force only of this act, defeat or enlarge an estate tail, and every such disposition by a married woman shall be made conformably to the provisions, relative to dispositions by married women, of an act passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple Modes of Assurance" (*n*), or, in Ireland, of an act passed in the fourth and fifth years of the reign of his said late Majesty, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance, in Ireland."

Contingent and other like interests, also rights of entry, made alienable by deed, saving estates in tail; and as regards married women enjoining conformity to 3 & 4 Will. 4, c. 74.

4 & 5 Will. 4, c. 92.

(*l*) The alienation of interests of this description under the law as it existed previously to the abolition of fines and recoveries, has been already considered (See *ante*, p. 257). As to the alienation of the interest of a

8 & 9 Vict. c. 106, s. 6.

yearly tenant, see *Alcock* v. *Moorhouse* (9 Q. B. Div. 371). As to alienation of supposed rights, see 32 Hen 8, c. 9; *Doe* v. *Evans* (1 C. B. 717, and the cases there cited).

(*m*) It has been said that this means a right of entry in the nature of an estate or interest—that is, where a person by lapse of time has lost everything except his right of entry—but that the section does not include a right of entry for forfeiture (*Hunt* v. *Remnant*, 9 Exch. 640; *Hunt* v. *Bishop*, 8 Exch. 680). The reason being that it was at the election of the person entitled to enter whether he would take advantage of the breach (*Jenkins* v. *Jones*, 9 Q. B. Div. 131). As to the transfer of rights of re-entry for forfeiture, see Conv. Act, 1881, s. 10, sub-s. 1, *post*.

Prior to this act all dealings with a right of entry, except by release to the person in possession, were dealings with a pretenced right within the meaning of 32 Hen. 8, c. 9, and so void and penal under that statute. Since 8 & 9 Vict. c. 106, if such a right is not fictitious in fact, it is not "pretenced" within that statute, and may be properly dealt with (*Jenkins* v. *Jones*, 9 Q. B. Div. 135). In order to recover the penalty under 32 Hen. 8, c. 9, it must be proved, not only that the title is fictitious, but, that at the time of the dealing the defendant knew that it was so (*Kennedy* v. *Lyell*, 15 Q. B. D. 491).

(*n*) See *ante*, p. 292.

Disclaimer by Married Women.

Capacity of married women to disclaim estates or interests by deed extended to England.

7. After the first day of October, one thousand eight hundred and forty-five, an estate or interest in any tenements or hereditaments in England, of any tenure, may be disclaimed by a married woman by deed; and every such disclaimer shall be made conformably to the said provisions of the said Act for the abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance (*o*).

(*o*) See *ante*, p. 292.

Contingent Remainders.

Contingent remainders protected as from 31st December, 1844, against the premature failure of a preceding estate.

8. A contingent remainder, existing at any time after the thirty-first day of December, one thousand eight hundred and forty-four, shall be, and, if created before the passing of this act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender or merger, of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened (*p*).

Destruction of contingent remainders.

(*p*) This section of the act does not alter the rules of law as to the creation of contingent remainders (See 2 Bl. Comm. 164, 170; Watk. on Conv. tit. Remainder). In consequence of the rule that a remainder must vest in the grantee during the existence of the particular estate, or the very instant it determines, contingent remainders might be defeated by destroying or determining the particular estate on which they depended, before the contingency happened whereby they became vested (1 Real Prop. Rep. 66, 135). Therefore, when there was tenant for life, with divers remainders in contingency, he might not only by his death, but by

alienation, surrender, or other methods, have destroyed and determined his own life estate before any of those remainders vested; the consequence of which was, that he utterly defeated them all. As, if there were tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son was born, surrendered his life estate, he by that means defeated the remainder in tail to his son: for his son not being *in esse* when the particular estate determined, the remainder could not then vest; and, as it could not vest then by the rules of law it never could vest at all. In these cases, therefore, it was necessary to have trustees appointed to preserve the contingent remainders; in whom there was vested an estate in remainder for the life of the tenant for life, to commence when his estate determined. If, therefore, his estate for life determined otherwise than by his death, the estate of the trustees, for the residue of his natural life, would then have taken effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency (2 Black. Com. 171). The above clause will supersede the necessity of a limitation of estates to trustees during the life of the tenant for life, to support the contingent remainders expectant upon the determination of the life estate by forfeiture, surrender or merger.

8 & 9 Vict. c. 106, s. 8.

Section supersedes necessity of trustees to preserve contingent remainders.

See *Egerton* v. *Massey* (3 C. B. N. S. 338; 27 L. J. C. P. 10), as to the destruction of a contingent remainder by merger.

The act only applies to the three cases of forfeiture, surrender or merger. If at the time when the particular estate would naturally have expired, the contingent remainder be not ready to come into immediate possession, it will still fail as before (Williams' Real Prop. 296, 14th ed.)

Contingent remainders of copyholds were never liable to destruction by the sudden termination of the particular estate on which they depend. But there is no distinction between freeholds and copyholds in those cases where the particular estate expires naturally and regularly before the happening of the contingency (Scriv. Cop. 60, 6th ed.) Quasi-contingent remainders in copyholds were protected from destruction by the estate of the lord of the manor (*Pickersgill* v. *Grey*, 30 Beav. 352).

Contingent remainders in copyholds.

By 40 & 41 Vict. c. 33, it is enacted that every contingent remainder created by any instrument executed after the passing of the act (the 2nd of August, 1877), or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use, or executory devise, or other executory limitation.

40 & 41 Vict. c. 33.

Equitable contingent remainders (*e. g.*, arising by a limitation of an equity of redemption) were not subject to the old rule which made legal contingent remainders liable to be defeated by the failure of the particular estate (*Astley* v. *Micklethwait*, 15 Ch. D. 59). And where an equitable contingent remainder became clothed with the legal estate after the passing of 40 & 41 Vict. c. 33, it was not defeated by the failure of the prior life interest (*Re Freme, Freme* v. *Logan*, 1891, 3 Ch. 167).

Equitable remainders.

Reversion expectant on Lease.

9. When the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditaments, of any tenure, shall, after the said first day of October, one thousand eight hundred and forty-five, be surrendered

When the reversion on a lease is gone the next estate to be deemed the reversion.

8 & 9 Vict. c. 106, s. 9.

or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease (*q*).

(*q*) This section of the act is retrospective in its operation (*Upton* v. *Townend*, 17 C. B. 542).

It sometimes happened, where the immediate reversion on a lease was a term, or other particular estate, that it became merged in some other estate in the same land; and, where that was the case, not only the benefit of the covenants, but the rent and all remedies for it, were lost (3 Real Prop. R. 49). The object of this section is to prevent such consequence, and to preserve covenants of, and remedies against, a lessee, and the obligations on the lessor which are incident to the immediate reversion (*Webb* v. *Russell*, 3 T. R. 678; *Wootley* v. *Gregory*, 2 Yo. & J. 536; *Burton* v. *Barclay*, 7 Bing. 745; *Thorne* v. *Woolcombe*, 3 B. & Ad. 586; 2 Platt on Leases, 393—399).

The disclaimer of a trustee in bankruptcy under the Act of 1869 is a surrender within this section (*Smalley* v. *Hardinge*, 7 Q. B. Div. 524; see *Re Roberts*, *Ex p. Brook*, 10 Ch. Div. 110). As to the effect of a disclaimer under the Act of 1883, see *Re Morgan* (22 Q. B. Div. 592), and cases there quoted.

The above section only applied to the case of surrender or merger of the immediate reversion. As to the severance of the reversion, see now Conv. Act, 1881, s. 10, sub-s. 1, *post*.

Act not to extend to Scotland.

10. This act shall not extend to Scotland.

SATISFIED TERMS.

8 & 9 Victoriæ, cap. 112.

An Act to render the Assignment of Satisfied Terms unnecessary. [8th August, 1845.]

Terms attendant on 31st December, 1845.

8 & 9 Vict. c. 112, s. 1.

Whereas the assignment of satisfied terms has been found to be attended with great difficulty, delay, and expense, and to operate in many cases to the prejudice of the persons justly entitled to the lands to which they relate: be it therefore enacted, that every satisfied term of years which, either by express declaration or by construction of law, shall upon the thirty-first day of December, one thousand eight hundred and forty-five, be attendant upon the inheritance or reversion of any lands (*a*), shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said thirty-first day of December, one thousand eight hundred and forty-five, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term (*b*).

On 31st December, 1845, satisfied terms of years attendant on inheritance, &c. of land, to cease, except, &c.

(*a*) The subject of attendant terms is fully explained in the Second Rep. Real Prop. Comm. pp. 7—14; and see Williams, Real Prop. 434, 14th ed.; Sugd. V. & P. 616 *et seq.*, 14th ed; Davidson, Conc. Prec. 20, 15th ed. As to terms attendant by implication or construction of law, see Sugd. V. & P. 625; *Belaney* v. *Belaney* (2 Ch. 138).

When is term satisfied.

A term does not become satisfied within this act except the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate, are united and merged in one person, or so long as there remains any useful purpose beneficial to the owner of the term, and consistent with the trust on which at the date of the transaction the term was held (*Anderson* v. *Pignet*, 8 Ch. 188, 189).

Cases under the act.

An agreement to assign an attendant term to a trustee for a mortgagee has been held to prevent the term ceasing as a satisfied term under this act (*Shaw* v. *Johnson*, 1 Dr. & Sm. 412); but not the mere delivery to the mortgagee of the deed of assignment to a trustee for the mortgagor (*Re Sleeman*, 4 Ir. Ch. Rep. 563; *Corry* v. *Cremorne*, 12 Ir. Ch. Rep. 136). A mortgage term was held not to cease under this section when the mortgage was paid off by, and a trust of the term declared in favour of, a

8 & 9 Vict. c. 112, s. 1.

person who had not the inheritance, but was believed at the time to have (*Doe* v. *Jones*, 13 Q. B. 774; *Anderson* v. *Pignet*, 8 Ch. 189). Terms were held to have ceased under this act in *Doe* v. *Price* (16 M. & W. 609); *Doe* v. *Mousldale* (*id.* 689).

The exception in the section: nature of the protection.

(*b*) The object of the act appears to be to merge all attendant terms, but to preserve to the persons entitled the protection which a term would have afforded to them, where, upon the 31st December, 1845, it was attendant by express declaration. But even this is a limited protection; for it gives, not such protection as a further assignment of it for a purchaser would confer, but such protection as it would have afforded if it had continued to subsist but had not been assigned or dealt with after the 31st December, 1845. This protection will of course extend to a new purchaser, although the term assigned to attend was left undisturbed (Sugd. V. & P. 497, 14th ed.; *Freer* v. *Hesse*, 4 De G. M. & G. 495; see also Sugd. V. & P. 623, 624, 14th ed., as to the nature of the protection afforded by an attendant term).

The proper way of testing the right of a person to the protection of such a term is to consider whether, if the act had not been passed, equity would restrain him from setting up the term (*Cottrell* v. *Hughes*, 15 C. B. 532). So where C. being, under a deed of settlement, tenant for life, with remainder to such of his children as he should appoint, but covenanting that he was seised in fee, sold the estate in 1840 to the defendant, who had no notice of the settlement, and the residue of two terms attendant on the inheritance was assigned to a trustee for the defendant to attend the inheritance: it was held that the terms were a protection against the settlement (*Ib.*) But where a term of 500 years, which was in fact satisfied and attendant on the inheritance, was assigned by the tenant for life, under a settlement to a trustee with a declaration of trust for certain parties: it was held, that such parties, having had notice that the term was satisfied, could not set up against the parties claiming under the settlement, the term which had been assigned by a person who had no right to deal with it except to the extent of his own interest (*Plant* v. *Taylor*, 7 H. & N. 211).

In *Bass* v. *Wellsted* (12 Jur. 347), a question was raised, but not decided, as to the protection against dower by a term since the above act.

Presuming surrender of terms.

A term assigned to attend the inheritance will not be presumed to have been surrendered, unless there has been a dealing with the estate in such a manner as reasonable men would not have dealt with it unless the term had been put an end to (*Garrard* v. *Tuck*, 8 C. B. 231). Therefore, where the owner of the estate, which was subject to such attendant term, devised it without referring to the term, and the devisee mortgaged it with notice of the term, but without the mortgagee taking any assignment of the term, and the devisee afterwards conveyed the estate to trustees for sale, it was held, that there had not been such a dealing with the estate as to induce the court to presume a surrender of the term (*Ib.*) As to presuming the surrender of terms, see also *Cottrell* v. *Hughes*, 15 C. B. 532, (where the decision in *Doe* v. *Hilder* (2 B. & Ald. 782) was doubted); *Doe* v. *Plowman* (2 B. & Ald. 573); *Doe* v. *Langdon* (12 Q. B. 711); *Hele* v. *Bexley* (17 Beav. 28); Sugd. V. & P. Appendix 26, 11th ed.; Dart V. & P. 363.

Terms satisfied after 31st December, 1845.

Satisfied terms now subsisting, &c. to cease on becoming attendant upon inheritance, &c. of lands.

2. Every term of years now subsisting or hereafter to be created, becoming satisfied after the said thirty-first day of December, one thousand eight hundred and forty-five, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall immediately upon the same be-

coming so attendant absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid (*c*). 8 & 9 Vict. c. 112, s. 2.

(*c*) See *Anderson* v. *Pignet* (8 Ch. 180), *ante*, note to the preceding section.

3. In the construction and for the purposes of this act, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, and to all such customary land as will pass by deed, or deed and admittance, and not by surrender, or any undivided part or share thereof respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male. Construction of act.

4. This act shall not extend to Scotland. Not to extend to Scotland.

THE TRUSTEE ACT, 1850.

13 & 14 VICTORIÆ, CAP. 60.

An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees.

[5th August, 1850.]

13 & 14 Vict. c. 60.

[*Sect.* 1 *has been repealed by* 38 & 39 *Vict. c.* 66, *s.* 1.]

Jurisdiction under act.

The jurisdiction of the Court of Chancery under the Trustee Acts, 1850 and 1852, is now assigned to the Chancery Division of the High Court of Justice (36 & 37 Vict. c. 66, s. 34 (2)). The County Courts have jurisdiction in cases where the value of the property does not exceed £500 (51 & 52 Vict. c. 43, s. 67).

Scope of act.

The scope of the act was to embrace every case of inconvenience (*Bristow* v. *Booth*, L. R. 5 C. P. 91). But under it the court has no jurisdiction to decide a dispute as to title (*Re Draper*, 9 W. R. 805). It has been said that the court, in acting under the Trustee Acts, never administers trusts (*Re Holland*, 16 Ch. Div. 672), certainly not in lunacy (*Re Currie*, 10 Ch. Div. 93).

Absolute beneficial interest.

The court has refused to vest trust property directly in a person having an absolute beneficial interest (*Re Holland*, *sup.*); but has done so after appointing as new trustee the person so entitled (*Re Currie*, *sup.*; *Re Dickson*, 1872, W. N. 223; *Re Price*, 1883, W. N. 202). Trust property, however, has been vested in persons having absolute beneficial interests where one of several trustees was out of the jurisdiction (*Re Bradshaw*, 2 D. M. & G. 900; see sect. 22); and where of three executors one was of unsound mind, and the other two refused to transfer (*Re White*, 5 Ch. 698; see sect. 2 of the Trustee Act, 1852); and where a sole trustee of copyholds died intestate and without an heir (*Re Godfrey*, 23 Ch. D. 205; see sects. 15 and 28). See also *Re Adams*, 1887, W. N. 175, under sect. 7; *Re Brass*, 4 W. R. 764; *Re Ryan*, 9 W. R. 137.

Recent legislation has rendered it unnecessary to resort to this act in several cases in which it was formerly resorted to, *e. g.*, where there is a contract to sell freeholds binding on the heir or devisee of a deceased vendor, see now Conv. Act, 1881, s. 4; but before that act *Re Lowry* (15 Eq. 78). As to the devolution of trust and mortgage estates in freeholds, see now Conv. Act, 1881, s. 30; but formerly, sects. 3 and 7 of the Trustee Act, 1850. And as to the appointment of new trustees and the vesting in them of the trust property, see now Conv. Act, 1881, ss. 30—34. Further, where any person neglects to comply with an order directing him to execute or indorse any conveyance or document, it is now provided by the Jud. Act, 1884, s. 14, that the court may nominate a person to do so in his place. A registrar has been nominated (*Howarth* v. *Howarth*, 11 P. D. 68, 95). The sections dealing with lunatic trustees and mortgagees have been repealed as to England, and orders as to such persons will in England be made under 53 Vict. c. 5 (*post*).

Interpretation of terms.

2. And whereas it is expedient to define the meaning in which certain words are hereafter used; it is declared, that the

several words hereinafter named are herein used and applied in the manner following respectively; (that is to say,) 13 & 14 Vict. c. 60, s. 2.

The word "lands" shall extend to and include manors, messuages, tenements and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein (*a*):

The word "stock" shall mean any fund, annuity or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein (*b*):

The word "seised" (*c*) shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity (*d*), in possession or in futurity, in any lands:

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands:

The words "contingent right," as applied to lands, shall mean a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent (*e*):

The words "convey" and "conveyance" applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and the substitution of more simple Modes of Assurance" (*f*), and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold lands (*g*): 3 & 4 Will. 4, c. 74.

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate:

The word "transfer" shall mean the execution and performance of every deed and act by which a person en-

13 & 14 Vict. c. 60, s. 2.

titled to stock can transfer such stock from himself to another:

The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any lord keeper or lords commissioners of the great seal for the time being:

The words "Lord Chancellor of Ireland" shall mean as well the Lord Chancellor of Ireland as any keeper or lords commissioners of the great seal of Ireland for the time being:

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage (*h*); but, with this exception, the words "trust" and "trustee" shall extend to and include implied and constructive trusts (*i*), and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person (*j*):

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ *de lunatico inquirendo*:

The expression "person of unsound mind" shall mean any person not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs (*k*):

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent:

The word "mortgage" shall be applicable to every estate, interest, or property in lands or personal estate which would in a court of equity be deemed merely a security for money (*l*):

The word "person" used and referred to in the masculine gender shall include a female as well as a male, and shall include a body corporate (*m*):

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female (*n*).

(*a*) "Lands" includes rent-charges (*Re Harrison*, Seton, 4th ed. 516).

(*b*) Shares in a joint-stock banking company come within this definition of stock (*Re Angelo*, 5 De G. & S. 278); also annuities from a life office (*Re Tweedy*, 28 Ch. D. 529); also shares in ships registered under the "Merchant Shipping Act, 1854" (18 & 19 Vict. c. 91, s. 10).

(*c*) This word does not apply to leaseholds (*Re Harvey*, Seton, 520; see *Re Mundel*, quoted under sect. 15, *post*, p. 507); but does to an estate tail (*Re Sherard*, 1 D. J. & S. 421).

(*d*) See *Re Williams* (5 De G. & Sm. 515), quoted under sect. 7, *post*, p. 503.

(*e*) This definition of "contingent right" is taken from the 8 & 9 Vict. c. 106, s. 6 (*ante*, p. 489), with the view of including in this act all the estates and interests which may be disposed of under the former act. 13 & 14 Vict. c. 60, s. 2.

(*f*) A vesting order under this act will, if consented to by the protector of the settlement, bar all estates in remainder, and not pass a base fee only under 3 & 4 Will. 4, c. 74, s. 34 (*Powell* v. *Matthews*, 1 Jur. N. S. 973, *ante*, p. 267, n.)

(*g*) As to copyholds, see *Rowley* v. *Adams* (14 Beav. 130).

(*h*) The court has no authority to convey the estate of a mortgagee who had been paid off (*Re Osborn*, 12 Eq. 392); but has authority to transfer the mortgage where the mortgagees are trustees, and one is out of the jurisdiction (*Re Walker*, 3 Ch. D. 209; see *Re Nicholson*, 34 Ch. Div. 663; also, *Re Underwood*, 3 K. & J. 745, quoted under sect. 15, *post*, p. 507).

(*i*) As to constructive trustees in the case of a sale of stock, see *Re Angelo* (5 De G. & Sm. 278); *Re Davis* (12 Eq. 214). Constructive trustees.

In the case of a sale of land, the general doctrine of equity is that after contract, the vendor is a constructive trustee of the land for the purchaser (*Shaw* v. *Foster*, L. R. 5 H. L. 333; see *Lysaght* v. *Edwards*, 2 Ch. D. 506, 510). For the purposes of this act, however, the following distinctions have been taken. Where the contract is executed by payment of the purchase-money, the vendor is a trustee within the act (*Re Cuming*, 5 Ch. 72; *Re Colling*, 32 Ch. Div. 336; *Re Wilkinson*, 12 W. R. 522); but not where the contract is unexecuted (*Re Carpenter*, Kay, 418; *Re Faulder*, 1866, W. N. 83; see, however, *Re Badcock*, 2 W. R. 386; *Re Taylor*, 1866, W. N. 5), except in the case of a compulsory sale (*Re Russell*, 35 L. J. Ch. 461; *Re Lowry*, 15 Eq. 78; doubted, *Re Colling*, 32 Ch. Div. 336). Where only part of the purchase-money had been paid but possession had been given and the vendor was found lunatic, a vesting order was made which was not, however, to be dated until after the payment of the balance (*Re Pagani*, 1892, 1 Ch. 236). Where there is a doubt as to the trusteeship by reason of the title being complicated an action should be brought (*Re Martin*, 34 Ch. D. 619; see sect. 53, *post*, p. 530). In the case of freeholds, where there is a contract binding the heir or devisee, the personal representative can now convey (Conv. Act, 1881, s. 4, *post*, p. 576).

The following persons amongst others have also been held to be constructive trustees for the purpose of this act. An assignee of a bankrupt's estate (*Re Joyce*, 2 Eq. 576). An infant beneficially entitled to stock standing in his own name subject to trusts for maintenance (*Gardner* v. *Cowles*, 3 Ch. D. 304; *Re Findlay*, 32 Ch. D. 221). Infant devisees of land as to which the testator had made an agreement of compromise (*Re Taylor*, 1866, W. N. 5). The husband of a *feme covert* trustee (*Re Wood*, 3 D. F. & J. 125; *Ex parte Bradshaw*, 2 D. M. & G. 900). The heir of a person who covenanted in a marriage settlement followed by marriage (*Re Bradley*, 34 W. R. 148). A mortgagor who had covenanted to surrender copyholds (*Re Crowe's Mortgage*, 13 Eq. 26). The heir of an equitable mortgagor who had agreed to execute a legal mortgage (*Re Jones & Co.*, 1888, W. N. 217). An heir who had elected to take on the trusts of a will (*Dewar* v. *Maitland*, 2 Eq. 834). An executor where a legacy was bequeathed to persons in succession (*Re Davis*, 12 Eq. 214).

(*j*) Having regard to the concluding words of this clause, a trustee was appointed to perform the duties of an executor (*Re Moore, M'Alpine* v. *Moore*, 21 Ch. D. 778; but see *Re Willey*, 1890, W. N. 1).

(*k*) As to what is the meaning "of unsound mind," see *Re Dewhirst* (33 Ch. Div. 416); *Re Martin* (34 Ch. Div. 618); *Re Campbell* (1888, W. N. 176); *Re Barber* (39 Ch. Div. 187).

(*l*) As to the meaning of mortgage in the act, see *Re Underwood* (3 K. & J. 475), quoted under sect. 15, *post*, p. 507, and see *Lawrence* v. *Galsworthy* (3 Jur. N. S. 1049).

(*m*) This act has been extended to the trustees of the private estates of her Majesty, her heirs and successors (25 & 26 Vict. c. 37, s. 10).

(*n*) Under this clause the words "sole trustee" include a body of two or more joint trustees (*Re Hyatt*, 21 Ch. D. 846).

13 & 14 Vict. c. 60, s. 3.

Lord Chancellor may convey estates of lunatic trustees and mortgagees.

3. When any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics to make an order that such lands be vested in such person or persons in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*o*).

Jurisdiction in lunacy.

53 Vict. c. 5.

(*o*) This section and the remainder of this act and the Trustee Act, 1852, so far as it gives jurisdiction in lunacy, have been repealed as to England, as from May 1st, 1890, by 53 Vict. c. 5 (Lunacy Act, 1890), s. 342. And since the last-mentioned date the making of vesting orders, and the appointment of new trustees by the Court of Lunacy, in the case of lunatic trustees and mortgagees, depends upon 53 Vict. c. 5, ss. 135—143, which will be found at length, *post*, p. 538.

In whom vested.

The jurisdiction in lunacy (as to which see formerly Jud. Act, 1873, s. 17, sub-s. 3, Jud. Act, 1875, s. 7), is now, under 53 Vict. c. 5, s. 108 (1), exerciseable by the Lord Chancellor entrusted by sign manual with the care, and commitment of the custody, of the persons and estates of lunatics, alone or jointly with other judges of the Supreme Court entrusted as aforesaid, or any one or more of such judges. The Lord Chancellor is *ex officio* one of the judges of the Chancery Division of the High Court (Jud. Act, 1873, s. 5), and he has, under sect. 51 of the Jud. Act, 1873, requested the Lords Justices to act as additional judges of the Chancery Division, for the purpose of making orders both in Chancery and lunacy (*Re Platt*, 36 Ch. Div. 410); but this jurisdiction will only be exercised in aid of their jurisdiction in lunacy (*Re Barber*, 39 Ch. Div. 187).

The following note relates to the law independently of the act 53 Vict. c. 5.

Whether application should be made in Chancery or lunacy.

Questions frequently arose whether a vesting order should be made in lunacy, or in Chancery and lunacy, or in Chancery. It was held that, where a trustee or mortgagee was lunatic or of unsound mind, not so found, the vesting order could not be made in Chancery only (*Jeffryes* v. *Drysdale*, 9 W. R. 428; *Re Mason*, 10 Ch. 273; *Re Nicholl*, 18 W. R. 443; *Re Martin*, 34 Ch. D. 618); and, where it dealt exclusively with the estate of a lunatic trustee, should be made in lunacy only (*Re Watson*, 58 L. T. 509; see *Re Watson*, 19 Ch. D. 384; *Re Jones*, 33 Ch. Div. 414; *Re Chauncey*, 14 W. R. 849; where the fund was to come into court, see *Re Dawson*, 6 N. R. 346). Where interests of sane as well as lunatic trustees were dealt with, it was held that the order should be made in both Chancery and lunacy (*Re Pearson*, 5 Ch. Div. 982; *Re Druce*, 46 L. T. 669; *Re Chell*, 49 L. T. 196; *Re Davidson*, 20 L. J. Ch. 644; *Re Batho*, 38 Ch. Div. 189; see however *Re East*, 8 Ch. 735). A vesting order might be made in Chancery only, where there had been an order for a sale (*Herring* v. *Clark*, 4 Ch. 167; *Stamper* v. *Stamper*, 46 L. T. 372); or where the lunatic trustee was out of the jurisdiction, under sect. 9 (*Re Gardner*, 10 Ch. D. 29), or was an infant, under sect. 7 (*Re Arrowsmith*, 4 Jur. N. S. 1123; 6 W. R. 642; see 53 Vict. c. 5, s. 143, *post*, p. 540). When the fact of the lunacy was disputed, the court had no jurisdiction (*Re Walker*, Cr. & Ph. 147; *Re Campbell*, 18 L. T. 202; see sect. 52, *post*, p. 530).

Cases under Trustee Act, 1850, s. 3.

Sect. 3 of the Trustee Act, 1850, applied where on an order for sale instead of partition, one part owner was a lunatic, and a person was appointed to convey for him (*Re Watson*, 58 L. T. 509). In the case of a lease, the legal term could be vested, but not the benefit of a covenant for quiet enjoyment (*Cowper* v. *Harmer*, 57 L. T. 714). A mere power of sale could be vested (*Re Boyce*, 4 D. J. & S. 205). Where a lunatic held land in trust for A. absolutely, the court refused to vest the land in A., but

appointed a new trustee and vested the land in him (*Re Holland*, 16 Ch. Div. 672). A mortgage vested in a lunatic mortgagee could be transferred under this section (*Re Nicholson*, 34 Ch. Div. 663; *contra*, *Re Brown*, 50 L. T. 373). 13 & 14 Vict. c. 60, s. 3.

For form of petition by committee of lunatic mortgagor, on payment off of mortgage, see Elmer, Pr. Lun. 240, 5th ed. Where the mortgagee was of unsound mind, and the mortgagor wished to pay off, it was said he should pay the money into court, and would then be entitled to a vesting order (*Re Sparks*, 6 Ch. Div. 361). See *Re Wheeler* (1 D. M. & G. 434), where it was said that in the case of a mortgagee found lunatic, the committee should petition. Where of three trustees, A., B., and C., B. was lunatic, and C. was a new trustee appointed under a power, and it was desired to vest in A. and C., A. was appointed to convey the estate of himself and B. to himself and C. (*Re Vicat*, 33 Ch. Div. 103). For vesting order in the case of a lunatic tenant in tail, see *Re Mason*, *Mason* v. *Mason* (7 Ch. Div. 707). Form of order.

For form of vesting order, and of order appointing person to convey estates vested in lunatic, see Elmer, 318, 7th ed. See further as to the form of orders vesting real estate, the note to sects. 7, 10, and 34, *post*.

A petition for an order, vesting in new trustees property, a trustee of which has been found lunatic, ought to be served on his committee (*Re Saumarez*, 8 D. M. & G. 390; and see *Re Parker*, 32 Beav. 580; *Re Wylde*, 5 D. M. & G. 25); but where the trustee is a person of unsound mind not found lunatic, he need not be served (*Re East*, 8 Ch. 735; *Re Green*, 10 Ch. 272). Service.

Where a mortgagee became of unsound mind, it was said that the mortgagor should bring the money into court and would then be entitled to a vesting order. The mortgagor would have to pay the costs of the necessary petition, but would not be ordered to pay any costs to the mortgagee (*Re Sparks*, 6 Ch. D. 361). Where the mortgagee had been found lunatic and the committee petitioned, the petitioner's costs came out of the lunatic's estate (*Re Wheeler*, 1 D. M. & G. 434). But in such a case the mortgagor should not be served (*Re Rowley*, 1 D. J. & S. 417); and in no case can have costs out of the lunatic's estate (*Re Phillips*, 4 Ch. 629). The stamp on the vesting order must in any case be paid by the mortgagor (*Re Thomas*, 22 L. J. Ch. 858; *Re Biddle*, 23 L. J. Ch. 23). Costs where mortgagee or his heir is a lunatic.

Where the heir of a mortgagee was a lunatic the mortgagor petitioning paid all costs (*Re Stuart*, 4 De G. & J. 319; *Re Jones*, 2 D. F. & J. 554).

Where the lunatic mortgagee was a trustee, the trust appearing on the face of the mortgage, the mortgagor petitioning paid all costs (*Re Lewis*, 1 Mac. & G. 23); but where the trust did not appear, the costs of a petition by the committee and the co-trustees of the lunatic were paid out of the trust estate (*Re Jones*, 2 Ch. Div. 70; see *Re Townsend*, 1 Mac. & G. 686).

Where a trustee becomes lunatic, and an application in lunacy is made for a transfer of the trust funds, no order will be made as to costs (*Re Garden*, 6 N. R. 347). As to the practice under former acts, see *Ex p. Pearce* (T. & R. 325). Where trustee a lunatic.

4. When any lunatic or person of unsound mind shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right (*p*). Contingent rights may be conveyed.

(*p*) This section has been repealed as to England by 53 Vict. c. 5, s. 342; see now sect. 135 (2) of that act (*post*, p. 538).

13 & 14 Vict. c. 60, s. 5.

Lord Chancellor may transfer stock of lunatic trustees and mortgagees.

5. When any lunatic or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting in any person or persons the right to transfer such stock or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons, together with any other person or persons the said Lord Chancellor may appoint (*q*).

(*q*) This section has been repealed as to England by 53 Vict. c. 5, s. 342; see now sect. 136 of that act (*post*, p. 539). The following note relates to the law independently of that act.

The executors of an executor were held to be "entitled" within 13 & 14 Vict. c. 60, s. 5, when the stock was standing in the name of the original testator (*Re Wacher*, 22 Ch. Div. 535). The wife of a lunatic was sole surviving trustee of stock. An order was made, appointing new trustees in the place of the married woman and the deceased trustees, and vesting in the new trustees the right to transfer the stock (*Re Wood*, 3 D. F. & J. 125). The sole surviving trustee of stock being of unsound mind, the beneficiaries were appointed trustees and the stock vested in them (*Re Currie*, 10 Ch. Div. 93).

Where one of the three executors of a surviving trustee of shares was of unsound mind, and the other two refused to act, an order was made vesting the right to transfer the shares in the beneficiaries (*Re White*, 5 Ch. 698).

Where one of several trustees was lunatic the court under this section vested the right to transfer stock in the remaining trustees (*Re Watson*, 19 Ch. Div. 384); and would make such an order as to the whole fund if immediately divisible (*Re Martyn*, 26 Ch. Div. 745; see *Re Wacher*, 22 Ch. Div. 535); or as to any part immediately payable (*Re Hodgson*, *Kenlis* v. *Hodgson*, 11 Ch. Div. 888). But where there was a continuing trust it was said that a new trustee must be appointed (*Re Nash*, 16 Ch. Div. 503; *Re Aston*, 23 Ch. Div. 217; *Re Ray*, 47 L. T. 500; *Re Hodgson*, *sup.*; see *Re Lamb*, 28 Ch. Div. 77; *Re Gardiner*, 33 Ch. Div. 590; *Re Peacock*, 14 Ch. Div. 212). See now *Re Leon*, 1892, 1 Ch. 348, *post*, p. 538. Where a lunatic was entitled jointly with a person out of the jurisdiction, and it was desired to vest in two new trustees already appointed, the stock was vested in the person out of the jurisdiction under this section, and then in the new trustees (*Re Batho*, 39 Ch. Div. 189; see *Re Druce*, 46 L. T. 669; *Re Rolls Hoare*, 1888, W. N. 94).

The court would not, under the act, make an order as to the retransfer of stock which had been transferred out of the names of the trustees (*Re Stewart*, 8 W. R. 297).

As to the effect of an order vesting the right to transfer stock, see sect. 26 (*post*, p. 513), and 15 & 16 Vict. c. 55, s. 6 (*post*, p. 535). Directions may be given as to how such a right is to be exercised (Sect. 31, *post*, p. 517).

Vesting orders as to stock.

Where a person of unsound mind was entitled to a sum of stock, as to part as trustee, and as to the residue beneficially, an order was made enabling new trustees to receive the arrears of dividends on the whole sum

of stock, upon an undertaking to invest in the name of the old trustee the dividends to which he was entitled beneficially (*Re Stewart*, 2 D. F. & J. 1; as to the indivisibility of dividends, see also *Skynner* v. *Pelichet*, 9 W. R. 191). As to the form of an order vesting the right to transfer stock, see further the note to sect. 22 (*post*, p. 511).

13 & 14 Vict. c. 60, s. 5.

As to the practice in lunacy, see note to sect. 3 (*ante*, p. 500).

Power to transfer stock of deceased person.

6. When any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action or any interest in respect thereof, in any person or persons he may appoint (*r*).

(*r*) This section has been, as to England, repealed by 53 Vict. c. 5, s. 342. See now sect. 136 (3) of that act (*post*, p. 539).

Court of Chancery may convey estates of infant trustees and mortgagees.

7. Where any infant shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*s*).

(*s*) Before the Conv. Act, 1881, infants often became by devolution or devise seised of lands as trustees or mortgagees, and in particular where a vendor of land had died (See *Re Lowry*, 15 Eq. 78). Now, under the Conv. Act, 1881, ss. 4 and 30 (*post*, pp. 576, 600), the legal estate devolves on the personal representative, both where there is a contract to sell freeholds binding on the heir or devisee of a deceased vendor, and in the case of trust and mortgage estates; except in the latter case where they are copyhold (50 & 51 Vict. c. 73, s. 45; see *Re Mills*, 37 Ch. D. 312).

The legal estate in copyholds outstanding in the infant heir of a testator was vested under sect. 7 (*Re Franklyn*, 1888, W. N. 217; see *Dewar* v. *Maitland*, 2 Eq. 834). This section applies where the infant is also a lunatic (*Re Arrowsmith*, 4 Jur. N. S. 1123; 6 W. R. 642; 53 Vict. c. 5, s. 143). A vesting order was refused as to an equitable estate vested in an infant, and which was bound by an order for sale (*Re Williams*, 5 D. G. & Sm. 575).

Infant tenant in tail.

In the case of an infant tenant in tail, a vesting order under this act will, if the protector consents to it, bar all estates in remainder (*Powell* v. *Matthews*, 1 Jur. N. S. 973; and see *Hargreaves* v. *Wright*, 1 W. R. 408; *Singleton* v. *Hopkins*, 4 W. R. 107; *Re Breary*, 1873, W. N. 487).

Service.

The infant should be served (*Re Jones*, 22 W. R. 837; *Re Adams*, 1887, W. N. 175; *Re Russell*, 1866, W. N. 125; *Re Cooper*, 9 W. R. 531; *contra*, *Re Little*, 7 Eq. 323; *Re Tweedy*, 9 W. R. 398; *Re Willan*, *ib.* 689; *Re Davies' Trust*, 1889, W. N. 215). A petition by a tenant for life for an order vesting property in a new trustee appointed under a power, must be served on the remainderman. It was said that the evidence must show that the event had occurred in which the power could be exercised, and that the new trustee was a fit person (*Re Maynard*, 16 Jur. 1084).

13 & 14 Vict. c. 60, s. 7.

Where a testator had agreed to grant easements, and infants were entitled to the land, a person was appointed under this section to convey to a releasee to uses for the purpose of granting the easements and subject thereto to the uses of the will (*Re Taylor*, 1866, W. N. 5). For orders under this section, see Seton, 503, 535, 4th ed.

Form of orders vesting real estate.

With regard in general to the form of orders vesting real estate the order should describe the property (*Re Ord*, 3 W. R. 386). Land may be vested to uses to bar dower (*Davey* v. *Miller*, 1 Sm. & Giff. App. 19); but a declaration against dower will not be inserted (*Ex p. Grieve*, 5 D. G. & Sm. 436). Land has been vested to the use of such persons as an executor and executrix (who was a married woman) should by deed appoint, and in default in the executor and executrix (*Re Powell*, 4 K. & J. 338); and has been vested subject to a legacy (*Re Ellerthorpe*, 18 Jur. 669). See further as to forms of vesting orders of real estate, the note to sects. 10 and 34 (*post*, pp. 505, 522).

Contingent rights of infant trustees and mortgagees.

8. Where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right (*t*).

(*t*) For forms of orders under this section, see Seton, 4th ed. 504.

Court of Chancery may convey the estate of a trustee out of the jurisdiction of the court.

9. When any person solely seised or possessed of any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said court to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate (*u*).

(*u*) If a lunatic trustee is out of the jurisdiction, a vesting order can be made under this section in Chancery alone (*Re Gardner*, 10 Ch. D. 29; see now 53 Vict. c. 5, ss. 135, 143, *post*, pp. 538, 540). A trustee will be treated as out of the jurisdiction, even where he appears by counsel (*Stilwell* v. *Ashley*, Seton, 520). Where a mortgagee who was a trustee absconded, the land was vested under this section in the *cestui que trust* (*Re Barker*, 58 L. T. 303). And where a mortgagee's heir was out of the jurisdiction, the land was vested in the mortgagee's executors (*Re Skitter*, 4 W. R. 791; see now Conv. Act, 1881, s. 30, *post*).

Where a trustee of a will disclaimed and the heir could not be found, a person was appointed to convey the land which had been sold in an administration action (*Wilkes* v. *Groom*, 8 D. M. & G. 205). An heir who was out of the jurisdiction was declared to be a trustee and his interest vested under this section in the executor (*Hooper* v. *Strutton*, 12 W. R. 367; see *Re Badcock*, 2 W. R. 386).

Where the legal interest in copyholds is vested in A. & B. as tenants in common, and A. is beneficially entitled to the whole, B. is solely seised within this section in one moiety in trust for A. (*McMurray* v. *Spicer*, 5 Eq. 538). And where the legal interest in freeholds is vested in A. and B. as joint tenants, and A. was beneficially entitled to the whole, B. is solely seised within this section of one moiety in trust for A. (*Ib.*)

13 & 14 Vict. c. 60, s. 9.

Mortgagor absconding.

Where a mortgagor under an equitable mortgage, the defendant in a foreclosure suit, had absconded, an order was made declaring him a trustee and vesting the estate in the mortgagee (*Lechmere* v. *Clamp*, 30 Beav. 218; 31 Beav. 578). But the order will not be made on motion to make the foreclosure absolute; a separate application must be made (*Smith* v. *Boucher*, 1 Sm. & G. 72). Where a mortgagor was abroad, a vesting order was refused as to the last day of the term which he had covenanted to assign to a purchaser from the mortgagee (*Re Propert*, 22 L. J. Ch. 948).

For forms of orders under this section, see Seton, 4th ed. 504. The case of a trustee of stock being out of the jurisdiction or impossible to find is provided for by sect. 22, *post*, p. 510.

Court may make order in cases where persons are seised of lands jointly with parties out of jurisdiction of court, &c.

10. When any person or persons shall be seised or possessed of any lands jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*v*).

(*v*) This section is to be read "when any person or persons shall be seised or possessed of any lands *upon any trust* jointly, &c. (*McMurray* v. *Spicer*, 5 Eq. 539). The words "seised jointly" are not to be construed strictly as referring to a joint tenancy at law only (*Re Greenwood*, 27 Ch. D. 359), and include co-parceners (*Ib.*) A mortgagee having died intestate, the estate descended upon two co-parceners, one of whom was out of the jurisdiction, the estate was vested in the other alone (*Re Templer*, 4 N. R. 494). Where one of a bankrupt's assignees had gone abroad, the court made an order declaring him a trustee, and vesting the estate in the other assignees (*Re Joyce*, 2 Eq. 576). An order was made under this section as to one of several trustees who was a convict (*Re Hulme*, 57 L. T. 13).

Where one of several mortgagees who were trustees was abroad, his interest was vested in a transferee (*Re Walker*, 3 Ch. D. 209). But where realty was mortgaged to A. and B., and A. went abroad, it was held, upon payment off of the mortgage, that the court had no jurisdiction under this section to vest in the purchaser the estate of A. (*Re Osborn*, 12 Eq. 392).

Form of order.

Under this section the court will make an order vesting lands in a new trustee jointly with continuing trustees (*Re Bute*, Johns. 15; see also *Smith* v. *Smith*, 3 Drew. 72); notwithstanding the doubts suggested in *Re Watt* (9 Hare, 106), and *Re Plyer* (9 Hare, 220). Service was dispensed with on the person abroad (*Re Greenwood*, 27 Ch. D. 359).

For form of order under this section, see Seton, 4th ed. 504.

Contingent rights of trustees.

11. When any person solely entitled to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said court shall direct; and the order

13 & 14 Vict. c. 60, s. 11.

shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right (*r*).

(*r*) For forms of orders under this section, see Seton, 4th ed. 505.

Court may make order in cases where persons are jointly entitled with others out of the jurisdiction of the court to a contingent right in lands.

12. When any person jointly entitled with any other person or persons to a contingent right in any lands upon any trust shall be out of the jurisdiction of the Court of Chancery or cannot be found, it shall be lawful for the said court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right (*s*).

(*s*) For form of order under this section, see Seton, 4th ed. 505.

When it is uncertain which of several trustees was the survivor.

13. Where there shall have been two or more persons jointly seised or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*t*).

(*t*) For form of order under this section, see Seton, 4th ed. 505.

When it is uncertain whether the last trustee be living or dead.

14. Where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*u*).

(*u*) For form of order under this section, see Seton, 4th ed. 505.

When trustee dies without an heir.

15. When any person seised of any lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the heir or devisee of such

trustee had duly executed a conveyance of the lands in the same manner for the same estate (*x*). 13 & 14 Vict. c. 60, s. 15.

(*x*) From the use of the word "seised" it was inferred that this section does not apply to leaseholds (*Re Mundel*, 8 W. R. 683), which, however, can be dealt with under sect. 34 (*Re Driver*, 19 Eq. 352).

Under the Conv. Act, 1881, s. 30, trust estates now devolve on the personal representative unless of copyhold tenure (50 & 51 Vict. c. 73, s. 45; see *Re Mills*, 37 Ch. D. 312). In the case of a bare trustee dying before 1882, see V. & P. Act, 1874, s. 5 (*post*, p. 567); 38 & 39 Vict. c. 87, s. 48. Under sects. 15 and 28 combined, the court vested copyholds, the sole trustee of which had died intestate without an heir, in the *c. q. t.* who was absolutely entitled (*Re Godfrey*, 23 Ch. D. 205). Where as a security for a loan land was conveyed on trust for sale and payment of the loan, and of the balance to the borrower, "his executors, administrators, and assigns," and the lender died intestate and without an heir, a vesting order was made under this section, the deed which operated as a conversion being more than a mere mortgage (*Re Underwood*, 3 K. & J. 745; see *Re Keeler*, 11 W. R. 62).

A bastard sold a reversionary interest in realty to which he was entitled under a will; the trustees of the will subsequently conveyed the legal estate to the bastard who died without children: an order was made under this act vesting the legal estate in the purchaser (*Re Wilkinson*, 12 W. R. 522).

For form of order under this section, see Seton, 4th ed. 506.

16. When any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands (*z*). Contingent right of unborn trustee.

(*z*) Orders have been made under this section, vesting in purchasers under a decree the rights and interests of unborn children (*Wake* v. *Wake*, 1 W. R. 283); and discharging in favour of purchasers the rights of unborn persons claiming under a settlement (*Hargreaves* v. *Wright*, 1 W. R. 408).

For form of order under this section, see Seton, 4th ed. 506.

[*Sects.* 17 *and* 18 *were repealed by* 15 *&* 16 *Vict. c.* 55, *s.* 2, post.]

19. When any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; that is to say, Power to convey in place of mortgagee.

When an heir or devisee of such mortgagee shall be out of

13 & 14 Vict. c. 60, s. 19.

the jurisdiction of the Court of Chancery, or cannot be found:

When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly-authorized agent of such last-mentioned person:

When it shall be uncertain which of several devisees of such mortgagee was the survivor:

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead:

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee:

And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate (*c*).

Application of section.

(*c*) Under the Conv. Act, 1881, s. 30 (*post*, p. 600), mortgage estates now devolve on the personal representative, unless they are of copyhold tenure (50 & 51 Vict. c. 73, s. 45; see *Re Mills*, 37 Ch. D. 312). Sect. 19 of the Trustee Act is not confined in its operation to a case of simple re-conveyance to the mortgagor. Where a mortgagee in fee (who had never been in possession or in receipt of the rents and profits) died intestate as to the mortgaged hereditaments, and his heir could not be found, the court, under this act, vested the legal estate in his executors, who proposed to transfer (*Re Boden*, 1 D. M. & G. 57; 9 Hare, 820; *contra*, *Re Meyrick*, 9 Hare, 116; see *Re Lea*, 6 W. R. 482). For the case where the mortgagee has been in possession, see *Re Skitter* (4 W. R. 791). And where the personal representative of a mortgagee assigns the mortgage, the heir of the mortgagee being out of the jurisdiction, the assignee may, under this section, obtain an order vesting the legal estate (*Re Quinlan*, 9 Ir. Ch. R. 306). So where the personal representative of a mortgagee sold under a power of sale, and the heir was not known (*Re White*, 1881, W. N. 115). But such an order will not be made where no sale or transfer has been proposed (*Re Hewitt*, 27 L. J. Ch. 302).

Bastard mortgagee.

A bastard mortgagee, having devised her real estate in terms which did not pass the legal estate in the mortgaged premises, died without issue, and the money was subsequently paid off. The crown offering no opposition, an order was made vesting the legal estate in a purchaser (*Re Minchin*, 2 W. R. 179).

Service.

Where the personal representative of a mortgagee sold the mortgaged property, the legal estate outstanding in the heir of the mortgagee was vested in the purchaser, without service being required on the heir of the mortgagee or the personal representative of the deceased mortgagor (*Re Wise*, 5 De G. & Sm. 415).

For form of order under this section, see Seton, 4th ed. 506.

Power to appoint a person to convey in certain cases.

20. In every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions

of this act, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, should it be deemed more convenient, to make the order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this act (*d*); and in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to made an order vesting in any person or persons the right to transfer any stock transferable in the books of the Governor and Company of the Bank of England, or of any other company or society established or to be established, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid; or the Court of Chancery, if it be deemed more convenient, to make an order directing the secretary, deputy secretary or accountant-general for the time being of the Governor and Company of the Bank of England, or any officer of such other company or society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other companies or societies and their officers and servants, for all acts done or permitted to be done pursuant thereto (*e*).

13 & 14 Vict. c. 60, s. 20.

(*d*) This section, as far as relates to the jurisdiction in lunacy, has been repealed as to England by 53 Vict. c. 5, s. 342.

A person can be appointed under this section to execute a lease (*Hall* v. *Hale*, 51 L. T. 226; *Cowper* v. *Harmer*, 57 L. T. 714; *Derham* v. *Kiernan*, I. R. 5 Eq. 217; *Hodgson* v. *Bower*, Seton, 4th ed. 529; see *contra*, *Grace* v. *Baynton*, 1877, W. N. 79). See also the power to order an officer of the court to execute documents given by the Jud. Act, 1884, s. 14. It is doubtful whether under this section a person could be appointed in place of an infant to convey in execution of a power given by statute, *e. g.*, 1 Will. 4, c. 47, s. 11, *ante*, p. 373 (*Wood* v. *Beatlestone*, 1 K. & J. 213).

Before 53 Vict. c. 5 (*post*, p. 538), persons were appointed under this section to convey on behalf of lunatics in the following cases. Where one of several trustees was a lunatic and a new trustee had been appointed (*Re Jones*, *Zincraft's Will*, 33 Ch. Div. 414; see *Re Mason*, 10 Ch. 273); in such a case the person appointed may be a continuing trustee (*Re Vicat*, 33 Ch. Div. 103). When the customary heir of a vendor who had covenanted to surrender copyholds was lunatic (*Re Cuming*, 5 Ch. 72). In a partition action when one part owner was lunatic (*Re Nicholson*, 34 Ch. Div. 663). Where after a decree for sale in a partnership action one partner was of unsound mind a person was appointed under this section (*Herring* v. *Clarke*, 4 Ch. 167). But a conveyance under this

13 & 14 Vict. c. 60, s. 20.

section cannot contain any contract binding the lunatic or his estate, such as (in the case of a lease) a covenant for quiet enjoyment (*Cowper* v. *Harmer*, 57 L. T. 714).

Who may be appointed.

In a foreclosure action against the infant heir of a mortgagee, his mother was appointed to convey (*Foster* v. *Parker*, 8 Ch. D. 147). Where the legal estate was vested in a tenant for life with remainder to an infant in tail, the agent of the vendor was appointed to convey for the infant on payment of the purchase-money into court (*Hargreaves* v. *Wright*, 1 W. R. 408). Where real estate devised to married women and infants was sold under a decree in lots, the court appointed the plaintiffs' solicitor to convey their shares to the several purchasers (*Hancox* v. *Spittle*, 3 Sm. & Giff. 478; and see *Wilks* v. *Groom*, 6 D. M. & G. 205, *ante*, p. 504).

Person absolutely entitled to stock.

(*e*) Where stock was standing in the names of two trustees, who were both dead, the survivor having died intestate and being without a legal personal representative. The court appointed the absolute owner of the stock trustee of the fund for his own benefit, and ordered it to be transferred by the proper officer into his name (*Re Dickson*, 1872, W. N. 223; 21 W. R. 220; *Re Price*, 1883, W. N. 202).

For forms of orders see the above cases, and Seton, 4th ed. 507; and as to the conveyance, see *Ex p. Foley*, 8 Sim. 395. The bank officer can only transfer for the person divested by the order. Any person jointly entitled must join in the transfer (*Wade* v. *Hopkinson*, Seton, 521; *Hodgson* v. *Hodgson*, *ib.*)

Palatine Courts.

[Sect. 21 contained provisions as to the jurisdiction of the Palatine Courts which have been replaced as follows:—Now as regards lands and personal estate in the County Palatine of Lancaster, the Lancaster Palatine Court (17 & 18 Vict. c. 82, s. 11), and, as regards lands and personal estate in the County Palatine of Durham, the Palatine Court of Durham (52 & 53 Vict. c. 47, s. 8), may exercise the powers and authorities of this act and the Trustee Act, 1852. In both cases, there is a proviso that no person who is within the jurisdiction of the High Court is to be deemed an absent trustee or mortgagee by a Palatine Court.

When land is situate partly within and partly without the jurisdiction of the Lancaster Palatine Court, proceedings may be taken in the High Court (*Wynne* v. *Hughes*, 26 Beav. 377). As to orders in lunacy, see *Re Ormerod*, 3 De G. & J. 249].

When trustees of stock out of the jurisdiction.

22. When any person or persons shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery (*g*), or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead (*h*) to any stock or chose in action upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said court may appoint; and when any sole trustee (*i*) of any stock or chose in action shall be out of the jurisdiction of the said court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said court may appoint (*k*).

Trustees out of jurisdiction.

(*g*) The husband of an executrix out of the jurisdiction was held to be a trustee within this section (*Ex p. Bradshaw*, 2 D. M. & G. 900; see now

M. W. P. Act, 1882, s. 18). It has been held that when a lunatic or infant trustee is also out of the jurisdiction, the case falls within the provisions applicable to the cases of lunacy and infancy (*Re Cramer*, 5 D. & Sm. 312; see *Re Smith*, I. R. 4 Eq. 180; see, however, *Re Gardner*, 10 Ch. D. 29). 13 & 14 Vict. c. 60, s. 22.

Where a trustee of stock was absent from England in command of a vessel on a voyage to India, he was not out of the jurisdiction within 11 Geo. 4 & 1 Will. 4, c. 60 (*Hutchison* v. *Stephens*, 5 Sim. 498). A debtor in India mortgaged shares in an English company to a creditor in England; upon sale by the mortgagee the debtor was a trustee of the shares for the purchaser within this section (*Re Angelo*, 5 D. G. & Sm. 278).

(*h*) Where stock was standing in the names of A. and B. as trustees for a lunatic, and A. had died long previously, but no proof upon which the bank would act could be furnished of his death, an order under this section was made upon B.'s death, appointing the bank's officer to concur with B.'s executor in tranferring the stock into court (*Re Bourke*, 2 D. J. & S. 426). Death of trustee unprovable.

(*i*) It was said that the term "sole trustee" meant a person originally a sole trustee or one who has become sole trustee by surviving. A. and B. being trustees, the Master found that it was uncertain whether A. was living or dead, but B. was living; afterwards B. died. It was held, that A. was not a sole trustee within this section (*Re Randall*, 1 Drew. 401; see *Re Hyatt*, 21 Ch. D. 846). Sole trustee.

(*k*) Bank stock was standing in the names of four trustees, one of whom was abroad and inaccessible. There being some inconvenience in removing him, the court, under this section, vested the right to receive the past and future dividends in the three other trustees during their joint lives (*Re Peyton*, 25 Beav. 317; 2 D. & J. 290; see, however, as to future dividends, *Re Hartnall*, 5 De G. & Sm. 111, *post*, p. 512). Where one of two trustees had been abroad for several years, and a new trustee had been appointed in his place, the right to tranfer was vested in the continuing and the new trustees (*Re Blaine*, 1886, W. N. 203; *Re Keeley*, 53 L. T. 487). The words "the court may appoint" mean appoint to transfer, not appoint as trustee (*Re Blaine*, *sup.*) Form of order.

It should appear on the face of the order that the trustee is out of the jurisdiction (*Re Mainwaring*, 26 Beav. 172). And see the form of order made under this section in *Coles* v. *Benbow*, 1873, W. N. 60.

Orders have been made under this section vesting the right to transfer stock in a *cestui que trust*, who was absolutely entitled (*Ex p. Bradshaw*, 2 D. M. & G. 900; *Re Ryan*, 9 W. R. 137; and see *Re White*, 5 Ch. 698; see *contra*, *Re Brass*, 4 W. R. 764; and *Re Dickson*, *ante*, p. 510). Also in a trustee who was beneficially interested, but only for the purpose of a transfer into court (*Frodsham* v. *Frodsham*, 15 Ch. D. 317). For forms of orders, see Seton, 4th ed. 508—510.

In petitions under this section, when there is a new trustee, he should be a co-petitioner (*Re Keeley*, 53 L. T. 487). Petition.

23. Where any sole trustee (*l*) of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto (*m*), it shall be lawful for the Court of Chancery to make an order vesting the sole right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said court may appoint (*n*). When trustee of stock refuses to transfer.

(*l*) The words "sole trustee" apply to two or more joint trustees (*Re*

13 & 14 Vict. c. 60, s. 23.

Hyatt, 21 Ch. D. 846; *Re Hartnall*, 5 D. G. & S. 111; see *contra*, *Re Spawforth*, 12 W. R. 978).

Request by person absolutely entitled.

(*m*) New trustees properly appointed are persons "absolutely entitled" within this section (*Ex p. Russell*, 1 Sim. N. S. 404; *Re Ellis*, 24 Beav. 426; *Re Baxter*, 2 Sm. & G. App. V.); but one of such trustees is not "absolutely entitled," nor is a life tenant of the dividends (*Mackenzie* v. *Mackenzie*, 5 De G. & Sm. 338).

The right to receive dividends may be vested in the person beneficially entitled on his request, but the court had no authority to make any order as to dividends subsequent to the request (*Re Hartnall*, 5 De G. & S. 111).

Service.

(*n*) A petition under sects. 23 and 24 need not be served on the recusant trustee (*Re Baxter*, 2 Sm. & G. App. V.; *Ex p. Armstrong*, 16 Sim. 296; see *Re Mount*, 24 L. T. 290, *post*).

Recusant trustee.

The case of a trustee refusing to obey an order of the Court of Chancery was not provided for by this act (*Mackenzie* v. *Mackenzie*, 5 De G. & Sm. 338). See now 15 & 16 Vict. c. 55, ss. 4, 5, *post*, p. 534, and Jud. Act, 1884, s. 14. The case of a trustee refusing or neglecting to convey lands is provided for by 15 & 16 Vict. c. 55, s. 2, *post*, p. 531. For forms of orders under this section, see Seton, 4th ed. 510, 511.

When one of several trustees of stock refuses to transfer or receive and pay over dividends.

24. Where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said court may appoint jointly with such other trustee or trustees (*o*).

(*o*) Where two executors of a surviving trustee refused to transfer to the persons absolutely entitled, and the third executor was a lunatic, a vesting order was made on a petition in lunacy and Chancery (*Re White*, 5 Ch. 698; see *Re Wacher*, 22 Ch. Div. 535). See further the note to sect. 23.

For forms of orders under this section, see Seton, 4th ed. 511.

When stock is standing in the name of a deceased person.

25. When any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found, or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said court may appoint (*p*).

(*p*) Orders have been made under this section where the surviving

trustee was dead intestate without personal representative (*Re Dickson*, 1872, W. N. 223; *Re Crowe*, 14 Ch. D. 304; see 14 Ch. D. 610). Also where the executor of the surviving executor of the surviving trustee had not proved the will (*Re Price*, 1883, W. N. 202). Also where, in the case of the death of a surviving trustee, there was a neglect to transfer by his executor (*Re Ellis*, 24 Beav. 426; *Re Trubee*, 1892, W. N. 88), or his next of kin (*Re Stroud*, 1874, W. N. 180). See *Re Hilliard*, 42 L. T. 79.

For form of order, see Seton, 4th ed. 511.

13 & 14 Vict. c. 60, s. 25.

26. Where any order shall have been made under any of the provisions of this act vesting the right to any stock in any person or persons appointed by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order as the said Bank of England, or such companies, associations or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the Lord Chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof (*q*).

Effect of an order vesting the legal right to transfer stock.

(*q*) This section has, so far as relates to the jurisdiction in lunacy, been repealed, as to England, by 53 Vict. c. 5, s. 342. See sect. 35, *post*, p. 523. Having regard to the words in this section "into their own names, or otherwise," an order was made vesting in new trustees the right to call for a transfer to themselves or any purchaser from them (*Re Peacock*, 14 Ch. Div. 212). See as to form of order under this section, *Re Smyth*, 2 De G. & Sm. 781; 4 De G. & Sm. 499; Trustee Act, 1852, s. 6, *post*, p. 535.

27. Where any order shall have been made under the provisions of this act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the legal right to sue for or recover any chose in action or any interest in

Effect of an order vesting legal right in a chose in action.

13 & 14 Vict. c. 60, s. 27.

respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence and prosecute, in his or their own name or names, any action, suit or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action (*r*).

(*r*) This section, so far as relates to the jurisdiction in lunacy, has been repealed, as to England, by 53 Vict. c. 5, s. 342.

Effect of an order vesting copyhold lands, or appointing any person to convey copyhold lands.

28. Whensoever, under any of the provisions of this act, an order shall be made, either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly (*s*): and whenever under any of the provisions of this act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of the manor, and every other person, shall, subject to the customs of the manor and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts, for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments (*t*).

Order vesting copyholds without consent of lord.

(*s*) This section, so far as relates to the jurisdiction in lunacy, has been repealed, as to England, by 53 Vict. c. 5, s. 342. An order vesting copyhold lands can be made without the consent of the lord, and will not prejudice his right to fines (*Paterson* v. *Paterson*, 2 Eq. 31; *Re Flitcroft*, 1 Jur. N. S. 418; *Re Hurst*, Seton, 540, 4th ed.; see, however, *Cooper* v. *Jones*, 25 L. J. Ch. 240, and *Re Howard*, 3 W. R. 605). Where such an order is made without the lord's consent, the person in whom the property is vested applies for admission as an ordinary surrenderee would have done (Lewin, 1163, 9th ed.; see *Bristow* v. *Booth*, L. R. 5 C. P. 92).

With consent of lord.

Where a vesting order is made with the lord's consent, surrender and admission are unnecessary. For the purpose of consenting, it is not necessary for the lord to appear in court; a verified certificate of his consent is sufficient (*Ayles* v. *Cox*, 17 Beav. 584; see *Cooper* v. *Jones*, 25 L. J. Ch. 240). For form of consent and verifying affidavit, see Dan. Ch. Forms, 897, 4th ed.

For form of order vesting copyholds, see Seton, 507, 4th ed.; *Re Crowe's Mortgage*, 13 Eq. 26. Orders have been made vesting copyholds in *Re Godfrey* (23 Ch. D. 205), and *Re Franklyn* (1888, W. N. 217).

Order appointing per-

(*t*) Where a person is appointed to convey copyholds, the person so appointed must surrender, and the surrenderee must be admitted (Lewin,

1163, 9th ed.) The Court of Queen's Bench will give effect to such an order by a mandamus to the lord (*Re Lane and Irving*, 12 W. R. 710). Persons have been appointed to convey, in *Re Collingwood* (6 W. R. 536); *Re Cuming* (5 Ch. 72). For form of order appointing a person to convey, see *Re Hey* (9 Hare, 221.)

13 & 14 Vict. c. 60, s. 28. son to convey copyholds.

29. When a decree shall have been made by any court of equity directing the sale of any lands for the payment of the debts of a deceased person, every person seised or possessed of such lands, or entitled to a contingent right therein, as heir or under the will of such deceased debtor, shall be deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of this act; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person (*u*).

When a decree is made for sale of real estate for payment of debts.

(*u*) Where part of a testator's real estate had been contracted to be sold by order of court, to provide for costs, the 29th and 30th sections did not apply (*Weston* v. *Filer*, 5 De G. & Sm. 608); but this difficulty has been removed by Trustee Act, 1852, s. 1, *post*, p. 532 (See *Wake* v. *Wake*, 17 Jur. 545). Where copyholds devised to an infant for life, remainder to his first and other sons in tail, were decreed to be sold to pay the testator's debts, the purchaser was entitled to require an order discharging the contingent rights of the unborn issue of the infant (*Wood* v. *Beetlestone*, 1 K. & J. 213). For forms of orders under this section, see Seton, 527, 533, 4th ed. Applications under this section must be made in chambers (R. S. C. Ord. 55, r. 2 (8)). The order should, it seems, be entitled in the matter of the act (*Gough* v. *Bage*, 25 L. T. 738; see table of Titles in Annual Practice).

Provisions for facilitating the conveyance of the lands of a deceased debtor, where a decree for sale has been made, are also contained in 11 Geo. 4 & 1 Will. 4, c. 47, ss. 11, 12, *ante*, pp. 373, 374.

30. Where any decree shall be made by any court of equity for the specific performance (*x*) of a contract concerning any lands, or for the partition (*y*) or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands (*z*), either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said court to declare, that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this act, or to declare concerning the interests of unborn persons (*a*) who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased, who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this act, and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights and interests of such persons, born or unborn, as the said court or the said Lord Chancellor

Court to declare what parties are trustees of lands comprised in any suit, and as to the interests of persons unborn.

13 & 14 Vict. c. 60, s. 27.

respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence and prosecute, in his or their own name or names, any action, suit or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action (*r*).

(*r*) This section, so far as relates to the jurisdiction in lunacy, has been repealed, as to England, by 53 Vict. c. 5, s. 342.

Effect of an order vesting copyhold lands, or appointing any person to convey copyhold lands.

28. Whensoever, under any of the provisions of this act, an order shall be made, either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly (*s*): and whenever under any of the provisions of this act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of the manor, and every other person, shall, subject to the customs of the manor and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts, for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments (*t*).

(*s*) This section, so far as relates to the jurisdiction in lunacy, has been repealed, as to England, by 53 Vict. c. 5, s. 342. An order vesting copyhold lands can be made without the consent of the lord, and will not prejudice his right to fines (*Paterson* v. *Paterson*, 2 Eq. 31; *Re Flitcroft*, 1 Jur. N. S. 418; *Re Hurst*, Seton, 540, 4th ed.; see, however, *Cooper* v. *Jones*, 25 L. J. Ch. 240, and *Re Howard*, 3 W. R. 605). Where such an order is made without the lord's consent, the person in whom the property is vested applies for admission as an ordinary surrenderee would have done (Lewin, 1163, 9th ed.; see *Bristow* v. *Booth*, L. R. 5 C. P. 92).

Order vesting copyholds without consent of lord.

With consent of lord.

Where a vesting order is made with the lord's consent, surrender and admission are unnecessary. For the purpose of consenting, it is not necessary for the lord to appear in court; a verified certificate of his consent is sufficient (*Ayles* v. *Cox*, 17 Beav. 584; see *Cooper* v. *Jones*, 25 L. J. Ch. 240). For form of consent and verifying affidavit, see Dan. Ch. Forms, 897, 4th ed.

For form of order vesting copyholds, see Seton, 507, 4th ed.; *Re Crowe's Mortgage*, 13 Eq. 26. Orders have been made vesting copyholds in *Re Godfrey* (23 Ch. D. 205), and *Re Franklyn* (1888, W. N. 217).

Order appointing per-

(*t*) Where a person is appointed to convey copyholds, the person so appointed must surrender, and the surrenderee must be admitted (Lewin,

1163, 9th ed.) The Court of Queen's Bench will give effect to such an order by a mandamus to the lord (*Re Lane and Irving*, 12 W. R. 710). Persons have been appointed to convey, in *Re Collingwood* (6 W. R. 536); *Re Cuming* (5 Ch. 72). For form of order appointing a person to convey, see *Re Hey* (9 Hare, 221.)

13 & 14 Vict. c. 60, s. 28.

son to convey copyholds.

29. When a decree shall have been made by any court of equity directing the sale of any lands for the payment of the debts of a deceased person, every person seised or possessed of such lands, or entitled to a contingent right therein, as heir or under the will of such deceased debtor, shall be deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of this act; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person (*u*).

When a decree is made for sale of real estate for payment of debts.

(*u*) Where part of a testator's real estate had been contracted to be sold by order of court, to provide for costs, the 29th and 30th sections did not apply (*Weston* v. *Filer*, 5 De G. & Sm. 608); but this difficulty has been removed by Trustee Act, 1852, s. 1, *post*, p. 532 (See *Wake* v. *Wake*, 17 Jur. 545). Where copyholds devised to an infant for life, remainder to his first and other sons in tail, were decreed to be sold to pay the testator's debts, the purchaser was entitled to require an order discharging the contingent rights of the unborn issue of the infant (*Wood* v. *Beetlestone*, 1 K. & J. 213). For forms of orders under this section, see Seton, 527, 533, 4th ed. Applications under this section must be made in chambers (R. S. C. Ord. 55, r. 2 (8)). The order should, it seems, be entitled in the matter of the act (*Gough* v. *Bage*, 25 L. T. 738; see table of Titles in Annual Practice).

Provisions for facilitating the conveyance of the lands of a deceased debtor, where a decree for sale has been made, are also contained in 11 Geo. 4 & 1 Will. 4, c. 47, ss. 11, 12, *ante*, pp. 373, 374.

30. Where any decree shall be made by any court of equity for the specific performance (*x*) of a contract concerning any lands, or for the partition (*y*) or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands (*z*), either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said court to declare, that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this act, or to declare concerning the interests of unborn persons (*a*) who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased, who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this act, and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights and interests of such persons, born or unborn, as the said court or the said Lord Chancellor

Court to declare what parties are trustees of lands comprised in any suit, and as to the interests of persons unborn.

13 & 14 Vict. c. 60, s. 30.

might under the provisions of this act make concerning the estates, rights and interests of trustees born or unborn (*b*).

(*x*) Under this section, the decree is made a condition precedent (*Re Colling*, 32 Ch. D. 336).

Specific performance.

A donee of a power of jointuring was ordered, in a suit by his wife for specific performance, to execute the power by a deed. On his refusal, he was declared a trustee, and the court appointed a person to execute the requisite deeds in his place (*Wellesley* v. *Wellesley*, 4 D. M. & G. 537). Where there had been a decree for specific performance of an agreement to grant a lease, and the defendant had refused to execute the lease, a person was appointed (under sect. 20) to execute in his place (*Hall* v. *Hale*, 51 L. T. 226; see, however, *Grace* v. *Baynton*, 1877, W. N. 79). So where infants were entitled to land subject to an agreement for a lease (*Hodgson* v. *Bower*; *Howell* v. *Palmer*, Seton, 529, 4th ed.)

Partition.

(*y*) In a partition suit, instead of giving an infant a day to show cause, the court may declare him to be a trustee of the shares allotted to other parties (*Bowra* v. *Wright*, 4 De G. & Sm. 265). Where in a suit for partition of lands, in which a lunatic was entitled to an undivided share, the lunatic had been declared a trustee within this act, the court of lunacy on a petition made a vesting order (*Re Molyneux*, 10 W. R. 512), notwithstanding the doubt expressed in *Re Bloomar* (2 De G. & J. 88). And where a decree had been made for partition of lands, an undivided share in which was vested in a lunatic as tenant in tail, an order was made in lunacy and Chancery directing the committee to execute all necessary assurances for giving effect to the partition (*Re Sherard*, 1 D. J. & S. 421). Where the shares of the parties to a partition suit were minute and complicated, the court declared each of the parties trustees as to the shares allotted to the other of them, and vested the whole in a single trustee with directions to convey (*Shepherd* v. *Churchill*, 25 Beav. 21; see form of order, *Ib.* p. 23; and *Orger* v. *Sparke*, 9 W. R. 180).

This section has been extended to cases where in partition actions the court directs sale instead of division (31 & 32 Vict. c. 40, s. 7, *post*). The Trustee Act, 1852, s. 1, also applies to such actions (*Beckett* v. *Sutton*, 19 Ch. D. 646). So, a party to such an action who has been found a lunatic was held a trustee, and a person was appointed in lunacy to convey for him (*Re Watson*, 58 L. T. 509). Where, upon an order for sale, the parties to the action and their unborn issue were declared trustees, a new trustee was appointed in their place, but not till after the order had been drawn up (*Lees* v. *Coulton*, 20 Eq. 20).

Foreclosure.

(*z*) This includes a decree ordering a mortgage (Seton, 527—538, 4th ed.) This section applies to all cases where there is a judgment against an infant for an immediate conveyance (*Mellor* v. *Porter*, 25 Ch. D. 161). Whether this includes a judgment against an infant for foreclosure of an equitable mortgage, see *S. C.* For an order in a foreclosure suit declaring the mortgagor a trustee for the mortgagee, see *Lechmere* v. *Clamp* and *Smith* v. *Boucher*, quoted *ante*, p. 505. Where a foreclosure suit was instituted against a mortgagor of unsound mind, an order was made vesting the property in the plaintiff as trustee for the purchaser (*Harrison* v. *Smith*, 17 W. R. 646).

(*a*) The words "unborn persons" include living persons who may subsequently have a right to claim under a party, *e. g.*, as his heir (*Bassett* v. *Moxon*, 20 Eq. 182).

(*b*) In the case of sales of realty, where there is only an unexecuted contract for sale, a suit is necessary to declare the vendor a trustee; but in the case of an executed contract a suit is not necessary (*Re Cuming*, 5 Ch. 72, *ante*, p. 509; see note, *ante*, p. 499).

As to the case where a person, declared to be a trustee in a suit, refuses to convey land, see *Knight* v. *Knight* and *Derham* v. *Kierman*, quoted in the note to Trustee Act, 1852, s. 2, *post*, p. 533.

The court has declared persons to be constructive trustees of stock

without suit (*Re Angelo*, 5 De G. & Sm. 278, *ante*, p. 511; *Re Davis*, 12 Eq. 214). 13 & 14 Vict. c. 60, s. 30,

Applications under this section must be in chambers (R. S. C. Ord. 55, r. 2(8)). For forms of orders under this section, see Seton, 528—536, 4th ed.; *Lees* v. *Coulton* (20 Eq. 21).

See in connection with this section the power given by the Jud. Act, 1884, s. 14, to appoint a person to execute documents on behalf of a recusant, and *Howarth* v. *Howarth*, 11 P. Div. 68, 95. Jud. Act, 1884, s. 14.

31. It shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this act are enforced (*c*). Power to make directions how the right to transfer stock to be exercised.

(*c*) This section, so far as relates to the jurisdiction in lunacy, has been repealed as to England by 53 Vict. c. 5, s. 342. Under this section the court may order the person in whom the right to transfer stock is vested, to transfer it into court (*Re Pitt*, 1 Jur. N. S. 1155; *Re Dawson*, 3 N. R. 397), *e. g.*, under the Trustee Relief Act (*Re Draper*, 9 W. R. 805; *Re Thornton*, 9 W. R. 475; see *Re Mais*, 21 L. J. Ch. 875).

For forms of orders under this section, see Seton, 508, 510, 511, 4th ed.

32. Whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees (*d*). Power to court to make order appointing new trustees.

(*d*) The court will not, upon an application under this section, enter into the question of the validity of the instrument creating the trust (*Re Matthews*, 26 Beav. 463). Except under special circumstances, as where a vesting order is required, the court will not appoint a new trustee where there is a valid power in the instrument of trust (*Re Davies*, 3 Mac. & G. 278; see *Re Cooper*, 4 W. R. 729); even where the donee of the power intends to exercise it corruptly (*Re Hodgson*, 9 Hare, 118). Nor as a rule will the court appoint where an appointment could be made under a statutory power (*Re Soulby*, 21 W. R. 256; *Re Gibbons*, 45 L. T. 756; see *Re Jackson*, 16 W. R. 572; *Re Shafto*, 29 Ch. D. 247; *Re Higginbottom*, 1892, W. N. 121). Nor, there being an existing power, does a judgment for the execution of the trusts give jurisdiction to the court to appoint; but in that case the person appointed by the donee of the power requires to be approved by the court; and repeated appointments of improper persons might be held to amount to a refusal to exercise the power (*Re Gadd*, *Eastwood* v. *Clark*, 23 Ch. Div. 134; *Re Hall*, *Hall* v. *Hall*, 51 L. T. 901). Proper persons appointed by the donee were approved by the court, although all the beneficiaries objected (*Cecil* v. *Langdon*, 28 Ch. Div. 1). Circumstances causing application to the court. (1.) Connected with the power.

Where the donee of the power is a lunatic, it would seem that the Court of Lunacy cannot appoint (See *Re Garrod*, 31 Ch. Div. 164); but the power may be exercised by the committee under an order in lunacy (53 Vict. c. 5, s. 128, 129; see *Re Bowmer*, 3 De G. & J. 658; *Re Garrod*, *sup.*); or the trustees may appoint under sect. 31 of the Conv. Act, 1881 (*Re Blake*, 1887, W. N. 173). The Court of Chancery has also jurisdiction to make an appointment (*Re Heaphy*, 18 W. R. 1070; *Re Sparrow*, 5 Ch. 662). The Master of the Rolls refused in such a case to appoint a new trustee, until a committee had been appointed and served with the petition (*Re*

13 & 14 Vict. c. 60, s. 32.

Parker's Trusts, 32 Beav. 580). The court has appointed new trustees in the following cases. Where the donees of the power were unwilling to appoint (*Re Knight*, 26 Ch. D. 82), or could not agree (*Re Tempest*, 1 Ch. 485), or were in India (*Re Humphry*, 1 Jur. N. S. 921); where under a settlement by a husband for the sole benefit of the wife, the husband and wife had a joint power but were judicially separated and the husband had long resided abroad (*Re Somerset*, 1887, W. N. 122); where the power was vested in the surviving trustee, "his heirs or assigns," and the heir of the last surviving trustee could not be found (*Re Freeman*, 37 Ch. D. 148); where it was doubtful whether the power applied to the case which had occurred (*Re Woodgate*, 5 W. R. 448; *Re Armstrong's Settlement*, 5 W. R. 448; *Cooper* v. *Macdonald*, 14 W. R. 755). See the further provisions as to powers of appointing new trustees in Conv. Act, 1881, s. 31 (*post*, p. 600).

(2.) Connected with the trustee.

Before 53 Vict. c. 5, orders were made in Chancery alone appointing a new trustee in the place of a lunatic (*Re Martin*, 34 Ch. Div. 618; *Re Davies*, 3 Mac. & G. 278; *contra*, *Re Ormerod*, 3 De G. & J. 249); and

Lunacy.

appointing new trustees in the place of a person of unsound mind and a deceased trustee (*Re Vickers*, 3 Ch. D. 112; *contra*, *Re Good Intent Society*, 2 W. R. 671). In some cases where a vesting order was also asked, the order was made in Chancery and lunacy (*Re Stewart*, 8 W. R. 297; *Re Davidson*, 20 L. J. Ch. 644; *Re Druce*, 46 L. T. 669; *Re Smyth*, 55 L. T. 37). As to the power of appointing new trustees possessed by the Court of Lunacy, see 53 Vict. c. 5, s. 141, *post*, p. 540, as to England, and Trustee Act, 1852, s. 10, *post*, p. 536, as to Ireland; *Re Owen* (4 Ch. 782); *Re Green* (10 Ch. 272); *Re Hodgson*, *Kenlis* v. *Hodgson* (11 Ch. Div. 889); *Re Rolls Hoare* (1888, W. N. 94); *Re Chauncey* (14 W. R. 849).

Infancy.

The court will appoint a new trustee in the place of an infant trustee nominated by a testator (*Re Gartside*, 1 W. R. 196; *Re Porter*, 25 L. J. Ch. 482). Without prejudice, however, to any application by the infant to be restored to the trusteeship when he comes of age (*Re Shelmerdine*, 33 L. J. Ch. 474; *Re Brunt*, 1883, W. N. 220; *Re Tallatire*, 1885, W. N. 191).

Incapacity.

The court will appoint a new trustee in the place of one who is incapable from old age and infirmities (*Re Lemann*, 22 Ch. D. 633; *Re Phelps*, 31 Ch. Div. 351; see *Re Barber*, 39 Ch. Div. 187; *Re Campbell*, 1888, W. N. 176), or ill-health (*Re Chauncey*, 14 W. R. 849; see *Re Dawson*, 3 N. R. 397).

Residence abroad.

The court has power under this section to appoint a new trustee in place of a trustee who is permanently residing abroad, without his consent (*Re Bignold*, 7 Ch. 223; *Re Martin Pye*, 42 L. T. 247). Where a trustee was resident in Jamaica, but there was no evidence that he did not intend to return to this country, *Kindersley*, V.-C., refused to appoint a new trustee (*Re Mais*, 16 Jur. 608; 21 L. J. Ch. 875). A bookseller domiciled in New York for several years was held "incapable of acting" within the words of a power (*Mennard* v. *Welford*, 1 Sm. & Giff. 426; but see *Re Bignold*, *sup.*) See, further, *Re Moravian Society*, 26 Beav. 101; *Re Arbib and Class*, 1891, 1 Ch. 601; *Re Watts*, 9 Hare, 106; *Re Harrison*, 22 L. J. Ch. 69; *Re Stewart*, 8 W. R. 297.

A new trustee will be appointed where a trustee absconds (*Hyde* v. *Benbow*, 1884, W. N. 117), or is an absconding bankrupt (*Re Renshaw*, 4 Ch. 783; *Re Druce*, 46 L. T. 669; *Re Lamb*, 28 Ch. D. 77; *Davies* v. *Hodgson*, 32 Ch. D. 225; *Re Gardiner*, 33 Ch. D. 590; *Re Mace*, 1887, W. N. 232).

Bankruptcy.

Where a trustee becomes bankrupt, it is now enacted that this section shall have effect so as to authorize the appointment of a new trustee in substitution for the bankrupt (whether voluntarily resigning or not), if it appears expedient to do so (46 & 47 Vict. c. 52, s. 147). The jurisdiction is in the Chancery Division (*Coombes* v. *Brookes*, 12 Eq. 61). When the bankruptcy is recent, and it is not shown that the man is of good character and has the command of means, he ought to be removed (*Re Adams' Trust*, 12 Ch. D. 637; see *Re Bridgman*, 1 Dr. & Sm. 170); except, possibly, where he has no money to receive (*Re Barker's Trusts*, 1 Ch. D. 43). A new trustee was appointed in place of a bankrupt (*Re Tweedy*, 28 Ch. D. 529). See also above cases as to absconding. Trust property does not pass to the bankruptcy trustee (46 & 47 Vict. c. 52, s. 44, sub-s. 1).

Felony.

Where a trustee is convicted of felony, the court can appoint a new

13 & 14 Vict. c. 60, s. 32.

trustee under Trustee Act, 1852, s. 8, *post*, p. 536. As to the escheat of trust property, see note to sect. 46, *post*, p. 527.

Surviving trustee dead intestate and no administrator.

Where a surviving trustee was dead intestate and no administration had been taken out, a new trustee was appointed under this section and Trustee Act, 1852, s. 9 (*Davis* v. *Chanter*, 6 W. R. 416). See before the last-mentioned act, *Re Hazeldine* (16 Jur. 853). As to vesting orders in such a case, see the note to sect. 34, *post*, p. 522. A person absolutely entitled to stock was in such a case appointed trustee for his own benefit, and the stock was ordered to be transferred to him (*Re Dickson*, 1872, W. N. 223, *ante*, p. 510).

No existing trustees.

Where there are no existing trustees the court can appoint under Trustee Act, 1852, s. 9, *post*, p. 536. And where trustees appointed by will have died in the testator's life, an appointment has been made (*Re Smirthwaite*, 11 Eq. 251; *Re Orde*, 24 Ch. Div. 271; *Re Williams*, 36 Ch. D. 231). Where the appointment of the acting trustees was void, and the donee of the power of appointment could not be found, the court appointed (*Re Freeman*, 37 Ch. D. 148).

No trustees originally appointed.

Where no trustees were originally appointed by a testator, the court will appoint, if expedient (*Re Gillett*, 1876, W. N. 251; 25 W. R. 23; see *Dodkin* v. *Brunt*, 6 Eq. 580; *Re Moore*, *McAlpine* v. *Moore*, 21 Ch. D. 778). So where persons were declared constructive trustees of stock, trustees were appointed in their place, although no trustees had been originally named by the testatrix (*Re Davis*, 12 Eq. 214). Where stock was standing in the name of a corporate body which had ceased to exist, the court appointed trustees, and directed them to transfer the fund (*Hanover* v. *Bank of England*, 8 Eq. 350).

Trustees refusing to act.

Where a trustee who had executed the deed creating the trust declined to act, the court refused, under this section, to appoint a new trustee in his place without his consent (*Re Garty*, 10 L. T. 331); but new trustees have been appointed in the place of disclaiming trustees (*Re Sheppard*, 4 D. F. & J. 423; *Re Martinez*, 22 L. T. 403; *Re Pratt*, 55 L. T. 313); and it is sufficient that a disclaiming trustee should disclaim at the bar (*Foster* v. *Dawber*, 1 Dr. & Sw. 172; *Re Tyler*, 5 De G. & Sm. 56).

Trustee will not be removed against his will under this act.

The court will not under this act remove a trustee who desires to continue in the trust (*Re Hodgson*, 9 Hare, 121), even if he is a solicitor who misconducts himself (*Re Blanchard*, 3 D. F. & J. 131), nor on the ground of lunacy where the lunacy is disputed (*Re Combs*, 51 L. T. 45). To remove a trustee resident within the jurisdiction from the trust against his wish, an action must be brought (*Re Blanchard*, 3 D. F. & J. 131; *Re Bignold*, 7 Ch. 223); and the mere fact of there being a dissension between one of the several *cestuis que trusts* and the trustee is not a sufficient ground for removal (*Forster* v. *Davies*, 10 W. R. 180). See further, Lewin, 1166 *et seq.*, 9th ed. But where new trustees can be appointed on petition, an action should not be brought (*Thomas* v. *Walker*, 18 Beav. 521; *Legg* v. *Mackrell*, 2 D. F. & J. 551).

Existing trustees will not be re-appointed.

It is now settled, after some difference of opinion (*Re Driver*, 19 Eq. 352; *Re Dalgleish*, 4 Ch. Div. 143; *Re Pearson*, 5 Ch. Div. 982), that the court will not re-appoint existing trustees with a view to a vesting order being made under sect. 34 (*Re Vicat*, 33 Ch. Div. 103; *Re Dewhirst*, *id.* 416).

Receiver.

Trustees may be appointed although there is a receiver of the trust property (*Reeves* v. *Neville*, 10 W. R. 335).

Principles on which new trustees are selected.

In selecting a new trustee, the court will have regard to the wishes of the author of the trust expressed in or clearly collected from the instrument creating the trust. A person will not be appointed with a view to the interest of some of the *cestuis que trusts* in opposition to the interests of others. The court will have regard to the question whether the appointment will promote or impede the execution of the trust; but the mere fact of the continuing trustee refusing to act with the proposed trustee is not sufficient to prevent the appointment (*Re Tempest*, 1 Ch. 485).

Who will be appointed.

The court will not in general appoint a *cestui que trust* to be a trustee (*Foster* v. *Abraham*, 17 Eq. 356; *Re Roskell*, Seton, 824, 4th ed.; *Re Conybeare*,

13 & 14 Vict. c. 60, s. 32.

1 W. R. 458; *Ex p. Clutton*, 17 Jur. 988); but where the *cestui que trust* is absolutely entitled, and it is desired to vest the trust funds in him, he may be appointed (*Re Currie*, 10 Ch. 93; *Re Dickson*, 1872, W. N. 223; *Re Price*, 1883, W. N. 202). A *cestui que trust* will be appointed under special circumstances, *e.g.*, where there are indications in the will (*Tempest* v. *Camoys*, 58 L. T. 221); or where a stranger cannot be found (*Re Clissold*, 10 L. T. 642); but in such cases an undertaking has been required that if the person appointed becomes the sole trustee, he will immediately take steps to appoint a co-trustee (*Re Burgess*, 1877, W. N. 87; *Re Lightbody*, 52 L. T. 40). The husband of a *cestui que trust* was appointed on a similar undertaking (*Re Parrott*, 1881, W. N. 158; *Re Hattatt*, 18 W. R. 416; see *Wilding* v. *Bolder*, 21 Beav. 224). An unmarried lady may be appointed under special circumstances (*Re Campbell*, 31 Beav. 176; *Berkley* v. *Berkley*, 9 Ch. 720; but see *Brook* v. *Brook*, 1 Beav. 531). As to married women, see now M. W. P. Act, ss. 18, 24, *ante*, pp. 336, 338. Persons resident out of the jurisdiction will only be appointed under special circumstances (*Re Freeman*, 37 Ch. D. 151; *Re Guibert*, 16 Jur. 852; *Re Curtis*, I. R. 5 Eq. 429). In the case of personalty, where all the *cestuis que trusts* were permanently resident abroad, such persons were appointed (*Re Liddiard*, 14 Ch. D. 310; *Re Austen*, 38 L. T. 601; *Re Drewe*, 1876, W. N. 168); and where one *cestui que trust* resided in Canada, a Canadian was appointed trustee of her share jointly with the other trustee (*Re Cunard*, 48 L. J. Ch. 172). In the case of realty, where all the *cestuis que trusts* were resident abroad, two Canadian and one English trustee were appointed, upon an undertaking by the Canadian trustees that they would not appoint any new foreign trustee without the consent of the court (*Re Freeman*, 37 Ch. D. 148). Where English and Irish lands were settled on the same trusts, and the English court had appointed English trustees of the English land, the Irish court appointed the same persons to be trustees of the Irish land (*Re Maberly*, 19 L. R. Ir. 341). When the *cestuis que trusts* are resident abroad, the court will appoint an alien to be trustee where no English person can be found (*Re Hill*, 1874, W. N. 228; see further note to sect. 34, *post*, p. 522). The agent of the property has been appointed and allowed to receive a commission (*Re Freeman*, 37 Ch. D. 148). The solicitor acting for the petitioner will not be appointed (*Re Orde*, 24 Ch. Div. 271); but this has been done where there was a difficulty in finding any one else (*Re Brentnall*, 1872, W. N. 77).

A corporation.

As regards the appointment of a corporation, the word "person" in this section includes, according to the interpretation in sect. 2, a "body corporate" (See *Pharmaceutical Society* v. *London Association*, 5 App. Cas. 857, and compare Conv. Act, 1881, ss. 2 (xvii.), 31, *post*, pp. 573, 600). In *Re Brogden*, *Billing* v. *Brogden* (1888, W. N. 238), however, *North*, J., thought he had no power to appoint a corporation. The bank cannot be compelled to register consols in the name of a corporation and an individual (*Law Guarantee Society* v. *Bank of England*, 24 Q. B. D. 406).

Number of trustees appointed.

Two trustees of real estate were appointed by the court in the place of one on a petition under this act (*Ex p. Tunstall*, 4 De G. & S. 421); Vice-Chancellor *Kindersley* observing, "That trust property ought, if possible, to be prevented from coming into the hands of a sole trustee" (See *Re Welsh*, 3 My. & Cr. 292; *Birch* v. *Cropper*, 2 De G. & S. 255; *Plenty* v. *West*, 16 Beav. 356); and new trustees have been added to the original trustees (*Re Boycott*, 5 W. R. 15; *Grant* v. *Grant*, 34 L. J. Ch. 641; *Re Brackenbury*, 10 Eq. 45; *Re Gregson*, 34 Ch. D. 209). The court will not in general diminish the number of the trustees, but, under special circumstances, two will be appointed in place of three (*Re Marriott*, 18 L. T. 749; *Bulkeley* v. *Earl of Eglinton*, 1 Jur. N. S. 994; *Re Fowler*, 1886, W. N. 183). In the case of the lunacy of one of several trustees, the court has, under 53 Vict. c. 5, ss. 135, 136 (*post*, p. 538) vested his estate in the others, although the number was thereby diminished (*Re Leon*, 1892, 1 Ch. 348). Prior to the last-mentioned act, it was

13 & 14 Vict. c. 60, s. 32.

decided by the Court of Appeal that where there was a continuing trust, and one of the trustees became lunatic, the court would not reduce the number by appointing the sane trustees to be trustees in the place of themselves and the lunatic, and vesting the property in them alone; and that a new trustee must be appointed (*Re Nash*, 16 Ch. Div. 503; *Re Aston*, 23 Ch. Div. 217; *Re Colyer*, 43 L. T. 454; *Re Ray*, 47 L. T. 500). So also when one of the trustees was an absconding bankrupt (*Re Lamb*, 28 Ch. D. 77; *Re Gardiner*, 33 Ch. D. 591). Before the decision in *Re Nash*, *sup.*, appointments of this nature had been made (*Re Stokes*, 13 Eq. 333; *Re Harford*, 13 Ch. D. 135; *Re Gibbin*, 1880, W. N. 99; *Taylor* v. *Northrop*, 29 W. R. 134; *Re Shipperdson*, 49 L. J. Ch. 619). Appointments and vesting orders of this nature have been made where the fund was immediately divisible (*Re Martyn*, 26 Ch. Div. 745; *Re Watson*, 19 Ch. Div. 384); and where the persons appointed undertook to bring the fund into court (*Davies* v. *Hodgson*, 32 Ch. D. 225); and where special circumstances showed it was impossible to obtain a new trustee (*Re Mace*, 1887, W. N. 232). The court will not appoint a sole trustee (*Re Ellison*, 2 Jur. N. S. 62; *Re Porter*, *ib.* 349; *Re Dickinson*, 1 Jur. N. S. 724; see *D'Adhemar* v. *Bertrand*, 35 Beav. 20; *West of England Bank* v. *Murch*, 23 Ch. D. 146), except under special circumstances (*Re Reynault*, 16 Jur. 233).

Severance of trusts.

Where by the same instrument different parts of the property are vested in the same trustees on different trusts, the court can (independently of the Conv. Act, 1882, s. 5) appoint separate new trustees of the different parts (*Re Paine*, 28 Ch. D. 725; *Re Hetherington*, 34 Ch. D. 211; *Re Grange*, *Cooper* v. *Todd*, 44 L. T. 469), or of one part only, without requiring new trustees to be appointed of the remaining part (*Re Moss*, 37 Ch. D. 513, where the existing trustees retired from part of the trusts; *Re Dennis*, 12 W. R. 575; *Re Cotterill*, 1889, W. N. 183; see *Re Cunard*, 48 L. J. Ch. 172). See Conv. Act, 1892, s. 6 (*post*, p. 634). An order was refused in *Re Nesbitt* (19 L. R. Ir. 509).

Creditor's deed.

The court has appointed new trustees of a trust deed for benefit of creditors (*Re Raphael*, 9 Eq. 233; *Re Price*, 6 Eq. 460; *Re Bache*, 1868, W. N. 223; *Re Donisthorpe*, 10 Ch. 55). As to appointing a trustee to perform executor's duties, see *Re Moore*, *McAlpine* v. *Moore* (21 Ch. D. 778); *Re Willey* (1890, W. N. 1).

Evidence on petition for appointment of new trustees.

The evidence should show that the person proposed to be appointed is a fit person. One affidavit is sufficient; the costs of a second will not be allowed (*Re Arden*, 1887, W. N. 166). The deponent's position in life must be stated, "gentleman" is not sufficient (*Re Horwood*, 55 L. T. 373; *Re Orde*, 24 Ch. Div. 271). He should not be the solicitor (*Grundy* v. *Buckridge*, 17 Jur. 731; 22 L. J. Ch. 1007; *Re Hartley*, 1879, W. N. 169). Something should be shown as to the pecuniary means of the proposed trustee (*Re Castle Sterry*, 1888, W. N. 179) "Of independent means" is sufficient, but not "gentleman" alone (*Re Horwood*, 55 L. T. 373). In general the proposed trustee should not appear by counsel to consent (*Re Draper*, 2 W. R. 440; *Re Parker*, 21 L. T. 218). His consent to act, however, should, in proceedings in Chancery and in Chancery and lunacy, be evidenced by a written consent signed by him, and verified by the signature of his solicitor (R. S. C. Ord. 38, r. 19a; *Re Hume*, 35 Ch. Div. 457). As to a consent in the case of proceedings in lunacy, see Rules in Lunacy, 1892, r. 92, and form of consent, *post*, pp. 542, 543.

As to the title to the property.

In the case of a vesting order, the beneficial title to the property may be proved by the affidavit of a person acquainted with the facts (*Re Hoskins*, 4 De G. & J. 436); but the legal title must be strictly proved (Seton, 4th ed. 548).

Service.

On a petition to appoint new trustees in the place of two who were desirous of retiring, both the old trustees and all the *cestuis que trusts* were required to appear (*Re Sloper*, 18 Beav. 596); but service on the old trustee has not been required, where he was of unsound mind (*Re Green*, 10 Ch. 272; *Re Stewart*, 8 W. R. 297; see *Re East*, 8 Ch. 735), or permanently resident abroad (*Re Bignold*, 7 Ch. 223; *Re Martin Pye*, 42 L. T.

13 & 14 Vict. c. 60, s. 32.

247; *Re Stewart*, *sup.*), or had absconded (*Re Nicholson's Trusts*, 1884, W. N. 76; *Hyde* v. *Benbow*, *id.* 117). Where the last trustee was dead, intestate, and a vesting order was asked, service on the heir was required (*Re Oxenham*, 1875, W. N. 6; *Re Smirthwaite*, 11 Eq. 251; see now Conv. Act, 1881, s. 30, *post*, p. 600; and *Re Pilling*, 26 Ch. D. 432). Service on the heir was not required in *Purvis* v. *Abraham* (1866, W. N. 126). The general rule is that all the *cestuis que trusts* must be served or join in the application (*Re Richards*, 5 De G. & Sm. 636; *Re Fellows*, 2 Jur. N. S. 62). A married woman can petition (*Re Outwin*, 48 L. T. 410). An infant petitions by his next friend (*Re Fellows*, *sup.*; *Jones* v. *Lewis*, 1 De G. & Sm. 251), and appears as respondent by a guardian *ad litem* (R. S. C. Ord. 16, r. 19). But where parties were numerous service was dispensed with on some who were represented by trustees (*Re Smyth*, 2 De G. & Sm. 781; see *Re Blanchard*, 3 D. F. & J. 137), and on one who was abroad (*Re Wilson*, 31 Ch. Div. 522; *Re Lightbody*, 52 L. T. 40; see *Re Parrott*, 1881, W. N. 158). Where an order had been made on petition, and two persons had been made petitioners without their consent, their names were struck out, and they were treated as not served (*Re Savage*, 15 Ch. D. 557). Where a new trustee was appointed of a term of years, service on the reversioner was required (*Re Farrant*, 20 L. J. Ch. 532).

Forms of petition and orders.

A form of petition for the appointment of new trustees, and for an order vesting lands, the right to call for a transfer of stock, and the right to sue for choses in action is given in Dan. Ch. Forms, 889 *et seq.*, 4th ed. As to summonses, see note to sect. 40, *post*, p. 525. For forms of orders, see Seton, 538—543, 4th ed. The petition should state the particular sections under which the order is to be made (*Re Moss*, 37 Ch. D. 513; *Re Hall*, 1888, W. N. 16). Where persons are only constituted trustees by an order in a suit, new trustees cannot be appointed in their place by the same order (*Lees* v. *Coulton*, 20 Eq. 20).

The new trustees to have the powers of trustees appointed by decree in suit.

33. The person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted (*d*).

(*d*) Formerly trustees appointed by the court could not appoint others in their place (*Holder* v. *Durbin*, 11 Beav. 594), or exercise discretionary powers (*Newman* v. *Warner*, 1 Sim. N. S. 457). See now Conv. Act, 1881, s. 33 (*post*, p. 603).

Power to court to vest lands in new trustees.

34. It shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees for such estate as the court shall direct; and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate (*e*).

Orders vesting real estate.

(*e*) The court has authority to make a vesting order under this act, though there may exist a person capable of executing a conveyance of the trust property to the persons appointed trustees by the court (*Re Manning*, Kay, App. 28). When the old trustee was of unsound mind not so found, the court, in a case before 53 Vict. c. 5, declined to make in Chancery a vesting order under this section (*Re Martin*, 34 Ch. Div. 618).

13 & 14 Vict. c. 60, s. 34.

See further, in connection with this and the following section, the analogous powers of the court of lunacy to make vesting orders where a committee exercises a power of appointing new trustees vested in the lunatic (53 Vict. c. 5, s. 129, *post*, p. 538).

Leaseholds.

Where a trustee of leaseholds has died without a representative, the court will, under this section, vest the leaseholds (*Re Matthews*, 2 W. R. 85; *Re Mundel*, 8 W. R. 683; *Re Driver*, 19 Eq. 352; *Re Rathbone*, 2 Ch. Div. 483; *Re Gillett*, 1876, W. N. 251). But existing trustees will not be re-appointed for this purpose (*Re Driver*, *sup.*; and see cases quoted *ante*, p. 519). In the case of a vesting order of leaseholds, the landlord need not be served (*Re Matthews*, 2 W. R. 85).

Aliens.

Where, by an order under this act, real estate was inadvertently vested in an alien, the court declined to vary the order by inserting the name of a natural-born subject without the consent of the crown: but the order was made upon a rehearing, before office found, the crown raising no objection (*Re Giraud*, 32 Beav. 385; see *Re Martinez*, 22 L. T. 403, *post*, p. 524). As to a vesting order against the Crown, see *Re Pratt*, 55 L. T. 313. As to the capacity of an alien to hold and dispose of real property, see now 33 & 34 Vict. c. 14, s. 2 (*ante*, p. 402); and as to the appointment of foreigners to be trustees, see the note to sect. 32, *ante*, p. 520.

Where new facts arise or are discovered after the making of a vesting order, see, as to the practice, *Re Havelock* (14 W. R. 26, 174); *Re Clinton* (1882, W. N. 176).

Form of order.

For forms of orders, see Seton, 4th ed. 538—540.

Where one of several trustees is out of the jurisdiction and a new trustee is appointed in his place, the vesting order should in form vest in the new and continuing trustees such estate as was vested in the continuing and absent trustees (*Smith* v. *Smith*, 3 Drew. 72; see *Re Fisher*, 1 W. R. 505; *Re Bute*, Johns. 15; see *contra*, *Re Watts*, 9 Hare, 106; *Re Plyer*, *Ib.* 220). In the case of a last surviving trustee who had died without a personal representative, the vesting order should in form vest the property in the new trustees, "for all such estate as was vested in the last surviving trustee at the time of his death" (*Re Williams*, 36 Ch. D. 231; *Re Rackstraw*, 52 L. T. 612; *Re Rathbone*, 2 Ch. Div. 483; see *Re Bishop of Sarum*, 55 L. T. 313; 1886, W. N. 140; *Re Pilling*, 26 Ch. D. 432).

Power to court to vest right to sue at law in new trustees.

35. It shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any chose in action, subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees (*f*).

(*f*) See *Re Smyth*, 4 De G. & S. 499; Trustee Act, 1852, s. 6, *post*, p. 535. The effect of a vesting order is to transfer to the new trustees of a will the rights and powers of the old trustees, so that administration with the will annexed will be granted to them (*Woodfall* v. *Arbuthnot*, L. R. 3 P. & M. 108). Orders were made under this section vesting the right to transfer stock standing in the name of a testator who had no personal representative (*Re Herbert*, 8 W. R. 272), and stock standing in the name of two original trustees, the survivor having died without personal representative (*Re Crowe*, 14 Ch. D. 610). The court has refused to vest in new trustees unauthorized investments (*Re Harrison*, 22 L. J. Ch. 69); but in such a case, the court has vested the right to call for a transfer to the trustees themselves or to any purchaser from them (*Re Peacock*, 14 Ch. Div. 212). For form of order where one of two new

13 & 14 Vict. c. 60, s. 35.

trustees died before the stock was transferred to him, see *Re Glanville* (1877, W. N. 248; 1878, W. N. 21); and see as to forms of orders, *Re Tweedy* (28 Ch. Div. 529); *Re Hopper* (1886, W. N. 40); Seton, 4th ed. 538, 542.

Old trustees not to be discharged from liability.

36. Any such appointment by the court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Who may apply.

37. An order, under any of the hereinbefore-contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock or chose in action subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an order under any of the provisions hereinbefore contained concerning any lands, stock or chose in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage (*g*).

(*g*) Where executors and trustees of a naturalized British subject renounced probate and declined to act, the court, on the petition of the administrator and the persons who would (if not aliens) have been co-heirs appointed new trustees and vested the real estate in them (*Re Martinez*, 22 L. T. 403). A person who has a contingent interest in real estate may present a petition for the appointment of new trustees (*Re Sheppard*, 4 D.

Infants.

F. & J. 423; *Re Harden Chapel*, 1 W. R. 212). Where there are infants *cestuis que trusts*, it is not sufficient that the adult *cestuis que trusts* should be petitioners; the infants (by their next friend) should join (*Re Fellows*, 2

Lunatics.

Jur. N. S. 62). A lunatic *cestui que trust* should petition (by his next friend); an order will not be made on the petition of the committee alone (*Re Bourke*, 2 D. J. & S. 426). In the case of a lunatic mortgagee, the petition should be presented by the committee (*Re Wheeler*, 1 D. M. & G.

Married women.

434; see, however, *Re Sparkes*, 6 Ch. Div. 361). A married woman since 1882 can present a petition without her husband being joined (*Re Outwin*, 48 L. T. 410).

In a petition for a vesting order a new trustee recently appointed by deed was required to be joined as co-petitioner (*Re Keeley*, 53 L. T. 487).

Creditors who have obtained decree.

Creditors who have obtained a decree for the administration of the estate of their debtor, under which a contract for sale of his real estate has been entered into, may apply for a vesting order (*Re Wragg*, 1 D. J.

Purchasers under decree.

& S. 356). And where a decree for sale had been made, it was held that a petition was properly presented by a purchaser whose money was in court (*Ayles* v. *Cox*, 17 Beav. 584; *Gough* v. *Bage*, 25 L. T. 738). Three purchasers of different lots were allowed to join in one petition (*Rowley* v. *Adams*, 14 Beav. 130).

[*Sects.* 38 *and* 39 *relating to the practice before the masters in Chancery have now been repealed by* 38 & 39 *Vict. c.* 66, *s.* 1, *which has also repealed the references to "motion" and "certificate" which formerly occurred in sects.* 41 *and* 42 *of this Act.*]

13 & 14 Vict. c. 60, s. 40.

Power to present petition in the first instance.

40. Any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, or from the Lord Chancellor, intrusted as aforesaid, may, should he so think fit, present a petition in the first instance to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for such order as he may deem himself entitled to, and may give evidence by affidavit or otherwise in support of such petition before the said court, or the Lord Chancellor, intrusted as aforesaid, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof (*h*).

(*h*) This section, so far as relates to the jurisdiction in lunacy, has been repealed, as to England, by 53 Vict. c. 5, s. 342.

In all cases where a judgment or order has been given or made for the sale or transfer of any stock or hereditaments, the application should be by summons (R. S. C. Ord. 55, r. 2 (8)). And where the application is for an appointment of new trustees, or for an appointment and a vesting or other order consequential thereon, it can now be made by summons (R. S. C. Ord. 55, r. 13 a); but the costs of a petition will be allowed in a complicated case (*Re Morris*, 60 L. T. 96). In any case not within the above-mentioned rules the application should in the first instance be by petition or motion (*Frodsham* v. *Frodsham*, 15 Ch. Div. 317; *Smith* v. *Gill*, 53 L. T. 623); but may afterwards be referred to chambers (*Re Tweedy*, 28 Ch. Div. 529; *Re Pratt*, 55 L. T. 313; see sect. 41, *post*).

Where under Ord. 55, r. 13 a, a vesting order had been made in chambers the Bank of England refused to act on it (*Re Griffith*, 1889, W. N. 171), and a vesting order was subsequently made on motion (*Ib.*; see *Re Jones, deceased*, 1889, W. N. 196; 61 L. T. 554).

Where application can be made under this act an action should not be brought (*Thomas* v. *Walker*, 18 Beav. 521). Where the application is by petition, the sections under which the order is asked should be stated in the petition (*Re Moss*, 37 Ch. D. 513; *Re Hall*, 1888, W. N. 16).

Service.

As to service in the case of lunatic trustees and mortgagees, see note to sect. 3, *ante*, p. 501; and in the case of infant trustees and mortgagees, see note to sect. 7, *ante*, p. 504. As to service on the mortgagor where a vesting order is asked, see *Re Wise* (5 De G. & Sm. 415), *ante*, p. 508, and *Re Crowe's Mortgage* (13 Eq. 26), *post*, p. 533; on an incumbrancer, see *Re Winteringham* (3 W. R. 578), *post*, p. 533; on recusant trustees, see note to sect. 23, *ante*, p. 512; on the lord of a manor, see note to sect. 28, *ante*, p. 514. When the next-of-kin of a lunatic are unknown the Attorney-General should be served (*Re Bourke*, 2 D. G. J. & S. 426). A devisee on trust for sale sufficiently represents the *cestuis que trusts* (*Re Blanchard*, 2 N. R. 386). And as to service in the case of a petition to appoint new trustees, see note to sect. 32, *ante*, p. 521.

What may be done upon petition.

41. Upon the hearing of any such petition, it shall be lawful for the said court, or for the said Lord Chancellor, should it be deemed necessary, to direct a reference to one of the masters in ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said court or for the said Lord Chancellor to direct such petition to stand over, to enable the petitioner or petitioners to adduce evidence or further evidence before the said court, or before the said Lord Chancellor, or to enable notice or any further notice of such petition to be served upon any person or persons (*i*).

13 & 14 Vict. c. 60, s. 41.

(*i*) This section, so far as relates to the jurisdiction in lunacy, has been repealed as to England by 53 Vict. c. 5, s. 342.

Court may dismiss petition with or without costs.

42. Upon the hearing of any such petition, whether any report from a master shall have been obtained or not, it shall be lawful for the court, or the Lord Chancellor, intrusted as aforesaid, to dismiss such petition, with or without costs, or to make an order thereupon in conformity with the provisions of this act (*j*).

(*j*) This section, so far as relates to the jurisdiction in lunacy, has been repealed as to England by 53 Vict. c. 5, s. 342.

Power to make an order in a cause.

43. Whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the masters of the Court of Chancery, the facts necessary for an order under this act shall appear to such court to be sufficiently proved, it shall be lawful for the said court, either upon the hearing of the said cause, or of any petition or motion in the said cause or matter, to make such order under this act (*k*).

(*k*) An originating summons under R. S. C. Ord. 55, r. 13 a, is a matter within this section (*Re Jones*, 1889, W. N. 196). Orders have been made without petitions in *Wood* v. *Beetlestone* (1 K. & J. 213); *Lechmere* v. *Clamp* (30 Beav. 218); *Hooper* v. *Strutton* (12 W. R. 367); *D'Adhemar* v. *Bertrand* (35 Beav. 19); *Harrison* v. *Smith* (17 W. R. 646); *Re Kay*, *Littlehales* v. *Lightfoot* (1889, W. N. 80). A petition in an action should also be intituled in the matter of the act as well as in the action (*Gough* v. *Bage*, 25 L. T. 738; *Huntley* v. *Clutterbuck*, 1872, W. N. 81). When persons are only constituted trustees by an order in an action, new trustees cannot be appointed in their place by the same order (*Lees* v. *Coulton*, 20 Eq. 20).

An order has been made under the Trustee Act, 1852, s. 4, upon motion (*Re Holbrook*, 8 W. R. 3, *post*). As to whether a petition in lunacy is necessary when property is vested in a lunatic, see note to sect. 3 (*ante*, p. 500). As to service on defendant trustee who cannot be found, see sect. 49, *post*, p. 528.

Orders made by the Court of Chancery, founded on certain allegations, to be conclusive evidence of the matter contained in such allegations.

44. Whenever any order shall be made under this act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the Court of Chancery or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, has made an order upon

such an allegation, shall be conclusive evidence of the matter so alleged in any court of law or equity upon any question as to the legal validity of the order: provided always, that nothing herein contained shall prevent the Court of Chancery directing a re-conveyance or re-assignment of any lands conveyed or assigned by any order under this act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this act, when the same shall appear to have been improperly obtained (*l*). 13 & 14 Vict. c. 60, s. 44.

(*l*) This section, so far as relates to the jurisdiction in lunacy, has been repealed as to England by 53 Vict. c. 5, s. 342.

45. It shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any lands, stock or chose in action, in the trustee or trustees of any charity or society over which charity or society the said Court of Chancery would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said court under any statute authorizing the said court to make an order to that effect in a summary way upon petition (*m*). Trustees of charities.

(*m*) This section, so far as relates to the jurisdiction in lunacy, has been repealed as to England by 53 Vict. c. 5. See now sect. 138 of that act (*post*, p. 539). New trustees having been appointed in Chancery under 16 & 17 Vict. c. 137, s. 28, and the surviving trustee being a lunatic, the vesting order was made at chambers under the Trustee Acts, 1850 and 1852 (*Re Davenport*, 4 D. M. & G. 839; see *Re Lincoln Chapel*, 1 Jur. N. S. 1011). The Chancellor of Durham has a concurrent jurisdiction under the Charitable Trusts Acts, as to charities within his jurisdiction (52 & 53 Vict. c. 47, s. 9). As to new trustees of land held on religious or educational trusts, see 53 & 54 Vict. c. 19, and the acts there referred to.

46. No lands, stock, or chose in action, vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place (*n*). No escheat of property held upon trust or mortgage.

(*n*) This section is the same as the 3rd section of 4 & 5 Will. 4, c. 23, for cases on which, see *Anon.* (13 L. J. 73); *Re Tyson* (1 Jur. 281); *Ex p. Tyson* (1 Jur. 472, cited 3 Y. & Coll. 344).

It had been considered that when land or personal property was vested in several trustees, one of whom was attainted, the whole, at least as to

13 & 14 Vict. c. 60, s. 46.

chattels, became forfeited to the crown, inasmuch as the crown could not be a joint tenant with any other person (Co. Litt. 190 a; *Hales* v. *Petit*, Plowd. 257; 9 Rep. 129 b; 2 Bl. Com. 409; Cro. Eliz. 263; Finch's Law, 178; 10 Mod. 245). See now 33 & 34 Vict. c. 23, and note to sect. 47.

Power is now given to the court to appoint new trustees in lieu of any joint or sole trustee who has been or shall be convicted of felony (15 & 16 Vict. c. 55, s. 8, *post*, p. 536).

Act not to prevent escheat or forfeiture of beneficial interest.

[47. Nothing contained in this act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this act had not passed (*o*).

(*o*) By 33 & 34 Vict. c. 23, s. 1, it is enacted, that from and after the 4th July, 1870, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat, but nothing in the act is to affect the law of forfeiture consequent on outlawry. The crown is empowered to appoint an administrator, in whom the convict's property vests (sects. 9, 10), and provision is made as to the mode in which the property is to be applied (33 & 34 Vict. c. 23, ss. 12—18).

Money of infants and persons of unsound mind to be paid into court.

48. Where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock or chose in action, conveyed, assigned, or transferred under this act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privity of the accountant-general (*p*), in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said court; and it shall be lawful for the said court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

(*p*) Compare the provision as to moneys recovered on behalf of infants, &c., in the Queen's Bench Division (R. S. C. Ord. 22, r. 15). The words as to the accountant-general are to be construed as if the paymaster-general, for the time being, were here named (35 & 36 Vict. c. 44, s. 6). As to paying money into court, and investing money paid into court, see the Pay Office Statutes and Rules in the supplement to the Annual Practice.

Court may make a decree in the absence of a trustee.

49. Where, in any suit commenced or to be commenced in the Court of Chancery, it shall be made to appear to the court by affidavit that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve

him with the process of the court, and that he cannot be found, it shall be lawful for the said court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause: provided always, that no such decree shall bind, affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right or interest which such person shall have at the time of making such decree for his own use and benefit, or otherwise than as a trustee as aforesaid (*q*).

13 & 14 Vict. c. 60, s. 49.

(*q*) Under the old practice a cause might be certified as fit to be set down, where a defendant trustee who had not entered an appearance could not be found (*Westhead* v. *Sale*, 6 W. R. 52; *Burrell* v. *Maxwell*, 25 L. T. 655). For the present practice, where a defendant does not appear, see R. S. C. Ord. 13, r. 12, and as to when one trustee can be sued in the absence of his co-trustee, see notes to R. S. C. Ord. 16, rr. 6 and 8 in the Annual Practice.

[*Sect.* 50 *has been repealed by* 38 & 39 *Vict. c.* 66, *s.* 1.]

51. The Lord Chancellor, intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or court shall think proper (*r*).

Costs may be paid out of the estate.

(*r*) This section, so far as relates to the jurisdiction in lunacy, has been repealed as to England by 53 Vict. c. 5, s. 342. See sect. 142 of the last-mentioned act, and the rules made under the same act, No. 110 (*post*, p. 542).

Costs under this act may be charged on the inheritance (*Ex p. Davies*, 16 Jur. 882), or may be ordered to be raised by mortgage (*Re Crabtree*, 14 W. R. 497; Seton, 4th ed. 554), or to be paid out of the corpus of the fund (*Ib.* 514). In the case of two trust funds the costs may be apportioned (*Re Grant*, 2 J. & H. 754; see *Re Allen*, 1889, W. N. 132). The amount of the trust fund was not alone a sufficient reason for directing costs on the higher scale (*Re Spettigue*, 32 W. R. 385).

Mode of raising costs.

The costs of appointing new trustees will in general be paid out of corpus (*Carter* v. *Sebright*, 26 Beav. 376). But where the application is solely for the benefit of a life tenant (Seton, 4th ed. 527), or of a reversioner (*Re Brackenbury*, 10 Eq. 45), the costs will be paid by the applicant.

Costs by whom payable.

As to the costs of two petitions presented on the same day, see *Re Pring* (28 L. T. 467). Where a bill was filed instead of a petition under the act, the plaintiff paid all costs (*Thomas* v. *Walker*, 18 Beav. 521).

On petitions under this act there is no jurisdiction to order respondents to pay costs (*Re Primrose*, 23 Beav. 590). In one case since the Jud. Acts and the R. S. C. Ord. 65, r. 1, *Pearson*, J., made such an order (*Re Knight*, 26 Ch. D. 82); which, however, was doubted by the Court of

Respondents.

13 & 14 Vict. c. 60, s. 51.

Appeal (*Ib.* 91); who have since decided that it was not the object of the Jud. Acts and Orders to give any new jurisdiction as to costs (*Re Mills*, 34 Ch. Div. 33). A respondent had to pay the costs of unnecessary charges in his affidavit (*Re Willis*, 12 W. R. 97); and a trustee improperly opposing a petition paid his own costs of opposition, and from his remaining costs were deducted the costs of other parties in respect of the opposition (*Re Wiseman*, 18 W. R. 574). A trustee may lose his right to costs by misconduct (*Re Knight*, 26 Ch. Div. 82).

A lord of the manor appearing to consent pays his own costs (*Ayles* v. *Cox*, 17 Beav. 584). A tenant for life in remainder appearing in his own interest pays his own costs (*Re Thornton*, 9 W. R. 475). If a respondent is improperly served, no costs will be allowed (R. S. C. Ord. 65, r. 27 (23); *Day* v. *Croft*, 19 Beav. 518). As to whether if he is properly served he loses his costs by having notice not to appear, see *Turner* v. *Mullineux*, 9 W. R. 252. As to tender of costs on service, see R. S. C. Ord. 65, r. 27 (19).

Between vendor and purchaser.

As between vendor and purchaser, the costs of proceedings under this act should be paid by the vendor (*Bradley* v. *Munton*, 16 Beav. 294; *Ayles* v. *Cox*, 17 Beav. 584); but a railway company purchasing paid such costs (*Re Nash*, 4 W. R. 111).

As to the costs of proceedings under this act occasioned by the lunacy of a trustee, or of a mortgagee or his heir, see the note to sect. 3, *ante*, p. 501.

Commission concerning person of unsound mind.

52. Upon any petition being presented under this act to the Lord Chancellor, intrusted as aforesaid, concerning a person of unsound mind, it shall be lawful for the said Lord Chancellor, should he so think fit, to direct that a commission in the nature of a writ de lunatico inquirendo shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission (*s*).

(*s*) This section has been repealed as to England, by 53 Vict. c. 5, s. 342. In one case where the lunacy was disputed, the court refused to direct a commission (*Re Combs*, 51 L. T. 45, see *ante*, p. 500).

Suit may be directed.

53. Upon any petition under this act being presented to the Lord Chancellor, intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said Lord Chancellor or the said Court of Chancery to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose (*t*).

(*t*) This section, so far as relates to the jurisdiction in lunacy, has been repealed as to England by 53 Vict. c. 5, s. 342. In the following cases the court refused to make orders without suit, *Re Burt* (9 Hare, 289); *Re Carpenter* (Kay, 418); *Re Collinson* (3 D. M. & G. 409); *Re Weeding* (4 Jur. N. S. 707); *Re Martin* (34 Ch. D. 618); see *L. & S. W. R.* v. *Bridger* (12 W. R. 98).

Powers of Court of Chancery to extend to property in the colonies.

54. The powers and authorities given by this act to the Court of Chancery in England shall extend to all lands and personal estate within the dominions, plantations, and colonies belonging to her Majesty (except Scotland (*u*)).

(*u*) Vesting orders have been made by the English Court of Chancery as to lands in Ireland (*Re Hewitt*, 6 W. R. 537; *Re Taitt*, 1870, W. N. 25),

and in Canada (*Re Schofield*, 24 L. T. 322; *Re Groom*, 11 L. T. 336). As to the jurisdiction in lunacy over lands and personal estate in Scotland and Ireland, see now 53 Vict. c. 5, s. 110, *post*, p. 538. Before the repeal by the last-mentioned act of sect. 56 of this act it was held that there was no jurisdiction in lunacy over Irish lands (*Re Davies*, 3 Mac. & G. 278), or personal estate (*Re Hodgson*, *Kenlis* v. *Hodgson*, 11 Ch. Div. 888); but that the L. JJ. as additional judges of the Chancery Division for the purposes of lunacy applications (See note to sect. 3, *ante*, p. 500) had such jurisdiction (*Re Lamotte*, 4 Ch. Div. 325; *Re Smyth*, 55 L. T. 37); and that the petition should be entitled in lunacy and in Chancery (*Ib.*)

13 & 14 Vict. c. 60, s. 54.

The provisions of the Trustee Acts have been extended to the private property of the sovereign in England and Ireland (25 & 26 Vict. c. 37, s. 10).

Powers given to Court of Chancery may be exercised by that court in Ireland.

55. The powers and authorities given by this act to the Court of Chancery in England shall and may be exercised in like manner, and are hereby given and extended to the Court of Chancery in Ireland with respect to all lands and personal estate in Ireland.

[*Sect.* 56 *has been repealed by* 53 *Vict. c.* 5, *s.* 342.]

Powers of Lord Chancellor in lunacy may be exercised by Lord Chancellor of Ireland.

57. The powers and authorities given by this act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall and may be exercised in like manner by and are hereby given to the Lord Chancellor of Ireland, intrusted as aforesaid, with respect to all lands and personal estate in Ireland (*w*).

(*w*) See *Re Smith*, I. R. 4 Eq. 180.

Short title.

58. In citing this act in other acts of parliament, and in legal instruments, and in legal proceedings, it shall be sufficient to use the expression "The Trustee Act, 1850."

[*Sects.* 59 *and* 60 *are repealed by* 38 & 39 *Vict. c.* 66, *s.* 1.]

THE TRUSTEE ACT EXTENSION.

15 & 16 VICTORIÆ, CAP. 55.

An Act to extend the Provisions of "The Trustee Act, 1850." [30th June, 1852.]

15 & 16 Vict. c. 55, s. 1.

WHEREAS it is expedient to extend the provisions of the Trustee Act, 1850: be it therefore enacted,

Court of Chancery may make an order for vesting the estate in lieu of conveyance by a party to the suit after a decree or order for sale.

1. When any decree or order shall have been made by any court of equity directing the sale of any lands for any purpose whatever, every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or, being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850; and in every such case it shall be lawful for the Court of Chancery, if the said court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof, for such estate as the court shall think fit, either in any purchaser or in such other person as the court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate (*a*).

(*a*) This section provides for the case where an order has been made for the sale of any lands for any purpose (*Re Colling*, 32 Ch. Div. 336); including sales under the Partition Acts, 1868 and 1876, *post* (*Beckett* v. *Sutton*, 19 Ch. D. 646), and sales of the interest of the crown in escheated estates (47 & 48 Vict. c. 71, s. 5). The application of the section is not limited to cases of persons under disability (*Beckett* v. *Sutton*, 19 Ch. D. 646). Where an order has been made for sale of a lunatic's estate, a vesting order may be made under this section in Chancery only (*Herring* v. *Clark*, 4 Ch. 167; *Re Stamper*, *Stamper* v. *Stamper*, 46 L. T. 372). And see *Wake* v. *Wake*, 17 Jur. 545.

Applications under this section should be made in chambers (R. S. C. Ord. 55, r. 2 (8)).

See further the note to Trustee Act, 1850, s. 29, *ante*, p. 515.

Power to make an order for vesting the estate, on

2. [*That sections numbered seventeen and eighteen in the Queen's printer's copy of the Trustee Act*, 1850, *be repealed; and*] in every case where any person is or shall be jointly or solely seised or possessed of any lands or entitled to a contingent right

therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly-authorized agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said court shall be satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person, in such manner and for such estate as the court shall direct, or releasing such contingent right in such manner as the court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate (*b*).

15 & 16 Vict. c. 55, s. 2.

refusal or neglect of a trustee to convey or release.

(*b*) The words between brackets are repealed by 38 & 39 Vict. c. 66, s. 1.

A refusal is not "wilful" within this section if the trustee entertains *bonâ fide* doubt as to the title of the applicant to call for a conveyance (*Re Mills*, 40 Ch. Div. 14). An order has been made under this section to defeat an attempt at extortion on the part of a trustee (*Re O'Donnell*, 19 W. R. 522). Where one of two trustees of mortgages absconded, and refused to transfer to the continuing and a new trustee, a vesting order was made, but the court required the new trustee to be joined as co-petitioner (*Re Keeley*, 53 L. T. 487; see *Re Grayson*, 27 W. R. 534).

Cases under this section.

A. having been declared a trustee of leaseholds for the plaintiff, and ordered to execute an assignment, refused to execute. Notice of motion for an order directing A. to execute the deed within four days, or for a vesting order, was served on A., who did not appear. The motion having stood over for twenty-eight days, a vesting order was made under this section on an *ex parte* application (*Knight* v. *Knight*, 1866, W. N. 114). And where the defendant had been declared a trustee for the purpose of executing a lease to the plaintiff, and neglected to do so within twenty-eight days after formal demand, an order was made that on the consideration money being brought into court, the chief clerk should execute the lease (*Derham* v. *Kiernan*, I. R. 5 Eq. 217; see note to sect. 20 of Trustee Act, 1850, *ante*, p. 509. See also *Warrender* v. *Foster*, Seton, 4th ed. 538, and the power given by Jud. Act, 1884, s. 14).

Where a mortgagor covenanted to surrender copyholds to his mortgagee, and neglected to surrender for twenty-eight days after demand and tender of engrossment, a vesting order was made on the petition of the mortgagee (*Re Crowe's Mortgage*, 13 Eq. 26). See also, as to the instrument to be tendered in the case of copyholds, *Rowley* v. *Adams* (14 Beav. 130). Separate orders may be made as to different parts of the property if convenient (*Brader* v. *Kirby*, 1872, W. N. 174).

The petition need not be served on the recusant (*Re Crowe's Mortgage*, 13 Eq. 26; see *Ex p. Armstrong*, 16 Sim. 296; *Re Baxter*, 2 Sm. & Giff. App. 5). An order vesting lands, which were subject to an annuity, was made under this section, without requiring service on the annuitant (*Re Winteringham*, 3 W. R. 578).

The case of trustees refusing or neglecting to transfer stock is provided for by Trustee Act, 1850, ss. 23, 24.

For form of order under this section, see Seton, 4th ed. 508.

3. When any infant shall be solely entitled to any stock upon any trust, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof; and

Power to make an order for the transfer or receipt of

15 & 16 Vict. c. 55, s. 3.

dividends of stock in name of an infant trustee.

when any infant shall be entitled jointly with any other person or persons to any stock upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons jointly entitled with the infant, or in him or them, together with any other person or persons the said court may appoint (*c*).

Infant solely entitled.

(*c*) Under the Trustee Act, 1850, the court had no jurisdiction to make a vesting order with regard to stock held by an infant sole trustee (*Cramer* v. *Cramer*, 5 De G. & S. 312). Under this section where stock is standing in the name of an infant who is the sole beneficial owner of it, but subject to a provision in regard to maintenance or otherwise which is vested in somebody else, the infant may be declared a trustee and a vesting order made (*Gardner* v. *Cowles*, 3 Ch. D. 304; see *Sanders* v. *Horner*, 25 Beav. 476). So, also, where there was no provision for maintenance, but only an order by a Scotch court for maintenance (*In re Findlay*, 32 Ch. D. 221; but see *Ib.* p. 641).

An infant was declared a trustee of stock standing in his own name, and to which he was absolutely entitled in order to obtain payment of dividends to his guardian (*Re Westwood*, 6 N. R. 61); but this was subsequently discharged and an order under 1 Will. 4, c. 65, s. 32, substituted (6 N. R. 316).

Where money, in which infants were beneficially interested, was by mistake invested in their names in consols, the court upon a bill filed by executors, who were entitled to the control of the money, declared the infants trustees for the plaintiffs, and directed a vesting order (*Rives* v. *Rives*, 1866, W. N. 144).

Infant jointly entitled with other person.

Where stock to which an infant was beneficially entitled was standing in the joint names of himself and another person, it was vested by an order in that other person (*Re Harwood*, 20 Ch. D. 536; *Re Barnett*, 1889, W. N. 216). Where a father transferred stock into the joint names of himself, his wife, and an infant child, and the evidence showed that the transfer was made under a mistake, the court declared the infant a trustee for the father and made an order under this section (*Devoy* v. *Devoy*, 3 Sm. & Giff. 403; followed in *Stone* v. *Stone*, 3 Jur. N. S. 708). Where stock was standing in the names of three trustees and an infant, and two trustees were dead, and the third was out of the jurisdiction, the court appointed a guardian and allowed maintenance, and vested the right to receive the dividends in the guardian during the minority (*Re Morgan*, Seton, 4th ed. 516).

For forms of orders under this section, see Seton, 4th ed. 509, 512.

On neglect to transfer stock for twenty-eight days, order may be made vesting right to transfer in such person as the court shall appoint.

4. Where any person shall neglect or refuse to transfer any stock, or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting all the right of such person to transfer such stock or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said court may appoint (*d*).

(*d*) See sect. 23 of the Trustee Act, 1850, and note, *ante*, p. 511. An order under this or the following section must not deal with a larger

subject-matter than the previous order which it proposes to enforce (*Skynner* v. *Pelichet*, 9 W. R. 191). A petition for a preliminary order under this section need not be served upon the trustee (*Re Mount*, 24 L. T. 290). An order under this section has been made upon motion (*Re Holbrook*, 8 W. R. 3). Applications under this section, in all cases where an order has been made for a transfer of stock, should be in chambers (R. S. C. Ord. 55, r. 2 (8)). 15 & 16 Vict. c. 55, s. 4.

As to service of an order under this section, see *Coles* v. *Benbow* (1873, W. N. 60).

For forms of orders under this section, see Seton, 4th ed. 513.

On like neglect by executor, similar order may be made.

5. When any stock shall be standing in the sole name of a deceased person, and his personal representative shall refuse or neglect to transfer such stock or receive the dividends or income thereof for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said court may appoint (*e*).

(*e*) See sect. 25 of the Trustee Act, 1850, *ante*, p. 512.
For form of order under this section, see Seton, 4th ed. 511.

Bank of England and companies to comply with such orders.

6. When any order, being or purporting to be under this act, or under the Trustee Act, 1850, shall be made by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly; and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order; and the Bank of England, and all companies and associations whatever and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of England, or such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made (*f*).

(*f*) This section, so far as relates to the jurisdiction in lunacy, has been repealed as to England by 53 Vict. c. 5, s. 342; see sect. 145 of that act. This provision appears to have been introduced in consequence of *Re Smyth* (4 De G. & S. 499). The bank are bound under this section to comply with a vesting order in proper form, but are entitled to require that the order shall show that the statutory requirements have been satisfied (*Re Tweedy*, 28 Ch. Div. 529).

Indemnity to bank and companies so obeying.

7. Every order made or to be made, being or purporting to be made under this or the Trustee Act, 1850, by the Lord

15 & 16 Vict. c. 55, s. 7.

Chancellor, intrusted as aforesaid, or by the Court of Chancery, and duly passed and entered, shall be a complete indemnity to the Bank of England, and all companies and associations whatsoever, and all persons, for any act done pursuant thereto; and it shall not be necessary for the Bank of England, or such company or association, or person, to inquire concerning the propriety of such order, or whether the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, had jurisdiction to make the same (*g*).

(*g*) This section, so far as relates to the jurisdiction in lunacy, has been repealed as to England by 53 Vict. c. 5, s. 342. See sect. 333 of that act, which contains a similar indemnity.

Power to appoint new trustees in lieu of persons convicted of felony.

8. When any person is or shall be jointly or solely seised or possessed of any lands or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the Court of Chancery, upon proof of such conviction, to appoint any person to be a trustee in the place of such convict, and to make an order for vesting such lands, or the right to transfer such stock, and to receive the dividends or income thereof, in such person to be so appointed trustee; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability, and had duly executed a conveyance or assignment of his estate and interest in the same (*h*).

(*h*) The court cannot make a vesting order under this section except in cases where it appoints a new trustee (*Re Hulme*, 57 L. T. 13). So where one of two trustees of lands, partly within and partly without the jurisdiction of the palatine court, was convicted of felony, and the palatine court appointed a new trustee and vested the land within its jurisdiction, the High Court could not vest the other land under this section, but an order was made under sect. 10 of the Act of 1850 (*Ib.*) See Trustee Act, 1850, s. 46 (*ante*, p. 527), as to the escheat of trust property; and Trustee Act, 1850, s. 32 (*ante*, p. 517), as to the appointment of new trustees.

Power to the court to appoint new trustees where there is no existing trustee.

9. In all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said court to make an order appointing a new trustee or new trustees whether there be any existing trustee or not at the time of making such order (*i*).

(*i*) See the note to Trustee Act, 1850, s. 32, *ante*, p. 519.

Chancellor may make order for appointment of trustees, without it being necessary that it should be made in Chancery, &c.

10. In every case in which the Lord Chancellor, intrusted as aforesaid, has jurisdiction under this act, or the Trustee Act, 1850, to order a conveyance or transfer of land or stock, or to make a vesting order, it shall be lawful for him also to make an order appointing a new trustee or new trustees, in like manner as the Court of Chancery may do in like cases, without its being necessary that the order should be made in Chancery

as well as in lunacy, or be passed and entered by the registrar of the Court of Chancery (*j*). 15 & 16 Vict. c. 55, s. 10.

(*j*) This section has been repealed as to England by 53 Vict. c. 5, s. 342. See now sect. 141 of that act (*post*, p. 540). Where a petition was presented under the Trustee Acts, 1850 and 1852, for the appointment of new trustees in the place of trustees, some of whom were dead and the survivor a person of unsound mind, the petition might be entitled in lunacy only (*Re Owen*, 4 Ch. 782; *Re Green*, 10 Ch. 272; *Re Rolls Hoare*, 1888, W. N. 94). In some cases appointments have been made in lunacy, but the petition was entitled in Chancery for the purpose of a vesting order (*Re Lamotte*, 4 Ch. Div, 325; *Re Smyth*, 55 L. T. 37; *Re Druce*, 46 L. T. 669).

11. All the jurisdiction conferred by this act on the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, shall and may be had, exercised and performed by the person or persons for the time being intrusted as aforesaid (*k*). As to powers of persons intrusted with the care of lunatics.

(*k*) This section has been repealed as to England by 53 Vict. c. 5, s. 342. See now sect. 108 (1) of that act, and the note to the Trustee Act, 1850, s. 3 (*ante*, p. 500).

12. This act shall be read and construed according to the definitions and interpretations contained in the second section of the Trustee Act, 1850 (*l*), and the provisions of the said last-mentioned act (except so far as the same are altered by or inconsistent with this act) shall extend and apply to the cases provided for by this act, in the same way as if this act had been incorporated with and had formed part of the said Trustee Act, 1850. Act to be construed as part of Trustee Act, 1850.

(*l*) See *ante*, pp. 496—499.

13. Every order to be made under the Trustee Act, 1850, or this act, which shall have the effect of a conveyance or assignment of any lands, or a transfer of any such stock as can only be transferred by stamped deed, shall be chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed by the person or persons seised or possessed of such lands, or entitled to such stock; and every such order shall be duly stamped for denoting the payment of the said duty (*m*). All orders made under Trustee Act, 1850, or this act, to be chargeable with the same stamp duty as deeds of conveyance.

(*m*) For the present regulations as to stamps on orders under the Trustee Acts, see Stamp Act, 1891, ss. 54, 62, and first schedule to the act. Compare Registrars Notice, 1871, W. N. Part 2, p. 112.

THE LUNACY ACT, 1890.

53 VICTORIÆ, CAP. 5, ss. 110, 129, 135—143, 341.

53 Vict. c. 5, s. 110.

Powers to extend to British possessions.

110. The powers and authorities given by this act to the judge in lunacy shall extend to property within any British possession.

Appointment of new trustees under power to have effect of appointments by High Court, and like orders may be made as under Trustee Act, 1850.

129. Where under this act the committee of the estate under order of the judge exercises, in the name and on behalf of the lunatic, a power of appointing new trustees vested in the lunatic, the person or persons who shall after and in consequence of the exercise of the power be the trustee or trustees shall have all the same rights and powers as he or they would have had if the order had been made by the High Court; and the judge may, in any such case where it seems to him to be for the lunatic's benefit and also expedient, make any order respecting the property subject to the trust, which might have been made in the same case under the Trustee Act, 1850, or any act amending the same, on the appointment thereunder of a new trustee or new trustees.

Power to vest lands and release contingent right of lunatic trustee or mortgagee.

135.—(1.) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage the Judge in Lunacy may by order vest such land in such person or persons for such estate, and in such manner, as he directs.

(2.) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the judge directs.

(3.) An order under sub-sections (1) and (2) shall have the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the lands for the estate named in the order, or releasing or disposing of the contingent right.

(4.) In all cases where an order can be made under this section the judge may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under sub-sections (1) and (2).

(5.) Where an order under this section vesting any copyhold land in any person or persons is made with the consent of the lord or lady of the manor, such land shall vest accordingly without surrender or admittance.

(6.) Where an order is made appointing any person or persons to convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands; and the lord or lady of the manor shall, subject to the customs of the manor and the usual payments, be

bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done such assurances and things (*a*). 53 Vict. c. 5, s. 135.

(*a*) Where one of four trustees became a lunatic, the trust property was under this sect. sub-s. (1) vested in the other three trustees (*Re Leon*, 1892, 1 Ch. 348). When a person who had contracted to sell leaseholds went abroad and was found lunatic there, an order was made under this section vesting the land in the purchaser, the order, however, not to be dated until after payment of the purchase-money (*Re Pagani*, 1892, 1 Ch. 236).

See sects. 3, 4, 20 and 28 of the Trustee Act, 1850, and the notes thereto, *ante*, pp. 500, 509, 514.

Power to vest right to transfer stock and sue for chose in action.

136.—(1.) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the judge in lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action.

(2.) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action either in such person or persons alone or jointly with any other person or persons.

(3.) When any stock is standing in the name of a deceased person, whose personal representative is a lunatic, or when a chose in action is vested in a lunatic as the personal representative of a deceased person, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action in any person or persons he may appoint.

(4.) In all cases where an order can be made under this section, the judge may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(5.) The person or persons in whom the right to transfer or call for a transfer of any stock is vested, may execute and do all powers of attorney, assurances, and things to complete the transfer to himself or themselves or any other person or persons according to the order, and the Bank and all other companies and their officers and all other persons shall be bound to obey every order under this section according to its tenor.

(6.) After notice in writing of an order under this section, it shall not be lawful for the Bank or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order (*b*).

(*b*) See sects. 5, 6, 20, 26, 27, and 31 of the Trustee Act, 1850, and sect. 6 of the Trustee Act, 1852, and the notes thereto (*ante*).

Person to be appointed to transfer.

137. Where a person is appointed to make or join in making a transfer of stock, such person shall be some proper officer of the Bank, or the company or society whose stock is to be transferred.

52 Vict. c. 5, s. 138.

Charity trustees.

138. The powers conferred by this act as to vesting orders may be exercised for vesting any land, stock, or chose in action in the trustee or trustees of any charity or society over which the High Court would have jurisdiction upon suit duly instituted, whether the appointment of such trustee or trustees was made by instrument under a power or by the High Court under its general or statutory jurisdiction (*c*).

(*c*) See sect. 45 of the Trustee Act, 1850, and note thereto, *ante*, p. 527.

Declarations and directions.

139. The judge in lunacy may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act is to be exercised.

Order to be conclusive evidence of allegation on which it is founded.

140. The fact that an order for conveying any land or releasing any contingent right has been founded upon an allegation of the personal incapacity of a trustee or mortgagee shall be conclusive evidence of the fact alleged in any court upon any question as to the validity of the order, but this section shall not prevent a judge of the High Court from directing a re-conveyance of any lands or contingent right dealt with by the order, or from directing any party to any proceeding concerning such land or right to pay any costs occasioned by the order when the same appears to have been improperly obtained.

Power to appoint new trustees.

141. In every case in which the judge in lunacy has jurisdiction to order a conveyance or transfer of land or stock, or to make a vesting order, he may also make an order appointing a new trustee or new trustees (*d*).

(*d*) As to the consent of the new trustee to act, see r. 92 and Form 12, *post*, pp. 542, 543.

Costs.

142. The judge in lunacy may order the costs of and incident to obtaining an order under the provisions of this act as to vesting orders and carrying the same into effect to be paid out of the land or personal estate or the income thereof in respect of which the order is made, or in such manner as the judge may think fit (*e*).

(*e*) See rules under this act, No. 110 (*post*, p. 542), and the note to sect. 51 of the Trustee Act, 1850, *ante*, p. 529.

Saving of power of High Court.

143. The provisions of this act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant (*f*).

(*f*) See sects. 7 and 8 of the Trustee Act, 1850 (*ante*, pp. 503, 504), and *Re Arrowsmith* (6 W. R. 642).

Definitions.

341. In this act, if not inconsistent with the context—

"The Bank" means the Governor and Company of the Bank of England:

"Contingent right," as applied to lands, includes a contingent and executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right

of entry, whether immediate or future, and whether vested or contingent: 53 Vict. c. 5, s. 341.

"Convey" and "conveyance" include the performance of all formalities required to the validity of conveyances by married women and tenants in tail under the "Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," and also surrenders and other acts which a tenant of copyhold lands can perform preparatory to or in aid of a complete assurance of such copyhold lands: 3 & 4 Will. 4, c. 74.

"Dividends" includes interest and other annual produce:

"Land" includes an undivided share of land:

"Lunatic" means an idiot or person of unsound mind:

"Mortgage" includes every estate, interest, or property in real or personal estate, which is a security for money or money's worth:

"Stock" includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer, accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854: 17 & 18 Vict. c. 104.

"Transfer" includes assignment, payment, and other disposition, and the execution, and performance, of every assurance and act to complete a transfer:

"Trust" and "trustee" include implied and constructive trusts, and cases where the trustee has some beneficial interest, and also the duties incident to the office of personal representative of a deceased person, but not the duties incident to an estate conveyed by way of mortgage (*g*).

(*g*) As to constructive trustees, see note (*h*), *ante*, p. 499.

THE RULES IN LUNACY, 1892.

Mode of Application.

Lunacy Rules, 1892.

After Rule 16, which provides for applications for an order for an inquisition by petition, the subsequent rules are as follows:—

17. Applications for a traverse and for a supersedeas, and applications under that portion of the Lunacy Act, 1890, which relates to "vesting orders" shall also be made by petition.

19. All other applications under the Lunacy Acts, 1890 and 1891, or under those acts and also in the Chancery Division, shall, unless the judge or masters shall in any particular case otherwise direct, be made by summons at chambers before the masters.

20. In all cases in which the judge has, under the Lands Clauses Acts, the Settled Estates Act, 1877, the Settled Land

Lunacy Rules, 1892.

Acts, 1882 to 1890, or any other enactment, jurisdiction to make an order upon petition affecting the property of a lunatic, the application for the order shall, unless the judge or master in any particular case otherwise directs, be made by summons at chambers before the masters.

21. If in any case in which the application is not by these rules or by the judge or masters directed to be made by petition, a petition is presented without the direction of the judge or masters, no further costs shall be allowed than would be allowed upon a summons.

23. All matters which require to be brought before the judge, shall be brought before him out of court. The judge may make an order upon any summons or petition without the attendance of counsel, solicitors, or parties, or after such attendance, or may adjourn the summons or petition into court, or refer the same to the masters for inquiry, or further inquiry, upon any matter. Any matter may be adjourned from court for consideration by the judge out of court.

24. The judge and masters respectively may direct any person to be served with notice of any application, and may dispense with service on any person.

Vesting Orders.

57. Applications under that portion of the Lunacy Act, 1890, which relates to "vesting orders" may be made—

(a) Where the application is for the appointment of new trustees, or relates to property subject to a trust, by any person beneficially interested in the property, whether under disability or not, or by any duly appointed trustee thereof.

(b) Where the application relates to any property subject to a mortgage, by any person beneficially interested in the equity of redemption or in the mortgage money, whether under disability or not.

58. The application shall be intituled in the matter of the trust or mortgage, and of the particular lunacy, and in the matter of the Lunacy Act, 1890.

59. The applicant shall serve any such application upon the person or persons, who, according to the practice of the Chancery Division of the High Court, would be required or entitled to be served in similar cases.

Evidence.

92. The consent of a new trustee to act shall be sufficiently evidenced by a written consent signed by him and verified by a solicitor.

Costs.

110. The rules of the Supreme Court as to costs for the time being in force shall, subject to these rules, apply to the costs of proceedings under the Lunacy Acts, 1890 and 1891, taken after the commencement of these rules in any matter.

FORMS *in* **Schedule to Rules** *to be used "with such variations as the circumstances require." R.* 9. **Lunacy Rules, 1892.**

FORM 1.

Title of Proceedings.

(a) *Application as to Alleged Lunatic.*

In Lunacy.
In the matter of A. B., a person alleged to be of unsound mind.

(b) *Application as to Lunatic so found by Inquisition.*

In Lunacy.
In the matter of A. B., a person of unsound mind.

(c) *Application as to Lunatic not so found by Inquisition.*

In Lunacy.
In the matter of A. B., a person of unsound mind not so found by inquisition.

(d) *Application in Lunacy and in the Chancery Division.*

In Lunacy
and
In the High Court of Justice,
Chancery Division.
In the matter of A. B., a person of unsound mind [*or as the case may be*].

(f) *Application for Vesting Orders.*

In Lunacy.
In the matter of the trusts of an indenture dated , and made between .
and
In the matter of A. B., a person of unsound mind [*or as the case may be*].
and
In the matter of the Lunacy Acts, 1890 and 1891.

FORM 12.

Consent to Act.

I, A. B., , of , hereby consent to act as trustee of the [*describe the instrument*].
Dated the day of . (Signed) A. B.

I, C. D., of , solicitor, hereby certify that the above-written signature is the signature of A. B., the person mentioned in the above-written consent.
Dated the day of . (Signed) C. D.

FORM 13.

Summons before the Masters.

(*For Title, see Form* 1.)

Let all parties concerned attend the Master in Lunacy in Chambers [*or, in the case of a person through mental infirmity arising from disease or age incapable of managing his affairs*, the Master in Chambers at Room No.], at the Royal Courts of Justice, London, on day, the day of , at o'clock in the noon, on the hearing of an application on the part of [*here state on whose behalf the application is made and its object*].
Dated the day of , 18 .
This summons was taken out by , of , solicitor for .
To .

LAW OF PROPERTY AND TRUSTEES RELIEF AMENDMENT.

22 & 23 Victoriæ, cap. 35.

An Act to further amend the Law of Property and to relieve Trustees. [13th August, 1859.]

22 & 23 Vict. c. 35, s. 1.

Be it enacted as follows:

Leases.

Restriction on effect of licence to alien.

1. Where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, underlease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence), and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, underlease, or other matter not specifically authorized or made dispunishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done (*a*).

Covenants and conditions not to assign or underlet without licence.

(*a*) Before this act, when, under a condition restraining assignment without licence, a licence had been once given, the condition was determined (*Dumpor's case*, 4 Co. 119 b); and the law was the same with respect to a covenant to the like effect, although there seems to be no reason why such a covenant or condition should not be held to run with the land, and be binding on such persons as might become assigns with the consent of the landlord (See *Weatherall* v. *Geering*, 12 Ves. 511; 3 Real Prop. Rep. 49). As to covenants and conditions not to assign or underlet without licence, see further Woodfall, Landlord and Tenant, 676, 14th ed.; *Varley* v. *Coppard*, L. R. 7 C. P. 505). Such covenants run with the land where assigns are named (*Williams* v. *Earle*, L. R. 3 Q. B. 739. See *West* v. *Dobb*, L. R. 5 Q. B. 460).

So in the case of a lease to several lessees, upon condition that they or any of them should not assign without the lessor's licence, an alienation

with licence by one of the lessees determined the condition as to all. And a condition not to alien the land or any part thereof without licence was determined as to the whole by the lessor's licence to alien part only (*Dumpor's case*, 4 Co. 119 b). The doctrine of *Dumpor's case* was disapproved by distinguished judges, but never overruled (*Brummell* v. *Macpherson*, 14 Ves. 175; see Dyer, 152, pl. 7; see further the note to *Dumpor's case*, 1 Smith, L. C.; 1 Wms. Saund. 445 *et seq.* (ed. 1871); *Saunders* v. *Merryweather*, 13 W. R. 814). It does not appear to have been expressly decided that this doctrine applied to any other covenant or condition than that against alienation; but it would seem to have been equally applicable on principle to all covenants and conditions by which the licence or consent of the lessor was made requisite for doing any particular act (See 3 Real Prop. Rep. 50; and Lord *Eldon's* remarks in *Macher* v. *The Foundling Hospital*, 1 Ves. & B. 191). The doctrine had been restricted from applying to licences granted to tenants of crown lands by 8 & 9 Vict. c. 99, s. 5.

22 & 23 Vict. c. 35, s. 1.

Dumpor's case.

The rule laid down in *Dumpor's case*, so far as relates to conditions contained in leases, has been done away with by sects. 1 and 2 of this Act.

As to waiver, see 23 & 24 Vict. c. 38, s. 6, *post*, p. 556.

Restricted operation of partial licences.

2. Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or underletting or doing any other specified act without licence, and a licence at any time after the passing of this act shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence (*b*).

(*b*) See the note to sect. 1, *ante*.

Apportionment of conditions of re-entry in certain cases.

3. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him (*c*).

(*c*) The rule of law was, that conditions were entire and could not be apportioned by the act of the parties (Co. Litt. 215 a; *Dumpor's case*, 4 Rep. 119 b; see *Weatherall* v. *Geering*, 12 Ves. 511). And accordingly before this act it was held that the severance of the reversion, as by assignment of the reversion in part of the premises, destroyed the whole condition of re-entry for non-payment of rent (*Knight's case*, 5 Rep. 55 b).

Apportionment of conditions of re-entry.

22 & 23 Vict. c. 35, s. 3.

Where, however, the assignment was of part (in time) of the reversion of the whole (in space) of the premises, the assignee could avail himself of a condition of re-entry (*Wright* v. *Burroughes*, 3 C. B. 685). Notwithstanding the destruction of the condition of re-entry, the lessor, or under 32 Hen. 8, c. 34 his assignee, could either sue on a covenant in the lease to pay rent (*Twynam* v. *Pickard*, 2 B. & Ald. 105; see Shepp. T. 176; whether the action was founded on privity of estate or of contract only; *Swansea* v. *Thomas*, 10 Q. B. D. 48); or distrain for the rent (*Neal* v. *Mackenzie*, 1 M. & W. 758; see *Jacob* v. *Kirk*, 2 M. & Rob. 221).

Apportionment of rent.

This section prevents the destruction of a condition of re-entry by the severance of the reversion in cases where the rent is legally apportioned. Upon the question of apportionment of rent the following distinctions have been laid down. Rent may be apportioned in the following amongst other ways. By law, as upon the death intestate of an owner of freeholds and leaseholds comprised in one lease. Or by act of the parties, as (1) upon a grant or devise of the reversion in part of the land (*West* v. *Lascelles*, Cro. Eliz. 851, but in such cases, before payment can be enforced, the apportioned amount must be fixed, either by the consent of the lessee or by a jury, *Bliss* v. *Collins*, 5 B. & Ald. 876; *Swansea* v. *Thomas*, 10 Q. B. D. 51); or (2) upon grant or devise of part of the rent (*Bliss* v. *Collins*, 5 B. & Ald. 882; *Ards* v. *Watkin*, Cro. Eliz. 637, 651); or (3) upon a surrender to the lessor of part of the land (Co. Litt. 148); or (4) upon an eviction of the lessee from part of the land by title paramount to the lessor (*Neal* v. *Mackenzie*, 1 M. & W. 747; see *Doe* v. *Meyler*, 2 Maul. & S. 276; *Stevenson* v. *Lambard*, 2 East, 575; *Tomlinson* v. *Day*, 2 Brod. & B. 680; Co. Litt. 148 b). If, however, the lease be bad as to part of the land by act of the lessor, there will be no apportionment, and no rent will be payable in respect of any of the land (*Neal* v. *Mackenzie*, 1 M. & W. 747).

Eviction by title paramount.

If part of the land out of which a rent-charge issues is evicted by a title paramount, the rent will be apportioned; and if a rent service is chargeable on land which descends to parceners, and they make partition, and one is distrained for the whole, she may compel the others to contribution. The same doctrine will apply to co-feoffees of the land, or of different parts of the land (Co. Litt. 146, 148, 149; Com. Dig. Suspension, E. G.; 2 Inst. 119: Bac. Abr. Rent, M. 1, 2; *Averall* v. *Wade*, Lloyd & G. temp. Sugd. 252).

Conv. Act, 1881.

As to the apportionment of rent and of covenants, whether by the lessor or lessee, and of conditions contained in leases made after 1st January, 1882, see Conv. Act, 1881, ss. 10, 11 and 12 (*post*, pp. 585, 586).

Statutory provisions for apportionment of rent.

Statutory provisions have been made for the apportionment of rent where land is taken for certain public purposes (See 8 & 9 Vict. c. 18, s. 119; 12 & 13 Vict. c. 49; 17 & 18 Vict. cc. 32, 97, 116).

As to the apportionment of rent service, see further, Woodfall, L. & T. 416 *et seq.*, 14th ed. And as to the apportionment of rent-charges, see the note to 23 & 24 Vict. c. 35, s. 10, *post*.

[*Sects.* 4—9 *inclusive have been repealed by the Conv. Act*, 1881.]

Rent-charges.

Release of part of land charged not to be an extinguishment.

10. The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditament released without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release (*e*).

Release of rent-charges.

(*e*) Before this act a person having a rent-charge, by releasing his right

in part of the land charged, extinguished the whole rent (18 Vin. Abr. 504). On a release since this act of part of the land subject to a rent-charge, without the concurrence of the persons interested in the remainder, the remainder will be subject only to a proportionate part of the whole rent-charge (*Booth* v. *Smith*, 14 Q. B. D. 318). A person having a rent-charge may release part of it to the tenant of the land, and reserve part (Co. Litt. 148 a; 3 Vin. Abr. 10, 11). 22 & 23 Vict. c. 35, s. 10.

If a man, having a rent-charge issuing out of lands, purchases any part of them, the rent-charge is extinct in the whole (Litt. s. 222; Co. Litt. 147 b; 1 Roll. Abr. 234; see Gilb. on Rents, 152). Unless the grantor, by his deed reciting such purchase, grants that he may distrain for such rent-charge in the residue of the land, for this amounts to a new grant (Co. Litt. 147 b). A rent-charge is extinguished by a devise to the grantee of part of the land out of which the rent-charge issues, notwithstanding the devise is expressly made over and above the rent-charge (*Dennet* v. *Pass*, 1 Bing. N. C. 388), although it is otherwise where part of the lands out of which the rent issues descends on the grantee (1 Roll. Abr. 236, pl. 5). Extinguishment of rent-charges.

As to the apportionment of a rent-charge charged on lands devised to trustees, see *Mills* v. *Cobb* (L. R. 2 C. P. 95). Two properties must contribute to a rent-charge charged on both in proportion to the actual income *de anno in annum*, and not in proportion to the capitalized value (*Ley* v. *Ley*, 6 Eq. 174). Apportionment of rent-charges.

For conditions of sale apportioning a rent-charge, where the property charged is sold in lots, see 1 Prideaux Conv. 71, 13th ed.

Judgments.

11. The release from a judgment of part of any hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased, or as to any other property not specifically released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments or property remaining unreleased, and not concurring in or confirming the release (*f*). Release of part of land charged not to affect judgment.

(*f*) Under the old law the release from a judgment of part of the land charged therewith discharged the whole (See *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444).

Where a tenant by elegit took a conveyance of part of the lands extended, in satisfaction of part of his debt, his tenancy by elegit on the rest was extinguished (*Hele* v. *Bexley*, 17 Beav. 14). Purchase by judgment creditor of part of land extended.

See also as a release from a judgment, *Moscrop* v. *Sandeman* (9 Jur. N. S. 1146).

A provision similar to the above section was applied to Ireland by 11 & 12 Vict. c. 48, s. 72. Irish Act.

Powers.

12. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of Mode of execution of powers.

21 & 22 Vict. c. 35, s. 12.

such power should be executed or attested with some additional or other form of execution or attestation or solemnity: provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend (*g*).

(*g*) At common law signing is not essential to the validity of a deed, though sealing is. And, accordingly, the common form of attestation to a deed used to be "sealed and delivered by the party in the presence of us." It was decided, however, in *Wright* v. *Wakeford* (17 Ves. 454; 4 Taunt. 213), where a power was required to be executed with a consent testified by writing under hand and seal attested by two or more credible witnesses, and the attestation clause did not express that the witnesses attested the signing as well as the sealing and delivery of the deed; that the power was not well executed. *Preston's Act* (54 Geo. 3, c. 168) was passed to cure the defect thus arising as to all instruments intended to exercise powers and executed before the 30th July, 1814. The above section was passed to provide a further remedy. See, further, Sugden on Powers, 234 *et seq.*, 8th ed.

Wright v. *Wakeford.*

Preston's Act.

Appointments by will.

By 1 Vict. c. 26, s. 10 (*ante*, p. 411), an appointment by will is to be executed like other wills and to be valid, although other required solemnities are not observed.

Sale under power not to be avoided by reason of mistaken payment to tenant for life.

13. Where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the court shall direct, and the settlement of the said principal moneys and interest, under the direction of the court, upon such parties as in the opinion of the court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly the court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him (*h*).

(*h*) Before this act, trustees having a power of sale only could not sell the estate separate from the timber standing upon it, though the tenant for life was without impeachment of waste, and might have cut the timber previously to the sale (*Cholmeley* v. *Paxton*, 3 Bing. 207; 5 Bing. 48;

S. C. nom. *Cockerell* v. *Cholmley*, 10 B. & C. 564; 3 Russ. 565; 1 Russ. & M. 418; 1 Cl. & Fin. 60; see 25 & 26 Vict. c. 108, *post*). See *Re Llewellin*, *Llewellin* v. *Williams* (37 Ch. D. 317), where the price of timber was treated as capital money under the S. L. Act, 1882. 22 & 23 Vict. c. 35, s. 13.

[The 14th, 15th, 16th, 17th and 18th sections of this act are inserted *ante*, pp. 386—390.]

[The 19th and 20th sections of this act, as to inheritance, are inserted *ante*, p. 355.]

Assignment of Personalty.

21. Any person shall have power to assign personal property now by law assignable, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another (*i*). Assignment to self and others.

(*i*) See note to sect. 50 of the Conv. Act, 1881, *post*, p. 613.

[The 22nd section of this act is referred to *ante*, p. 468. And the 23rd section is inserted *ante*, p. 390.]

---

24. Any seller or mortgagor of land, or of any chattels, real or personal, or choses in action, conveyed or assigned to a purchaser [*or* mortgagee] (*k*), or the solicitor or agent of any such seller or mortgagor, who shall, after the passing of this act, conceal any settlement, deed, will, or other instrument material to the title or any incumbrance from the purchaser [*or* mortgagee], or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, and being found guilty shall be liable, at the discretion of the court, to suffer such punishment by fine or imprisonment for any time not exceeding two years, with or without hard labour, or by both as the court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them in consequence of the settlement, deed, will, or other instruments or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land; but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall Punishment of vendor, &c. for fraudulent concealment of deeds, &c. or falsifying pedigree.

22 & 23 Vict. c. 35, s. 24.

be commenced without the sanction of her Majesty's attorney-general, or in case that office be vacant of her Majesty's solicitor-general; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the attorney-general or the solicitor-general (as the case may be) shall direct.

(*k*) This section of the act shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in this section (23 & 24 Vict. c. 38, s. 8, *post*, p. 557). Where no title is to be shown before a stipulated date, the section does not apply to the concealment of any earlier matter (*Smith* v. *Robinson*, 13 Ch. D. 148).

Interpretation of terms.

25. In the construction of the previous provisions in this act the term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever; and

The term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged, or charged as security for the repayment of money or money's worth lent, and to be reconveyed, re-assigned, or released on satisfaction of the debt; and

The term "mortgagor" shall be taken to include every person by whom any such conveyance, assignment, pledge or charge as aforesaid shall be made; and

The term "mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge, or charge as aforesaid is made or transferred:

The term "judgment" shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of judgments (*l*).

(*l*) See 1 & 2 Vict. c. 110, s. 18, *ante*, p. 459.

Trustees and Executors.

Trustee, &c. making payment under power of attorney not to be liable by reason of death of party giving such power.

26. No trustee, executor, or administrator making any payment or doing any act bonâ fide under or in pursuance of any power of attorney shall be liable for the moneys so paid or the act so done by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power, provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act bonâ fide done as aforesaid by such trustee, executor, or administrator, was not known to him: provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall

have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor, or administrator, if the money had not been paid away under such power of attorney (*m*).

22 & 23 Vict. c. 35, s. 26.

(*m*) According to the old common law, a power of attorney is instantly revoked by the death of the grantor, and acts afterwards done under it are invalid (*Watson* v. *King*, 4 Camp. 272). In equity, however, before this act it seems that acts done under a power of attorney after the death of the grantor, *bonâ fide* and without notice, were considered valid (*Bailey* v. *Collett*, 18 Beav. 179, and cases there quoted). Powers of attorney issued by the Bank of England for the transfer of stock contained a clause making a transfer valid, notwithstanding the previous death of the grantor; as to which see *Kiddill* v. *Farnell* (3 Sim. & Giff. 428). Where a legacy was bequeathed to a married woman abroad with her husband, and the husband required the legacy to be paid under a power of attorney, the executor was justified in paying the money into court, because until reduction into possession by the husband, the wife's right might have accrued by the death of the husband (*Re Jones*, 3 Drew. 680).

As to powers of attorney, see now Conv. Act, 1881, s. 47, Conv. Act, 1882, ss. 8 and 9, *post*, pp. 612, 630.

27. Where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed (*n*).

As to liability of executor or administrator in respect of rents, covenants or agreements.

(*n*) As to the liability of the executor of a lessee in respect of the rents, covenants and agreements of his testator, see 2 Wms. Exors., 6th ed., 1617 *et seq.*

Where an executor fairly states the facts and pays over the assets under the direction of the court in an administration suit, he is fully indemnified

Executor fully pro-

22 & 23 Vict. c. 35, s. 27.

against all existing or contingent demands on the estate (*Dean* v. *Allen*, 20 Beav. 1; *Waller* v. *Barrett*, 24 Beav. 413; *Addams* v *Ferick*, 26 Beav. 384; *Bennett* v. *Lytton*, 2 J. & H. 155; *Smith* v. *Smith*, 1 Dr. & Sm. 384; *Williams* v. *Headland*, 4 Giff. 505). In the case of administration by the court, it is now improper to impound any part of the residuary estate, either on the ground of indemnity to the executor, or for the protection and benefit of the lessor (*Dodson* v. *Sammell*, 1 Dr. & Sm. 575). And an indemnity fund formerly set apart in respect of leaseholds was paid out without the consent of the ground landlord (*Ib.*; *Sowdon* v. *Marriott*, 21 W. R. 808; *contra*, *Bunting* v. *Marriott*, 9 W. R. 264). So where all a testator's leases had been sold or surrendered (*Reilly* v. *Reilly*, 34 Beav. 406).

tected by the decree of the court.

Payment out of indemnity fund.

Under the circumstances mentioned in this section an executor obtains protection without the necessity of applying to the court (*Smith* v. *Smith*, 1 Dr. & Sm. 384; *Re Green*, 2 D. F. & J. 121).

Right to follow assets.

As to the right of a creditor to follow assets into the hands of a legatee and compel him to refund, see 2 Wms. Exors., 6th ed., 1343 *et seq.* As to the right, where personal assets have been aliened by the person who has received them, see *Dilkes* v. *Broadmead* (2 D. F. & J. 566); and where real assets have been aliened, see *Spackman* v. *Timbrell*, 8 Sim. 253 (*ante*, p. 370), and *Kinderley* v. *Jervis*, 22 Beav. 1 (*ante*, p. 379).

As to liability of executor, &c. in respect of rents, &c. in conveyances on rents-charge.

28. In like manner, where any executor or administrator, liable as such to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed (*o*).

(*o*) See note to sect. 27, *ante*.

22 & 23 Vict. c. 35, s. 29.

As to distribution of the assets of testator or intestate after notice given by executor or administrator.

29. Where an executor or administrator shall have given such or the like notices as in the opinion of the court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively (*p*).

Proceedings by an executor or administrator.

(*p*) An executor or administrator can (with a view to any difficulty) apply by summons for an order determining questions arising in the administration of the estate (R. S. C. Ord. 55, r. 3); or for an order for administration (r. 4); which, however, the judge is not bound to order (r. 10); or (with a view to dealing with claims against the estate) he may issue notices under this section.

Protection afforded to an executor.

As to the protection obtained by an executor who acts under a decree of the court, see note to sect. 27, *ante*, p. 551. An executor who distributes assets, after taking the steps pointed out by sect. 29, is in the same position as if the estate had been administered under the court (*Clegg* v. *Rowland*, 3 Eq. 368; *Re Frewen*, *Frewen* v. *Frewen*, 60 L. T. 953, which see as to notice to the executor; *Hunter* v. *Young*, 4 Ex. Div. 256, in which last case the executor was held not a necessary party to an action by a creditor to compel a legatee to refund; and see *Re Bowden*, *Andrew* v. *Cooper*, 45 Ch. D. 447). The section is not confined to claims by creditors, but protected an administratrix from a claim by next of kin (*Newton* v. *Sherry*, 1 C. P. Div. 246).

The mere sending in a claim in answer to advertisements does not keep the creditor's right alive (*Re Stephens*, *Warburton* v. *Stephens*, 43 Ch. D. 44).

Liability on shares.

Executors who have distributed assets under this section will be protected as regards those assets from liability on shares held by their testator (*Russell's case*, 15 S. J. 790; see *Cole's case*, 15 S. J. 711); but not where they had notice of the liquidator's claim (*Markwell's case*, 21 W. R. 135). They may, however, be placed on the list of contributories, on the ground that further assets may come to their hands (*Russell's case*, *sup.*)

An executor who paid a legacy without providing for a contingent liability on shares was made liable (*Taylor* v. *Taylor*, 10 Eq. 477); but was entitled to make legatees refund (*Jervis* v. *Wolferstan*, 18 Eq. 18).

In administration actions a fund was set aside to meet possible calls (*Re Muggeridge*, *Muggeridge* v. *Sharp*, 10 Eq. 443); but under the circumstances this was not considered necessary in the case of shares in a chartered banking company (*Re Griffiths*, *Tate* v. *Rolls*, 1880, W. N. 159). As to the possible extent of a deceased shareholder's liability, see *Baird's case*, 5 Ch. 725.

Notices.

The practice as to notices given by the Chancery Division in administration actions is laid down in R. S. C. Ord. 55, rr. 45—47. In administration actions, it is unnecessary to repeat notices which have been already issued under this section (*Cuthbert* v. *Wharmby*, 1869, W. N. 12). In

22 & 23 Vict. c. 35, s. 29.

an action seeking to make an executor liable who has issued notices, the court of first instance is by this section clothed with the duty of forming its own opinion as to the sufficiency of the notices: and *qu.* whether an appeal will lie (See *Re Bracken, Doughty* v. *Townson*, 43 Ch. Div. 1). Where executors had issued notices, but had not inserted any notice in the Gazette or a London paper, they were insufficient (*Wood* v. *Weightman*, 13 Eq. 434). But there is no absolute rule as to the insertion in a London paper, or as to the length of the notice; the court will regard the particular circumstances of each case (*Re Bracken, Doughty* v. *Townson, sup.*)

Trustee, executor, &c. may apply by petition to judge of Chancery for opinion, advice, &c. in management, &c. of trust property.

30. Any trustee, executor or administrator (*q*) shall be at liberty, without the institution of a suit, to apply by petition to any judge of the High Court of Chancery, or by summons upon a written statement to any such judge at chambers (*r*), for the opinion, advice, or direction of such judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate, such application to be served upon or the hearing thereof to be attended by all persons interested in such application, or such of them as the said judge shall think expedient; and the trustee, executor or administrator, acting upon the opinion, advice or direction given by the said judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator in the subject-matter of the said application: provided nevertheless, that this act shall not extend to indemnify any trustee, executor or administrator, in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator, shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice and direction; and the costs of such application as aforesaid shall be in the discretion of the judge to whom the said application shall be made (*s*).

Who may apply.

(*q*) An order has been made under this section on the petition of a *cestui que trust* (*Re Ward*, 14 W. R. 96), and of one of several trustees (*Re Muggeridge*, Johns. 625). As to the respective jurisdictions of the English and Irish Chancery Courts, see *Re French* (15 Eq. 68).

(*r*) As to proceedings under this section, see Dan. Ch. Forms, 954; R.S.C. Ord. 52, rr. 19—22. The petition or statement should be signed by counsel (23 & 24 Vict. c. 38, s. 9, *post*, p. 557; *Re Boulton*, 1882, W. N. 62).

Service.

The petitioners must serve such persons as they think proper, and must not bring on the petition merely in order to ascertain who ought to be served (*Re Green*, 29 L. J. Ch. 716; see, however, *Re Muggeridge*, Johns. 625; *Re Cook*, 1873, W. N. 49). Service on beneficiaries has been dispensed with (*Re Tuck*, 1869, W. N. 15; *Re French*, 15 Eq. 68; *Re Larken*, 1872, W. N. 85). As to costs, see R. S. C. Ord. 65, r. 26.

Practice under the section.

(*s*) On such a petition the court will not direct an inquiry (*Re Mockett*, Johns. 628). No affidavits can be read (*Re Muggeridge*, Johns. 625; *Re Barrington*, 1 J. & H. 142). The court will not give an opinion upon matters of detail which cannot be properly dealt with without the superintendence of the court and the assistance of affidavits (*Re Barrington*, 1 J. & H. 142); nor on an hypothesis (*Re Box*, 11 W. R. 945); nor on questions of construction (*Re Lorenz*, 1 Dr. & Sm. 401; *Re Hooper*, 29 Beav. 656; but see *Re Ware*, 20 W. R. 142; see further, *Re Evans*, 30 Beav. 232; *Re Burnett*, 10 Jur. N. S. 1099).

Questions decided under this section.

On petition under this section the court has decided questions as to the appointment of foreign trustees (*Re Long*, 17 W. R. 218; *Re Smith*, 20 W. R. 695). As to the power of trustees to mortgage with power of sale

(*Re Chawner*, 8 Eq. 569), to sell (*Re Stone*, 1874, W. N. 4), to lease (*Re Shaw*, 12 Eq. 124; see *Re Lees*, 1875, W. N. 61); to fix reserve biddings on a sale (*Re Peyton*, 30 Beav. 252), and to lay out personalty in improving the estate (*Re Dennis*, 5 Jur. N. S. 1388; *Re Hotham*, 12 Eq. 76; *Re Pearson*, 21 W. R. 401; *Re Leslie*, 2 Ch. Div. 185), or in payment of costs (*Re De la Warr*, 16 Ch. D. 587; see, however, *Re Willan*, 45 L. T. 745). As to investments (*Re Knowles*, 18 L. T. 809; *Re Peyton*, 7 Eq. 463; *Re Langdale*, 10 Eq. 39; *Re Clergy Corporation*, 18 Eq. 280; *Re Wedderburn*, 9 Ch. D. 112). As to the exercise of a power of advancement (*Re Long*, 17 W. R. 218; *Re Kershaw*, 6 Eq. 322), and maintenance (*Re Tibbs*, 17 W. R. 304; *Re Breeds*, 1 Ch. D. 226). As to the payment of a married lunatic's separate income (*Re T.*, 15 Ch. D. 78). As to the appropriation and payment of legacies (*Re Murray*, 1868, W. N. 195; *Re Hellmann*, 2 Eq. 363; *Re Taylor*, 1881, W. N. 12). As to the distribution of the estate (*Re Green*, 2 De G. F. & J. 121). And a question of apportionment (*Re Rogers*, 1 Dr. & Sm. 338). **22 & 23 Vict. c. 35, s. 30.**

The opinion of the court under this section gives an indemnity to the trustees only upon the facts stated, is subject to no appeal, and will not preclude an action (*Re Mockett*, Johns. 628). This section is retrospective (*Re Simpson*, 1 J. & H. 89). **Nature of the indemnity.**

31. Every deed, will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following; that is to say, "That the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such moneys, stocks, funds, and securities, as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person, with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument, to reimburse themselves, or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument" (*t*). **Every trust instrument to be deemed to contain clauses for the indemnity and reimbursement of the trustees.**

(*t*) The indemnity clause formerly expressly inserted in instruments and now implied therein by this section, did little more than what the court would have done without the clause (*Dawson* v. *Clarke*, 18 Ves. 254).

As regards the acts of co-trustees, a trustee may be liable (1) where he hands over trust money without securing its due application; (2) where he allows a co-trustee to receive money without making due enquiry as to his dealing with it; and (3) where he becomes aware of a breach of trust committed or meditated and does not proceed for restitution or redress (*Wilkins* v. *Hogg*, 8 Jur. N. S. 25). A trustee was made liable for permitting his co-trustee to retain sole possession of bonds to bearer (*Lewis* v. *Nobbs*, 8 Ch. D. 591). The usual indemnity clause would not protect a trustee in such cases (*Mucklow* v. *Fuller*, Jac. 198; *Dicks* v. *Barford*, 19 Beav. 409; *Brumridge* v. *Brumridge*, 27 Beav. 5). But where a will specially provided that any trustee who should pay over to his co-trustee or should concur in any act enabling him to receive moneys for the general purposes of the will should not be obliged to see to the appli- **Acts of co-trustees.**

22 & 23 Vict. c. 35, s. 31.

cation thereof, nor be rendered responsible by express notice of the misapplication thereof, trustees paying over money to a co-trustee were protected (*Wilkins* v. *Hogg*, 3 Giff. 116; 10 W. R. 47; *Pass* v. *Dundas*, 43 L. T. 665). See in general as to the right of the passive trustee to indemnity from the acting trustee, *Bahin* v. *Hughes* (31 Ch. Div. 390).

Acts of bankers, &c.

As regards mercantile agents, such as bankers and brokers, a trustee cannot delegate the care of trust moneys to strangers where there is no "moral necessity from the usage of mankind" for the employment of such agency (*Speight* v. *Gaunt*, 9 App. Cas. 5). But it was held in equity that where, according to the usual and regular course of business, moneys ought to pass through the hands of mercantile agents, that course might properly be followed by trustees (*Ex p. Belchier*, Amb. 218; *Speight* v. *Gaunt*, *sup.*) The above section gives the force of statute to this doctrine of equity; and when once the propriety of employing the agent has been established, it throws the *onus probandi* on those who seek to charge a trustee with loss arising from an agent's default (*Re Brier*, *Brier* v. *Evison*, 26 Ch. Div. 243).

The agent must not be employed out of the ordinary scope of his business (*Fry* v. *Tapson*, 28 Ch. D. 268); and the trustee must exercise a discretion in the matter (*Re Weall*, *Andrews* v. *Weall*, 42 Ch. D. 674). Trustees were made liable for the fraud of their solicitors (*Bostock* v. *Floyer*, 1 Eq. 26; *Sutton* v. *Wilders*, 12 Eq. 373).

[Sect. 32 relating to investments by trustees has been repealed by sect. 8 of 52 & 53 Vict. c. 32, which contains further provisions (retrospective, see sect. 6), on the same subject.]

Act not to extend to Scotland.

33. This act shall not extend to Scotland.

FURTHER AMENDMENT OF LAW OF PROPERTY.

23 & 24 Victoriæ, cap. 38.

An Act to further amend the Law of Property.

[23rd July, 1860.]

---

23 & 24 Vict. c. 38, s. 6.

Be it enacted as follows:

[The 1st, 2nd, 3rd, 4th and 5th sections of this act, as to the registration of judgments, are inserted *ante*, pp. 470—473.]

Restriction of effect of waiver.

6. Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear (*a*).

(*a*) As to waiver of forfeiture, see the notes to *Duppa* v. *Mayo* (1 Wms. Saund. 443 *et seq.*, ed. 1871).

Provision for cases of future and

7. Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed

or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses, and the continued existence in him or elsewhere of any seisin to uses or scintilla juris shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or scintilla juris be deemed to be suspended, or to remain or to subsist in him or elsewhere (*b*).

23 & 24 Vict. c. 38, s. 7. contingent uses.

(*b*) As to the doctrine of scintilla juris, see Sugden, Powers, 18 *et seq.*, 8th ed.

8. The section twenty-four (*c*) in the act of the session of the twenty-second and twenty-third of Queen Victoria, chapter thirty-five, shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in the said section.

Sect. 24 of 22 & 23 Vict. c. 35, extended to mortgagees.

(*c*) *Ante*, p. 549.

9. Where any trustee, executor or administrator shall apply for the opinion, advice or direction of a judge of the court of Chancery under the thirtieth section of the act of the twenty-second and twenty-third of her present Majesty, chapter thirty-five (*d*), the petition or statement shall be signed by counsel, and the judge by whom it is to be answered may require the petitioner or applicant to attend him by counsel either in chambers or in court where he deems it necessary to have the assistance of counsel.

Form of applying for advice of judge, &c. under sect. 30 of 22 & 23 Vict. c. 35.

(*d*) *Ante*, p. 554.

[Sects. 10—12 are omitted. Sect. 10 empowered certain judges to make general orders as to the investment of cash under the control of the court. This is now provided for by R. S. C. Ord. 22, r. 17, a rule made by the Rule Committee under the powers of Jud. Act, 1875, ss. 17 and 24, and Jud. Act, 1879, s. 22. Sect. 11, relating to investments by trustees, has been repealed by sect. 8 of 52 & 53 Vict. c. 32, which contains further provisions (retrospective, see sect. 6) on the same subject. Sect. 12 merely extended sect. 32 of 22 & 23 Vict. c. 35, which has now been repealed, see *ante*, p. 556. Sect. 13 is inserted *ante*, p. 176. Sect. 14, relating to taking accounts of debts of deceased persons, has been repealed as to England by 46 & 47 Vict. c. 49, s. 3, and as to Ireland by 30 & 31 Vict. c. 44, s. 52.]

---

15. This act is not to extend to Scotland, nor are any of the clauses, except clause six and the subsequent clauses, to extend to Ireland.

Act not to extend to Scotland, &c.

TRUSTEES AND MORTGAGEES ACT.

23 & 24 VICTORIÆ, CAP. 145.

An Act to give to Trustees, Mortgagees and others certain Powers now commonly inserted in Settlements, Mortgages, and Wills. [28th August, 1860.]

23 & 24 Vict. c. 145, s. 1.

WHEREAS it is expedient that certain powers and provisions which it is now usual to insert in settlements, mortgages, wills, and other instruments should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument: be it enacted as follows:

PART I.

Powers of Trustees for Sale, &c., and Trustees of renewable Leaseholds.

Trustees empowered to sell may sell in lots, and either by auction or private contract.

1. In all cases where by any will, deed, or other instrument of settlement it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally, or in any particular event, over any hereditaments named or referred to in or from time to time subject to the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale by selling such hereditaments, either together or in lots, and either by auction or private contract, and either at one time or at several times, and (in case the power shall expressly authorize an exchange) to exchange any hereditaments which for the time being shall be subject to the uses or trusts aforesaid for any other hereditaments in England or Wales or in Ireland (as the case may be), and upon such exchange to give or receive any money for equality of exchange (*a*).

(*a*) Parts I. and II. of this act have been respectively repealed by S. L. Act, 1882, s. 64, and Conv. Act, 1881, s. 71 (*post*, p. 621), but in neither case does the repeal affect "the operation, effect, or consequence" of any instrument executed before the commencement of the repealing act (See *Re Solomon Meagher*, 40 Ch. D. 508). The subject-matters of sects. 1 and 2, and also of Part II. of the present act, have respectively been further dealt with by sect. 35 and sect. 19 *et seq.* of Conv. Act, 1881, but the last-mentioned provisions are not retrospective. Parts I. and II. of the present act have accordingly been retained.

The subject-matter of sects. 8 and 9 of the present act is further dealt with in sects. 10 and 11 of the Trustee Act, 1888, which provisions are retrospective.

23 & 24 Vict. c. 145, s. 2.

Sale may be made under special conditions, and trustees may buy in, &c.

2. It shall be lawful for the persons making any such sale or exchange to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale or exchange, as they shall think fit, and also to buy in the hereditaments or any part thereof at any sale by auction, and to rescind or vary any contract for sale or exchange, and to resell the hereditaments which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby, and no purchaser under any such sale shall be bound to inquire whether the person making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other hereditaments or otherwise.

Trustees exercising power of sale, &c. empowered to convey.

3. For the purpose of completing any such sale or exchange as aforesaid, the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question, either by way of revocation and appointment of the use, or otherwise, as may be necessary.

Moneys arising from sales, &c. to be laid out in other lands;

4. The money so received upon any such sale or for equality of exchange as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed or instrument containing the power of sale or exchange, or if no such indication be therein contained as to all or any part of such money, then the same shall with all convenient speed be laid out in the purchase of other hereditaments in fee simple in possession to be situate in England or Wales or in Ireland (as the case may be), or of lands of a leasehold or copyhold or customary tenure which, in the opinion of the persons making the purchase, are convenient to be held therewith or with any other hereditaments for the time being, subject to the subsisting uses or trusts of the same will, deed or other instrument of settlement in which the power of sale or exchange was contained; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes and declarations, to which the hereditaments sold or given in exchange were or would have been subject, or as near thereto as the deaths of parties and other intervening accidents will admit of, but not so as to increase or multiply charges; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be of leasehold or copyhold or customary tenure shall be settled and assured upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes and declarations, as shall as nearly as may be correspond with and be similar to the aforesaid uses, trusts, intents and purposes, powers, provisoes, and declarations, but not so as to increase or multiply charges, and so that if any of the hereditaments so to be purchased shall be held by lease for years the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of

23 & 24 Vict. c. 145, s. 4.

twenty-one years; and any such purchase as aforesaid may be made subject to any special conditions as to title or otherwise: provided that no leasehold tenement shall be purchased under the powers hereinbefore contained which is held for a less period than sixty years.

or in payment of incumbrances.

5. Provided nevertheless, that it shall be lawful for the persons exercising any such power as aforesaid, if they shall think fit, to apply any money to be received upon any sale or for equality of exchange as aforesaid, or any part thereof, in lieu of purchasing lands therewith, in or towards paying off or discharging any mortgage or other charge or incumbrance which shall or may affect all or any of the hereditaments which shall then be subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were or was subject.

Money arising from sales, &c. not to be laid out, nor lands exchanged, elsewhere than in the country in which lands sold or exchanged is situated.

6. No money arising from any such sale or exchange of lands or hereditaments in England or Wales shall be laid out in the purchase of lands or hereditaments situate elsewhere than in England or Wales, and no lands situate in England or Wales shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in England or Wales; and no money arising from any such sale or exchange of lands in Ireland shall be laid out in the purchase of lands or hereditaments situate elsewhere than in Ireland, and no lands or hereditaments situate in Ireland shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in Ireland.

Until purchase of lands, &c. money to be invested at interest.

7. Until the money to be received upon any sale or for equality of exchange as aforesaid shall be disposed of in the manner herein mentioned, the same shall be invested at interest for the benefit of the same parties who would be entitled to the hereditaments to be purchased therewith as aforesaid, and the rents and profits thereof, in case such purchase and settlement as aforesaid were then actually made.

Trustees of renewable leaseholds may renew.

8. It shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of such trustees, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same (*c*).

Restriction.

(*c*) See Trustee Act, 1888, s. 10.

23 & 24 Vict. c. 145, s. 9.

Money for equality of exchange and for renewal of leases may be raised by mortgage, &c.

9. In case any money shall be required for the purpose of paying for equality of exchange as aforesaid, or for renewal of any lease as aforesaid, it shall be lawful for the persons effecting such exchange or renewal to pay the same out of any money which may then be in their hands in trust for the persons beneficially interested in the lands to be taken in exchange, or comprised in the renewed lease, whether arising by any of the ways and means hereinbefore mentioned or otherwise, and notwithstanding the provisions for the application of money arising from sales or exchanges hereinbefore contained; and if they shall not have in their hands as aforesaid sufficient money for the purposes aforesaid, it shall be lawful for such persons to raise the money required by mortgage of the hereditaments to be received in exchange or contained in the renewed lease (as the case may be), or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments taken in exchange or comprised in the renewed lease (as the case may be) shall be subject, and for the purpose of effecting such mortgage such persons shall have the same powers of conveying or otherwise assuring as are herein contained with reference to a conveyance on sale; and no mortgagee advancing money upon such mortgage purporting to be made under this power shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purposes aforesaid (*d*).

(*d*) See Trustee Act, 1888, s. 16.

No sale, &c. to be made without consent of tenant for life, &c.

10. No such sale or exchange as aforesaid, and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid, shall be made without the consent of the person appointed to consent by the will, deed, or other instrument, or if no such person be appointed, then of the person entitled in possession to the receipt of the rents and profits of such hereditaments, if there be such a person under no disability; but this clause shall not be taken to require the consent of any person where it appears from the will, deed or other instrument, to have been intended that such sale, exchange or purchase, should be made by the person or persons making the same without the consent of any other person.

Part II.

Powers of Mortgagees (*e*).

Powers incident to mortgages.

11. Where any principal money is secured or charged by deed on any hereditaments of any tenure, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators and assigns, shall, at any time after the expiration of one year from the time when such principal money shall have become payable, accord-

23 & 24 Vict. c. 145, s. 11.

ing to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers, to the same extent (but no more) as if they had been in terms conferred by the person creating the charge; namely,

To sell.

1st. A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner:

To insure.

2nd. A power to insure and keep insured from loss or damage by fire the whole or any part of the property (whether affixed to the freehold or not) which is in its nature insurable, and to add the premiums paid for any such insurance to the principal money secured at the same rate of interest:

To appoint receiver.

3rd. A power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

(*e*) In the case of a mortgage before 1881, these powers may be exercised since 1881 (*Re Solomon and Meagher*, 40 Ch. D. 508).

Receipts for purchase-money sufficient discharges.

12. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.

Notice to be given before sale; but purchaser relieved from inquiry as to circumstances of sale.

13. No such sale as aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property; but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given; but any person damnified by any such unauthorized exercise of such power shall have his remedy in damages against the person selling.

Application of purchase-money.

14. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows: first, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and, thirdly, in discharge of all the principal moneys then due in respect of such charge; and the residue of such money shall be paid to the person entitled to the property subject to the charge, his heirs, executors, administrators, or assigns, as the case may be.

15. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of, except that in the case of copyhold hereditaments the beneficial interest only shall be conveyed to and vested in the purchaser by such deed (*f*). 23 & 24 Vict. c. 145, s. 15. Conveyance to the purchaser.

(*f*) An equitable mortgagee, by deed, of freeholds can, under this section, convey the legal estate in the fee (*Re Solomon Meagher*, 40 Ch. D. 508). And where leaseholds are mortgaged by demise, the mortgagee can, under this section, convey to a purchaser the reversion left in the mortgagor (*Hiatt* v. *Hillman*, 19 W. R. 694; compare *Re Hodson and Howes*, 35 Ch. Div. 668, a case under the Conv. Act, 1881).

As to the effect of this section where the mortgagor has registered with an indefeasible title under 25 & 26 Vict. c. 53, see *Re Richardson* (12 Eq. 398; 13 Eq. 142).

16. At any time after the power of sale hereby conferred shall have become exerciseable, the person entitled to exercise the same shall be entitled to demand and recover, from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered or assigned to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of, and where the legal estate shall be outstanding in a trustee the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made. Owner of charge may call for title deeds and conveyance of legal estate.

17. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment is made within ten days after such requisition, then may in writing appoint any person he may think fit. Appointment of receiver.

18. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge. Receiver deemed to be the agent of the mortgagor.

19. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the Powers of receiver.

23 & 24 Vict. c. 145, s. 19.

rents, issues and profits of the property, of which he is appointed receiver by action, suit, distress or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.

Receiver may be removed.

20. Every receiver appointed as aforesaid may be removed by the like authority or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.

Receiver to receive a commission not exceeding five per cent.

21. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges and expenses whatsoever, such a commission, not exceeding five per centum on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five per centum on such gross amount.

Receiver to insure, if required.

22. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge (whether affixed to the freehold or not) which is in its nature insurable.

Application of moneys received by him.

23. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of all taxes, rates and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any, and in the next place in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is receiver, or on any part thereof, and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators or assigns.

This part to relate to charges by way of mortgage only.

24. The powers and provisions contained in this part of this act relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.

[PART III. of the present act (sects. 25 to 30), which contained provisions as to the investment of trust funds and the appointment and powers of trustees and executors, has been repealed by sect. 71 of the Conv. Act, 1881, but new provisions dealing respectively with the same subject-matter as the repealed sections will be found in the Trust Investment Act, 1889, and in sects. 43, 31, 36, and 37 of the Conv. Act, 1881. The new provisions are in every case retrospective, and may be cumulative (See *Re Lloyd*, 1888, W. N. 20). Part III. of the present act has accordingly been omitted.]

Part IV.

General Provisions.

23 & 24 Vict. c. 145, s. 31.

Tenants for life, &c. may execute powers, notwithstanding incumbrances.

31. For the purposes of this act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land or personal property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein (*g*).

(*g*) Part IV. of the present act has been repealed by sect. 64 of the S. L. A. 1882, but has been retained in connection with Parts I. and II. (See note *ante*, p. 558).

Powers, &c. hereby given may be negatived by express declaration.

32. None of the powers or incidents hereby conferred or annexed to particular offices, estates, or circumstances, shall take effect or be exerciseable if it is declared in the deed, will, or other instrument creating such offices, estates, or circumstances that they shall not take effect; and where there is no such declaration, then if any variations or limitations of any of the powers or incidents hereby conferred or annexed are contained in such deed, will, or other instrument, such powers or incidents shall be exerciseable or shall take effect only subject to such variations or limitations.

No persons other than those entitled under the settlement, &c. to be affected.

33. Nothing in this act contained shall be deemed to empower any trustees or other persons to deal with or affect the estates or rights of any persons soever, except to the extent to which they might have dealt with or affected the estates or rights of such persons if the deed, will, or other instrument under which such trustees or other persons are empowered to act had contained express powers for such trustees or other persons so to deal with or affect such estates or rights.

Commencement of act.

34. The provisions contained in this act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after the passing of this act, or under a will or codicil confirmed or revived by a codicil executed after that date.

Extent of act.

35. This act shall not extend to Scotland.

THE VENDOR AND PURCHASER ACT, 1874.

37 & 38 VICTORIÆ, CAP. 78.

An Act to amend the Law of Vendor and Purchaser, and further to simplify Title to Land.

[7th August, 1874.]

37 & 38 Vict. c. 78, s. 1.

WHEREAS it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser:

Be it enacted as follows:

Forty years substituted for sixty years as the root of title.

1. In the completion of any contract of sale of land made after the thirty-first day of December one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.

Rules for regulating obligations and rights of vendor and purchaser.

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold;

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions;

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents;

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser;

Fifth. Where the vendor retains any part of an estate to

which any documents of title relate he shall be entitled to retain such documents (*a*). 37 & 38 Vict. c. 78, s. 2.

(*a*) The first rule controls the right of a litigant in an action for specific performance to production of deeds, where there is merely a general denial of the title of the other party; but the rule does not prevent the title being shown to be bad *aliunde* (*Jones* v. *Watts*, 43 Ch. Div. 574). An agreement to grant a right of way for a term is within the rule (*S. C.*) The rule does not prevent a lessee being affected with constructive notice of his lessor's title (*Patman* v. *Harland*, 17 Ch. D. 353). In connection with this rule, see Conv. Act, 1881, s. 3 (1), *post*, p. 574, and s. 13 (1), *post*, p. 586.

Under the second rule, it was held that a recital in a deed more than twenty years old that the vendor was seised in fee simple prevented a purchaser from demanding any abstract of prior title (*Bolton* v. *School Board for London*, 7 Ch. D. 766). So a recital that a sale was made in pursuance of a trust for sale precluded a requisition as to whether it was a valid exercise of that trust (*Re Marsh and Granville*, 24 Ch. D. 11).

As to a covenant for production, see Conv. Act, 1881, s. 9 (8), *post*, p. 585.

3. Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this act. Trustees may sell, &c. notwithstanding rules.

4. The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust (*b*). Legal personal representative may convey legal estate of mortgaged property.

(*b*) This section has been repealed by the Conv. Act, 1881, s. 30 (2), *post*, p. 600.

5. Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like chattel real in the legal personal representative from time to time of such trustee (*c*). Bare legal estate in fee simple to vest in executor or administrator.

(*c*) Sect. 5 was, as to England, repealed and re-enacted in a limited form by 38 & 39 Vict. c. 87, s. 48. The last-named section has been repealed by the Conv. Act, 1881, s. 30 (2), *post*, p. 600. Sect. 5 has been repealed, as to Ireland, by the Conv. Act, 1881, s. 73, *post*, p. 622.

As to what was a bare trustee within the section, see *Christie* v. *Ovington* (1 Ch. D. 279); *Re Cunningham and Frayling* (60 L. J. Ch. 591); *Morgan* v. *Swansea Authority* (9 Ch. D. 582).

6. When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a feme sole (*d*). Married woman who is a bare trustee, may convey, &c.

(*d*) A married woman who was a trustee for sale was held, after an order for sale had been made by the court and the purchase-money had been paid into court, to be a bare trustee within this section (*Re Docwra, Docwra* v. *Faith*, 29 Ch. D. 693).

37 & 38 Vict. c. 78, s. 7.

Protection and priority by legal estates and tacking not to be allowed.

7. After the commencement of this act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this act (*e*).

(*e*) This section was repealed as to England, by 38 & 39 Vict. c. 87, s. 129, and as to Ireland by the Conv. Act, 1881, s. 73 (See *Robinson* v. *Trevor*, 12 Q. B. D. 423).

Non-registration of will in Middlesex, &c. cured in certain cases.

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by someone deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law (*f*).

(*f*) Wills must be registered in Middlesex within six months from the death (7 Anne, c. 20, ss. 1 and 8; see 54 & 55 Vict. c. 64; *Re Cooper*, *Cooper* v. *Vesey*, 20 Ch. Div. 611). As to Yorkshire, see now 47 & 48 Vict. c. 54, ss. 4 and 14; and before that act, 8 Geo. II. c. 6, and 6 Anne, c. 35; *Chadwick* v. *Turner*, 1 Ch. 310.

Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract,) and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid (*g*).

Cases under this section.

(*g*) In an action for specific performance of a contract as to real estate the ordinary form of relief is as follows:—The court (1) makes a declaration establishing the contract; (2) directs a reference as to title; and (3) gives directions consequent on the result of the reference (Seton, 4th ed. 1297, 1307).

37 & 38 Vict. c. 78, s. 9.

According to the words of this section the parties cannot, upon an application under it, question either the existence or the validity of the contract, *e. g.*, on the ground of fraud (*Re Hargreaves and Thompson*, 32 Ch. Div. 459; see *Re Davis and Cavey*, 40 Ch. D. 608; *Re Sandbach and Edmondson*, 1891, 1 Ch. 102). It is, however, only the existence and validity of the contract, in its inception, which cannot be questioned; and therefore questions as to rescission can be dealt with (*Re Jackson and Woodburn*, 37 Ch. D. 47). An application under this section cannot be treated as if an action had been brought (*Re Hargreaves and Thompson*, 32 Ch. Div. 456); but whatever could be done in chambers upon reference as to title where the contract had been established can be done (*Re Burroughs, Lynn and Sexton*, 5 Ch. Div. 604). And accordingly the same kind of evidence can be used (*Ib.*) The section, however, was not intended to enable the court to try in this way disputed questions of fact (*Ib.* 603; *Re Popple and Barratt*, 25 W. R. 248; *Re Gray and the Metropolitan R. Co.*, 44 L. T. 567), but was intended to enable either vendor or purchaser to obtain a decision upon some isolated point (*Re Hargreaves and Thompson*, 32 Ch. Div. 459), *e. g.*, any short point of law or construction arising upon the abstract or upon the purchaser's requisitions (*Re Popple and Barratt, sup.*)

The court has authority not only to decide the questions asked, but also to make an order which will be just, as the natural consequence of the decision (*Re Hargreaves and Thompson*, 32 Ch. Div. 457).

Question in respect of requisitions and objections.

Under this section the court has dealt with the following (among other) questions in respect of requisitions and objections, viz., whether a requisition as to the completeness of the abstract should be answered (*Re Ford and Hill*, 10 Ch. Div. 365); whether a vendor's refusal to answer a requisition was unreasonable (*Re Glenton and Saunders*, 53 L. T. 434); or whether succession duty was payable (*Re Cooper and Allen*, 4 Ch. D. 802; *Re Warner*, 17 Ch. D. 711); whether a purchaser was entitled to have a deed stamped (*Whiting to Loomes*, 17 Ch. Div. 10); whether the vendor was bound to apply for the discharge of incumbrances under sect. 5 of the Conv. Act, 1881 (*G. N. R. Co.* v. *Sanderson*, 25 Ch. D. 788); whether a purchaser was entitled to evidence that a debenture charge had not attached (*Re Horne and Hellard*, 29 Ch. D. 736), or that a power of sale had arisen (*Re Irish, &c. Society and O'Keefe*, 7 L. R. Ir. 136); what was sufficient evidence that covenants had been performed (*Ringer to Thompson*, 45 L. T. 580), or that a vendor had a right to convey (*Re Harman and Uxbridge R.*, 49 L. T. 130), or that no common rights existed (*Re Bridge and Macrae*, 30 W. R. 539); who should pay for registry searches (*Re Murray and Heggarty*, 15 L. R. Ir. 510), or for production of documents (*Willett* v. *Argenti*, 60 L. T. 735); whether an estate tail had been barred (*Re Dudson*, 8 Ch. D. 628); whether there was a presumption of enfranchisement of copyholds (*Re Lidiard*, 42 Ch. D. 254); what fine was payable on a sale of copyholds under the S. L. A. 1882 (*Re Naylor and Spendla*, 34 Ch. D. 217); whether a post-nuptial settlement was valid (*Re Foster and Lister*, 36 L. T. 582); whether mortgages passed under a devise (*Re Packman and Moss*, 1 Ch. D. 214); questions on the construction of wills (*Re Coleman and Jarrom*, 4 Ch. D. 165; *Re White and Hindle*, 7 Ch. D. 201; *Re Hutchinson and Tenant*, 8 Ch. D. 540; *Re Sturge and G. W. R. Co.*, 19 Ch. D. 444); whether the receipt of a married woman for a legacy discharged the property (*Re Coward and Adam*, 20 Eq. 179); whether trustees had been properly appointed (*Re Walker and Hughes*, 24 Ch. D. 698; *Re Glenny and Hartley*, 25 Ch. D. 611; *Re Coates to Parsons*, 34 Ch. D. 370); whether a lease had been properly granted (*Hallett to Martin*, 24 Ch. D. 624); whether a power of sale and exchange authorized a partition (*Re Frith and Osborne*, 3 Ch. D. 618); whether a power of sale under a local act was exerciseable (*Re St. Saviour's*, 31 Ch. D. 412); whether the trustee of a bankrupt could exercise a power of appointment (*Nichols to Nixey*, 29 Ch. D. 1005); questions under the S. L. A. 1882 (*Re Earle and Webster*, 24 Ch. D. 144; *Re Hale and Smyth*, 55 L. T. 151), or under the Conv. Act, 1881 (*Re Higgins and Percival*, 59

37 & 38 Vict. c. 78, s. 9.

L. T. 213); whether the concurrence was necessary of the Charity Commissioners (*Re Royal Society and Thompson*, 17 Ch. D. 407; *Finnis to Forbes*, 24 Ch. D. 591), or of the husband of a married woman (*Re Thompson and Curzon*, 29 Ch. D. 177), or of *cestui que trusts* (*Re Cooke*, 4 Ch. D. 454); whether a good title could be made by the following persons:—an heir (*Re Morton and Hallett*, 15 Ch. Div. 143); a devisee (*Osborne to Rowlett*, 13 Ch. D. 774); an executor (*Re Tanqueray-Willaume*, 20 Ch. Div. 465; *Re Whistler*, 35 Ch. D. 561); an administrator (*Re Clay and Tetley*, 16 Ch. Div. 3; *Re Adams and Kensington*, 27 Ch. D. 394); trustees (*Re Wright and Marshall*, 28 Ch. D. 93; *Patten to Edmonton*, 48 L. T. 870; *Re Arbib and Class*, 1891, 1 Ch. 601); a compounding debtor (*Re Kearley and Clayton*, 7 Ch. D. 615); the survivor of two trustees of a bankrupt (*Re Waddell*, 2 Ch. D. 172), or of two liquidators of a company (*Re Metropolitan Bank and Jones*, *ib.* p. 366); whether the joint receipt of different mortgagees was a good receipt (*Re Parker and Beech*, 56 L. T. 95); whether trustees could be required to receive money personally (*Re Bellamy*, 24 Ch. D. 387; *Re Flower*, 27 Ch. D. 592).

Claim for compensation.

The court has also decided claims for compensation; *e. g.*, whether compensation was payable before completion (*Aspinalls to Powell*, 60 L. T. 595; *Re Herbalt and Chaytor*, 57 L. J. Ch. 421; *Re Orange and Wright*, 52 L. T. 606), or after completion (*Re Turner and Skelton*, 13 Ch. D. 130). As to reference to chambers, see *Aspinalls to Powell* (60 L. T. 595).

Other questions.

The court has also decided other questions; *e. g.*, what should be the form of conveyance (*Re Piggott and G. W. R. Co.*, 18 Ch. D. 146); whether particular covenants should be inserted (*Re Agg-Gardner*, 25 Ch. D. 600; *Re Moncton and Gilzean*, 27 Ch. D. 555; *Re Gray and Metropolitan R. Co.*, 44 L. T. 567; *Re Sawyer and Baring*, 51 L. T. 356; *Re Mordy and Cowman*, *ib.* 721; *Re Lander and Bagley*, 1892, W. N. 119); who had the right to deeds (*Re Doherty*, 15 L. R. Ir. 247); whether the purchaser was entitled to a rent-charge as an indemnity against rent (*Ib.*); whether a purchaser was entitled to damages for non-repair paid to the vendor by a former tenant (*Re Edie and Brown*, 58 L. T. 307).

The court has also decided whether a right of way was included in the contract (*Re Lavery and Kirk*, 33 S. J. 127); whether a purchaser was bound by a condition of sale alleged to be misleading (*Re Marsh and Granville*, 24 Ch. Div. 11; *Re Sandbach and Edmondson*, 1891, 1 Ch. 99); to what a condition as to misdescription applied (*Re Beyfus and Masters*, 39 Ch. Div. 110); whether under the conditions the vendor had the right to rescind (*Re Jackson and Oakshott*, 14 Ch. D. 851; *G. N. R. Co.* v. *Sanderson*, 25 Ch. D. 788; *Moncton* v. *Gilzean*, 27 Ch. D. 555; *Re Dames and Wood*, 29 Ch. D. 626; *Re Jackson and Woodburn*, 37 Ch. D. 44; *Re Arbib and Class*, 1891, 1 Ch. 601); whether the purchaser had the right to show the title to be defective (*Re Davys and Saurin*, 17 L. R. Ir. 334), or to repudiate the contract (*Re Gloag and Miller*, 23 Ch. D. 320); what price was payable under the contract (*Re Popple and Barratt*, 25 W. R. 248); whether any, and what, interest was payable (*Re Piggott and G. W. R. Co.*, 18 Ch. D. 146; *Riley to Streatfield*, 34 Ch. D. 386; *Re Golds and Norton*, 52 L. T. 321); and the court has ordered the return of interest paid under protest (*Re Young and Harston*, 31 Ch. Div. 168).

Return of deposit.

The section provides that the judge shall make such order as to him shall appear just, and accordingly the court has upon a purchaser's summons ordered a return of the deposit with interest (*Re Cosh and Metropolitan District R. Co.*, 13 Ch. D. 607; *Re Hargreaves and Thompson*, 32 Ch. Div. 454; *Re Smith and Stott*, 48 L. T. 512; see, however, *Re Davis and Cavey*, 40 Ch. D. 608, where a return was claimed on the ground of fraud); and has, in addition, ordered payment by the vendor of the purchaser's costs of investigating the title (*Re Higgins and Hitchman*, 21 Ch. D. 95; *Re Ebsworth and Tidy*, 42 Ch. Div. 53; *Re Bryant and Barningham*, 44 Ch. Div. 218); and such costs may be charged on the vendor's interest on the property (*Re Yielding and Westbrook*, 31 Ch. D. 344). An order to the like effect has been made on a vendor's summons (*Re Higgins*

Costs of investigating title.

and Percival, 59 L. T. 213); and see the conditional order for return of deposit in *Re Beyfus and Master*, 39 Ch. D. 112. 37 & 38 Vict. c. 78, s. 9.

A question as to a voluntary gift, which was held not to be within the act, was yet determined under it, counsel admitting a contract for a nominal consideration (*Re Salisbury*, 23 W. R. 824).

The order on the summons may direct a reference to chambers as to the form of the conveyance (*Re Moncton and Gilzean*, 27 Ch. D. 564), or as to the amount of compensation (*Aspinalls to Powell*, 60 L. T. 595). Reference to chambers.

In actions for specific performance the general rule is that the parties to the contract, or their representatives, are the necessary and sufficient parties to the action (Fry, 3rd ed. 73, 83). On a summons under this section the only persons between whom the court can decide anything are, it has been said, the vendor and the purchaser (*Re Naylor and Spendla*, 34 Ch. Div. 220), but other parties (*e. g.*, a lord of the manor) may come in and be bound (*Ib.*) The court may direct other parties to be served, see *Re Tippett and Newbould*, 37 Ch. Div. 446; a case in which the summons was subsequently by amendment made an originating summons on a question of construction. No decision will bind any party not before the court, *e. g.*, the Crown in respect of duty (*Re Cooper and Allen*, 4 Ch. D. 827); nor will it prevent subsequent litigation against the same purchaser in respect of the same title (*Osborne to Rowlett*, 13 Ch. D. 781). Parties.

A summons may be adjourned into court without discussion (*Re Jackson and Woodburn*, 37 Ch. D. 47; see, however, *Re Coleman and Jarrom*, 4 Ch. D. 168), or for further argument. An adjournment may be ordered either at the request of one of the parties (*Re Warner*, 17 Ch. D. 712), or at the discretion of the judge (*Re Cooper and Allen*, 4 Ch. D. 805); and the adjournment may be on part only of the summons (*Re Tippett and Newbould*, 37 Ch. D. 445). The judgment may be given in court if the purchaser desires it (*Re Coleman and Jarrom*, 4 Ch. D. 168). Hearing of summons.

For the practice as to appeals from orders made in chambers under this act, see Annual Practice, note to sect. 50 of Jud. Act, 1873. The time within which an appeal can be brought is twenty-one days (*Re Blyth and Young*, 13 Ch. D. 416; *Re Ricketts and Avent*, 1890, W. N. 16). As to the time from which this period is calculated, see R. S. C. Ord. 58, r. 15. When an order dismissing an application contains a declaration as such, or as an expression of opinion so as to bind the rights of the parties, it is not a simple refusal of the application within that rule (*Re Clay and Tetley*, 16 Ch. Div. 3). Appeals.

As a general rule the costs will follow the event (*Re Davis and Cavey*, 40 Ch. D. 609; *Re Starr-Bowkett Society and Sibun*, 42 Ch. D. 386; *Re Johnson and Tustin*, 30 Ch. Div. 49). If the question submitted is whether a good title can be made, and the title, even though not one which a conveyancer would recommend a purchaser to accept, is yet held good, the purchaser should pay the costs (*Osborne to Rowlett*, 13 Ch. D. 798). But no order was made as to costs where the difficulty arose from conflicting decisions (*Osborne to Rowlett*, 13 Ch. D. 774), nor where there was a fair point for discussion (*Re Coward and Adams*, 20 Eq. 179; *Re Cosh and Metropolitan R. Co.*, 13 Ch. D. 613; *Finch* v. *Jukes*, 1877, W. N. 211; see *Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788). Costs given against the vendor may be charged on his interest in the property (*Re Yielding and Westbrook*, 31 Ch. D. 345; *Re Higgins and Percival*, 59 L. T. 214). Costs.

Where a respondent has not complied with an order made under this section, a further application should be made in chambers to enforce the order (*Thompson* v. *Ringer*, 44 L. T. 507); where *Bacon*, V.-C., dismissed a subsequent action for specific performance on the ground that this had not been done. Enforcement of order.

10. This act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874.

CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

44 & 45 VICTORIÆ, CAP. 41.

An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes. [22nd August, 1881.]

BE it enacted as follows:

I.—PRELIMINARY.

44 & 45 Vict. c. 41, s. 1.

Short title; commencement; extent.

1.—(1.) This act may be cited as the Conveyancing and Law of Property Act, 1881.

(2.) This act shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-one.

(3.) This act does not extend to Scotland.

Interpretation of property, land, &c.

2. In this act—

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest:

(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land:

(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income:

(iv.) Manor includes lordship, and reputed manor or lordship:

(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance:

(vi.) Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor (*a*), or entitled to redeem a mortgage, according to his estate, interest, or right, in the mort-

gaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property: 44 & 45 Vict. c. 41, s. 2.

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof:

(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called:

(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for building purposes or purposes connected therewith:

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes:

(xii.) Will includes codicil:

(xiii.) Instrument includes deed, will, inclosure award, and Act of Parliament:

(xiv.) Securities include stocks, funds, and shares:

(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy.

(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other document include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print:

(xvii.) Person includes a corporation:

(xviii.) Her Majesty's High Court of Justice is referred to as the court.

(*a*) *E.g.*, a second mortgagee (*Teevan* v. *Smith*, 20 Ch. Div. 730).

II.—Sales and other Transactions.

Contracts for Sale.

44 & 45 Vict. c. 41, s. 3.

Application of stated conditions of sale to all purchases.

3.—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion (*b*).

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement (*c*).

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise (*d*).

(4.) Where land sold is held by lease (not including underlease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase (*e*).

(5.) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date (*f*).

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested, or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser (*g*). **44 & 45 Vict. c. 41, s. 3.**

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

(8.) This section applies only to titles and purchasers on sales properly so called, notwithstanding any interpretation in this act.

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this act.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the court.

(*b*) See, in connection with this section, V. & P. Act, 1874, s. 2, rule 1 (*ante*, p. 566), and sect. 13 (*post*, p. 586).

(*c*) On an enfranchisement, it was said that the copyholder is not entitled to an acknowledgment of the right to production of the documents of title of the manor (*Re Agg-Gardner*, 25 Ch. D. 600).

(*d*) This sub-section was not intended to repeal the doctrines or qualify the principles on which before the act the courts granted or refused specific performance (*Nottingham Co.* v. *Butler*, 15 Q. B. D. 272). Accordingly, it does not preclude a purchaser who has discovered *aliunde* a defect prior to the stipulated commencement of title, and which was known to the vendor, from refusing to complete (*S. C.*, 16 Q. B. Div. 778); and see *Waddell* v. *Wolfe* (L. R. 9 Q. B. 515); *Smith* v. *Robinson* (13 Ch. D. 148).

(*e*) This sub-section applies only to a payment of money, and not to a rent of a peppercorn, or in kind (*Re Moody and Yates*, 30 Ch. Div. 344). As to the effect of breaches after contract and before completion, see *Lawrie* v. *Lees* (14 Ch. Div. 249; 7 App. Cas. 19).

44 & 45 Vict. c. 41, s. 3.

(*f*) The production of a receipt signed by the ground landlord is not sufficient within this sub-section (*Re Higgins and Percival*, 59 L. T. 213).

(*g*) This sub-section does not interfere with the duty of the vendor to furnish a proper abstract of title, and only deals with the expenses of requisitions made on the footing of such an abstract (*Re Johnson and Tustin*, 30 Ch. Div. 42). Where there is a covenant to finish, to the satisfaction of a surveyor, a house contracted to be sold, the surveyor's certificate forms part of the vendor's title, and must be procured at his expense (*Re Moody and Yates*, 30 Ch. Div. 344). But when a proper abstract has been delivered, this sub-section applies to the production of all documents properly comprised therein (*Re Ebsworth and Tidy*, 42 Ch. D. 34). The purchaser bore the cost of production of deeds in the hands of a mortgagee (*Re Willett and Argenti*, 60 L. T. 735); and the cost of statutory declarations made by the vendor (*Re Edwards and Rudkin*, 58 L. T. 789). It has been held in Ireland that in the absence of stipulation the vendor bears the cost of registry searches (*Re Murray and Heggarty*, 15 L. R. Ir. 510).

Completion of contract after death.

4.—(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3.) This section applies only in cases of death after the commencement of this act (*h*).

(*h*) See sect. 30, *post*, p. 600, and the cases quoted under sect 2 of the Trustee Act, 1850 (*ante*, p. 499).

Discharge of Incumbrances on Sale.

Provision by court for incumbrances, and sale freed therefrom.

5.—(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the court, or out of court, the court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in government securities, the court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the

court for special reason thinks fit to require a larger additional amount. 44 & 45 Vict. c. 41, s. 5.

(2.) Thereupon, the court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(3.) After notice served on the persons interested in or entitled to the money or fund in court, the court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this act, and to sales thereafter made (*i*).

(*i*) The court has refused to compel a vendor to free land from a rent-charge under this section where this would be a great hardship (*Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788). It is doubtful if this section applies to statutory rent-charges (*ib.*). On a sale by a mortgagor part of the purchase-money was paid into court under this section, and the property vested in the purchaser (*Milford Haven Co.* v. *Mowatt*, 28 Ch. D. 402). An order was made under this section where the land was charged with legacies (*Archdale* v. *Anderson*, 21 L. R. Ir. 527). For form of order on sale by the court, see *Dickin* v. *Dickin* (30 W. R. 887); *Patching* v. *Bull* (46 L. T. 227; 30 W. R. 244).

General Words.

General words in conveyances of land, buildings, or manor.

6.—(1.) A conveyance of land shall be deemed to include and shall by virtue of this act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof (*k*).

(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals,

44 & 45 Vict. c. 41, s. 6.

quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seck, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof (*l*).

(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6.) This section applies only to conveyances made after the commencement of this act.

(*k*) An easement will not be "enjoyed" within this section when there could be no expectation of its continuance (*Birmingham Banking Co.* v. *Ross*, 38 Ch. Div. 307). And *semble*, the operation of the section might be excluded by the express mention of "appurtenances" (*Ib.* p. 308; see *Beddington* v. *Atlee*, 35 Ch. D. 331).

(*l*) Sub-sects. 1—3 only apply to conveyances since the act. As to the construction of similar words in conveyances before the act, see the cases quoted *ante*, p. 59. See also the cases as to implied grants of easements, quoted *ante*, pp. 59, 73, 93.

Covenants for Title.

Covenants for title to be implied.

7.—(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

On conveyance for value by beneficial owner.

(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

The right to convey.

That, notwithstanding anything by the person who so conveys

or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if

44 & 45 Vict. c. 41, s. 7.

Quiet enjoyment.

Freedom from incumbrance.

Further assurance.

44 & 45 Vict. c. 41, s. 7.

so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

On conveyance of leaseholds for value, by beneficial owner.

(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Validity of lease.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

On mortgage, by beneficial owner.

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Right to convey.

Quiet enjoyment.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and henceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further,

Freedom from incumbrance.

Further assurance.

that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required: 44 & 45 Vict. c. 41, s. 7.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely): On mortgage of leaseholds, by beneficial owner.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them: Validity of lease. Payment of rent and performance of covenants.

(E.) In a conveyance by way of settlement, the following On settlement.

44 & 45 Vict. c. 41, s. 7.

covenant by a person who conveys and is expressed to convey as settlor (namely):

For further assurance, limited.

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required:

On conveyance by trustee or mortgagee.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the court, which covenant shall be deemed to extend to every such person's own acts only (namely):

Against incumbrances.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee,

or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance. 44 & 45 Vict. c. 41, s. 7.

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

(8.) This section applies only to conveyances made after the commencement of this act (*m*).

(*m*) It has been said that the covenants included by virtue of this section are express, not implied, covenants (*L. N. & W. R. Co.* v. *Boulton*, 62 L. T. 398). On a sale of the freehold, sub-leases by a tenant of the vendor, who had surrendered his lease previous to the sale, were not breaches of the covenants (A.) (*David* v. *Sabin*, 1892, W. N. 115).

The contribution to the expense of paving a new street is not a charge on the land, and therefore not an incumbrance within this section (*Egg* v. *Blayney*, 21 Q. B. D. 107). The words "beneficial owner" in a bill of sale introduce the covenants in clause C., and make the bill void under the Bills of Sale Act, 1882, s. 9 (*Ex p. Stanford, Re Barber*, 17 Q. B. D. 259).

Execution of Purchase Deed.

Rights of purchaser as to execution.

8.—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

(2.) This section applies only to sales made after the commencement of this act (*n*).

(*n*) See *Viney* v. *Chaplin*, 2 De G. & J. 468; *Re Bellamy and Metropolitan Board*, 24 Ch. Div. 398.

Production and Safe Custody of Title Deeds.

Acknowledgment of right to production,

9.—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of

44 & 45 Vict. c. 41, s. 9.

and undertaking for safe custody of documents.

that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorized in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5.) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

(6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those docu-

ments or any of them to him, or some person on his behalf; and the court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application. 44 & 45 Vict. c. 41, s. 9.

(8.) An acknowledgment shall by virtue of this act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

(9.) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(11.) An undertaking for safe custody of documents shall by virtue of this act satisfy any liability to give a covenant for safe custody of documents.

(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this act.

III.—Leases.

10.—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessees part to be observed or performed, and every condition of re-entry and other condition Rent and benefit of lessees covenants to run with reversion.

44 & 45 Vict. c. 41, s. 10.

therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2.) This section applies only to leases made after the commencement of this act (*o*).

(*o*) Where a lease is granted by the mortgagor under sect. 18 (*post*, p. 590), the mortgagee, on giving notice, has under this section the benefit of the lessee's covenants (*Municipal Society* v. *Smith*, 22 Q. B. D. 70). The effect on conditions generally of a severance of the reversion now depends on sects. 10 and 12 of the present act. For the old law as to conditions of re-entry where the reversion was severed, see 22 & 23 Vict. c. 35, s. 3, and note, *ante*, p. 545.

Obligation of lessors covenants to run with reversion.

11.—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2.) This section applies only to leases made after the commencement of this act.

Apportionment of conditions on severance, &c.

12.—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this act.

On sub-demise, title to leasehold

13.—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold

reversion, the intended lessee shall not have the right to call for the title to that reversion. 44 & 45 Vict. c. 41, s. 13.

(2.) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained. reversion not to be required.

(3.) This section applies only to contracts made after the commencement of this act (*p*).

(*p*) This section does not absolve an intending lessor from the duty of telling his intended lessee of any defect of title (*Cresswell* v. *Davidson*, 56 L. T. 812). See in connection with this section V. & P. Act, 1874, s. 2, r. 1 (*ante*, p. 566), sect. 3, sub-sect. 1 of the present act, *ante*, p. 574, and sect. 4 of Conv. Act, 1882, *post*, p. 629.

Forfeiture.

14.—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach (*q*). Restrictions on and relief against forfeiture of leases.

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit (*r*).

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee-farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns (*s*).

(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is

44 & 45 Vict. c. 41, s. 14.

inserted in the lease in pursuance of the directions of any act of parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased (*t*); or to a condition for forfeiture on the bankruptcy of the lessee (*u*), or on the taking in execution of the lessee's interest; or

(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

(7.) The enactments described in Part I. of the second schedule to this act are hereby repealed.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(9.) This section applies to leases made either before or after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary.

(*q*) In the case of an agreement to grant a lease subject to usual covenants, the proviso for re-entry in the lease should only extend to the non-payment of rent (*Hodgkinson* v. *Crowe*, 10 Ch. 622); and this section has made no difference (*Re Anderton and Milner*, 45 Ch. D. 476).

Sub-sect. (1). This section does not take away the lessor's right of re-entry, but merely affords the lessee a *locus pœnitentiæ* (*Cresswell* v. *Davidson*, 56 L. T. 811). It has been said that a notice under this section is a condition precedent to the bringing of an action (*North London Co.* v. *Jacques*, 49 L. T. 659; 32 W. R. 283; see, however, *Scott* v. *Brown*, 51 L. T. 746). The form of the notice should comply with the particulars mentioned in sub-sect. (1) (*North London Co.* v. *Jacques*, *sup.*; see *Jacques* v. *Harrison*, 12 Q. B. D. 136; *Greenfield* v. *Hanson*, 30 S. J. 650; *Cronin* v. *Rogers*, 1 Cab. & Ell. 348). In a case where compensation is not desired, it is not necessary that the notice should require compensation (*Lock* v. *Pearce*, 1892, 2 Ch. 328). The compensation, is, it seems, to be measured by the same rule as damages in an action for breach (*Skinners' Co.* v. *Knight*, 1891, 2 Q. B. 545). The question what is a reasonable time must go to a jury (*Ib.*). As to the lessor recovering the cost of employing a solicitor and surveyor, &c., see Conv. Act, 1892, s. 2, sub-s. (1), *post*, p. 632.

As to service of the notice, see *Cronin* v. *Rogers*, *sup.*

Sub-sect. (2). (*r*) Sub-sect. (2) extends to breaches committed before the Act (*Quilter* v. *Mapleson*, 9 Q. B. D. 672). It does not apply to cases where the landlord has already entered (*Ib.* 675; *Rogers* v. *Rice*, 1892, 2 Ch. 170; *Lock* v. *Pearce*, 1892, 2 Ch. 328), except where he entered without serving a proper notice (*Jacques* v. *Harrison*, 12 Q. B. D. 136, 165; *Scott* v. *Brown*, 51 L. T. 746). Sub-sect. (2) gives jurisdiction to refuse relief under sub-sect. (1) (*Scott* v. *Brown* 51 L. T. 746; see *Ruttledge* v. *Whelan*, 10 L. R. Ir. 263). As to its application to a breach of covenant by a previous holder of an under-lessee's interest, see *Fleetwood* v. *Hull* (23 Q. B. D.

35). And as to the terms on which relief will be granted, see *Quilter* v. *Mapleson* (9 Q. B. D. 672); *North London Land Co.* v. *Jacques* (49 L. T. 659; 32 W. R. 283); *Bond* v. *Freke* (1884, W. N. 47); *Mitchison* v. *Thomson* (1 Cab. & Ell. 72). 44 & 45 Vict. c. 41, s. 14.

The lessee's application under sub-sect. (2) may be by originating summons (sect. 69, *post*, p. 620; *Rogers* v. *Rice*, 1892, 2 Ch. 170).

(*s*) Enforceable agreements for leases or under-leases are within this section (Conv. Act, 1892, s. 5, *post*, p. 634). See before that act *Swaine* v. *Ayres* (21 Q. B. D. 289); *Ayling* v. *Mercer* (1885, W. N. 166); *Strong* v. *Stringer* (61 L. T. 470). But not a tenancy at will (*Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220). The word "lessee" includes an assignee of a lease (*Cronin* v. *Rogers*, 1 Cab. & Ell. 348). As to the protection of under-lessees, see Conv. Act, 1892, s. 4, *post*, p. 634; and before that act, *Cresswell* v. *Davidson* (56 L. T. 811); *Burt* v. *Gray* (1891, 2 Q. B. 98). Sub-sect. (3).

(*t*) See *Barrow* v. *Isaacs* (1891, 1 Q. B. 417). As to exacting a fine for a licence to assign where a lease contains a covenant of this nature, see Conv. Act, 1892, s. 3, *post*, p. 634. Sub-sect. (6).

(*u*) See *Ex p. Gould, Re Walker* (13 Q. B. D. 454; Conv. Act, 1892, s. 2, sub-ss. 2 and 3, *post*, p. 633).

IV.—Mortgages.

15.—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this act, be bound to assign and convey accordingly. Obligation on mortgagee to transfer instead of re-conveying.

(2.) This section does not apply in the case of a mortgagee being or having been in possession.

(3.) This section applies to mortgages made either before or after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary (*v*).

(*v*) Where there were first and second mortgages, it was held, under this section, that the mortgagor could not require the first mortgagee to assign, without the consent of the second mortgagee (*Teevan* v. *Smith*, 20 Ch. Div. 724). After this decision, the 12th section of the Conv. Act, 1882 (*post*, p. 632), was passed.

The word "terms" in this section does not refer merely to the amount of principal, interest, and costs, but includes any other term, such as a trust. So a mortgagor who is a trustee cannot claim a simple transfer (*Alderson* v. *Elgey*, 26 Ch. D. 567). As to who are entitled to redeem, see Fisher on Mortgages, 956.

16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee. Power for mortgagor to inspect title deeds.

(2.) This section applies only to mortgages made after the

44 & 45 Vict. c. 41, s. 16.

commencement of this act, and shall have effect notwithstanding any stipulation to the contrary (*w*).

(*w*) A director of a mortgagor company was refused inspection of a subsidiary mortgage deed (*Burn* v. *London & S. Wales Co.*, 1890, W. N. 209).

Restriction on consolidation of mortgages.

17.—(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this act (*x*).

(*x*) The costs of foreclosing two mortgages cannot, in cases to which this section applies, be consolidated any more than the mortgages themselves, but must be apportioned between the two estates (*De Caux* v. *Skipper*, 31 Ch. Div. 635). As to the application of the section, see *Bird* v. *Wenn* (33 Ch. D. 217).

Leases.

Leasing powers of mortgagor and of mortgagee in possession.

18.—(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this act, power to make from time to time any such lease as aforesaid.

(3.) The leases which this section authorizes are—

(i). An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour

of the lessee and all persons deriving title under him, be sufficient evidence. 44 & 45 Vict. c. 41, s. 18.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connexion with building purposes.

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

(14.) Nothing in this act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

(15.) Nothing in this act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this act had not been passed.

(16.) This section applies only in case of a mortgage made after the commencement of this act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

44 & 45 Vict. c. 41, s. 18.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting (*y*).

(*y*) A lease by a mortgagor under this section has the same effect as if the mortgagees had joined (*Wilson* v. *Queen's Club*, 1891, 3 Ch. 525).

Where an agreement for a mortgage which was dated before the act stipulated for all clauses usual in mortgages, the mortgagee was not entitled to a clause excluding sect. 18, sub-sect. (1) (*Re Nugent and Riley*, 49 L. T. 132).

Sale; Insurance; Receiver; Timber.

Powers incident to estate or interest of mortgagee.

19.—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby (*z*); and

(ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

(iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof (*a*); and

(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

(2.) The provisions of this act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended,

shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this act. 44 & 45 Vict. c. 41, s. 19.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4.) This section applies only where the mortgage deed is executed after the commencement of this act.

(*z*) An equitable mortgagee selling under this section can only sell his interest under the mortgage (*Re Hodson and Howe*, 35 Ch. Div. 668). This section does not give power to sell fixtures apart from the freehold (*Re Yates, Batcheldor* v. *Yates*, 38 Ch. Div. 112). The power of sale given by this section is not incorporated in a bill of sale in the statutory form (*Calvert* v. *Thomas*, 19 Q. B. Div. 204); nor does it apply in the case of debentures of a joint-stock company (*Blaker* v. *Herts Co.*, 41 Ch. D. 399).

(*a*) When a foreclosure action is pending, it is desirable that the appointment of a receiver should be made, not by the mortgagee but by the court (*Tillett* v. *Nixon*, 25 Ch. D. 238).

20. A mortgagee shall not exercise the power of sale conferred by this act unless and until— Regulation of exercise of power of sale.

(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service (*b*); or

(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii.) There has been a breach of some provision contained in the mortgage deed or in this act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

(*b*) A notice under sub-sect. 1 does not prevent a sale under sub-sects. 2 and 3, as soon as the conditions of those sub-sections are fulfilled (*Farrar* v. *Farrars, Limited*, 40 Ch. D. 395). As to notices, see sect. 67, *post*, p. 619.

A notice under sub-sect. 1, given by a mortgagee holding several mortgages executed by the same mortgagor, who has excluded sect. 17 of this act, does not affect the mortgagee's right to consolidate (*Griffith* v. *Pound*, 45 Ch. D. 553).

21.—(1.) A mortgagee exercising the power of sale conferred by this act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed Conveyance, receipt, &c. on sale.

44 & 45 Vict. c. 41, s. 21.

is sufficient otherwise by law, or is sufficient by custom, in that behalf (*c*).

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power (*d*).

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into court under this act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

(4.) The power of sale conferred by this act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5.) The power of sale conferred by this act shall not affect the right of foreclosure.

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this act or of any trust connected therewith.

(7.) At any time after the power of sale conferred by this act has become exerciseable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

(*c*) This section does not enable an equitable mortgagee to convey the legal estate (*Re Hodson and Howe*, 35 Ch. Div. 668).

(*d*) The fact that notice had not been given by the mortgagee under sect. 20 (i.) was held not to affect a purchaser (*Re Thompson and Holt*, 44 Ch. D. 492; see *Re Tritton*, 1891, W. N. 194).

Mortgagee's receipts, discharges, &c.

22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be

concerned to inquire whether any money remains due under the mortgage. 44 & 45 Vict. c. 41, s. 22.

(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this act directed respecting money received by him arising from a sale under the power of sale conferred by this act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

Amount and application of insurance money.

23.—(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2.) An insurance shall not, under the power conferred by this act, be effected by a mortgagee in any of the following cases (namely):

(i.) Where there is a declaration in the mortgage deed that no insurance is required:

(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this act authorised to insure.

(3.) All money received on an insurance effected under the mortgage deed or under this act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

Appointment, powers, remuneration, and duties of receiver.

24.—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mort-

44 & 45 Vict. c. 41, s. 24.

gagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same (*e*).

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the court thinks fit to allow, on application made by him for that purpose.

(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8.) The receiver shall apply all money received by him as follows (namely):

(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

(*e*) A mortgagor will be restrained from distraining for rent after a receiver has been appointed, even if such receiver has been negligent (*Bayly* v. *Went*, 51 L. T. 764). As to appointments by the court when this power could be exercised, see *Tillett* v. *Nixon* (25 Ch. D. 238).

Action respecting Mortgage.

Sale of mortgaged property in

25.—(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption

in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative. 44 & 45 Vict. c. 41, s. 25.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum fixed by the court, to meet the expenses of sale and to secure performance of the terms. Action for foreclosure, &c.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4.) In any case within this section the court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5.) This section applies to actions brought either before or after the commencement of this act.

(6.) The enactment described in Part II. of the second schedule to this act is hereby repealed. 15 & 16 Vict. c. 86, s. 48.

(7.) This section does not extend to Ireland (*f*).

(*f*) The powers given by sub-sects. 1 and 2 are distinct (*Woolley* v. *Colman*, 21 Ch. D. 173). It has been said that the order for sale under sub-sect. 1 is a matter of right (*Clarke* v. *Pannell*, 29 S. J. 147). The discretion referred to in sub-sect. 2 must be exercised judicially (*Merchant Banking Co.* v. *London, &c.*, 55 L. J. Ch. 479). Where a mortgagee's notice to pay off had expired and his power of sale was exercisable, and the mortgagor commenced an action for sale or redemption, an order for sale was made on the application of the mortgagor, such sale to be conducted by himself out of court, and to take place within three months (*Brewer* v. *Square*, 1892, 2 Ch. 111). In a foreclosure action a sale was ordered at the request of the mortgagor upon his depositing 150*l.* in court to meet expenses of sale (*Weston* v. *Davidson*, 1882, W. N. 28). A sale has been ordered under sub-sect. 2, at the request of an equitable mortgagee by simple deposit (*Oldham* v. *Stringer*, 51 L. T. 895; 33 W. R. 251), and of a second mortgagee (*Saul* v. *Pattinson*, 54 L. T. 670; 55 L. J. Ch. 831). A sale may be ordered of so much only as will satisfy the plaintiff's claim (*Wade* v. *Wilson*, 22 Ch. D. 235). At the request of the mortgagee, orders for sale have been made without allowing time for redemption (*Wade* v. *Wilson*, *sup.*; *Oldham* v. *Stringer*, *sup.*); but such time will usually be given (*Green* v. *Biggs*, 52 L. T. 680). Three months have been given (*Ib.*, *Jones* v. *Harris*, 55 L. T. 884). Ten days where the security was clearly insufficient (*Charlewood* v. *Hammer*, 28 S. J. 710; see *Williams* v. *Owen*, 27 S. J. 256).

Sale at request of mortgagor.

Of mortgagee.

The sale may be ordered out of court, a reserve price being fixed and the purchase-money being paid into Court (*Union Bank* v. *Ingram*, 20 Sale out of court.

44 & 45 Vict. c. 41, s. 25.

Ch. D. 463; *Woolley* v. *Colman*, 21 Ch. D. 169; *Davies* v. *Wright*, 32 Ch. D. 220; see R. S. C. Ord. 51, r. 1a). But a sale out of court can only be ordered when all parties interested are before the court or bound by the order (R. S. C. Ord. 51, r. 1a); *e. g.*, a second mortgagee (*Brewer* v. *Square*, 1892, 2 Ch. 114). As to when a sale is "altogether out of court," see *Cumberland Banking Co.* v. *Maryport Co.* (1892, 1 Ch. 92).

Conduct of sale.

The conduct of the sale has been given to the mortgagor (*Woolley* v. *Colman*, *sup.*; *Davies* v. *Wright*, *sup.*: *Brewer* v. *Square*, *sup.*; see *Christy* v. *Van Tromp*, 1886, W. N. 111). Where the mortgagor requests a sale he should give security for costs where the conduct is to be by the mortgagee (*Davies* v. *Wright*, 32 Ch. D. 220; see *Weston* v. *Davidson*, 1882, W. N. 28); and the mortgagor has been ordered to give security where he has the conduct himself (*Woolley* v. *Colman*, 21 Ch. D. 169; *Brewer* v. *Square*, 1892, 2 Ch. 111; but see *Davies* v. *Wright*, *sup.*). When the mortgagee requests the sale and the conduct is given to the mortgagor, the mortgagor need not give security (*Davies* v. *Wright*, *sup.*).

At what time sale will be ordered.

A sale may be ordered on an interlocutory application (*Woolley* v. *Colman*, 21 Ch. D. 173); or upon motion for judgment (*Wade* v. *Wilson*, 22 Ch. D. 235); or at any time before a foreclosure decree has become absolute (*Union Bank* v. *Ingram*, 20 Ch. D. 463); as when application for final order is made (*Weston* v. *Davidson*, 1882, W. N. 28).

Sale refused.

A sale has been refused when in an action for foreclosure alone it was asked for in the absence of the mortgagor, and without notice to him (*South Western Bank* v. *Turner*, 47 L. T. 433; 31 W. R. 113); also when asked by a second mortgagee in a case where the value was clearly insufficient for the first mortgage (*Merchant Banking Co.* v. *London, &c.*, 55 L. J., Ch. 479); also when the order asked for would necessarily include property not subject to the mortgage (*Gibbs* v. *Hayden*, 47 L. T. 184; 30 W. R. 725). This section does not enable the court, at the instance of debenture holders, to order a sale of an undertaking of a public character (*Blaker* v. *Herts, &c. Co.*, 41 Ch. D. 406).

V.—Statutory Mortgage.

Form of statutory mortgage in schedule.

26.—(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the third schedule to this act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there shall by virtue of this act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money:

Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any

time thereafter, at the request and cost of the mortgagor, shall re-convey the mortgaged property to the mortgagor, or as he shall direct. 44 & 45 Vict. c. 41, s. 26.

Forms of statutory transfer of mortgage in schedule.

27.—(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the third schedule to this act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely):

That the covenanter will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of it being designated a mortgage.

Implied covenants, joint and several.

28. In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or

41 & 45 Vict. c. 41, s. 28.

more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

Form of re-conveyance of statutory mortgage in schedule.

29. A re-conveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory re-conveyance of mortgage, being in the form given in Part III. of the third schedule to this act, with such variations and additions, if any, as circumstances may require.

VI. Trust and Mortgage Estates on Death.

Devolution of trust and mortgage estates on death.

30.—(1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

37 & 38 Vict. c. 78. 38 & 39 Vict. c. 87.

(2.) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this act (*g*).

(*g*) The wording of this section raises some difficulty as to where the legal estate is when there is no personal representative (*Re Pilling*, 26 Ch. D. 432); see the form of vesting order now usually adopted under the Trustee Acts, *ante*, p. 523. Copyholds were held to be within the section (*Re Hughes*, 1884, W. N. 53; see, however, *Re Mills*, 40 Ch. Div. 18), but they have now been excluded (50 & 51 Vict. c. 73, s. 45). This section does not enable a personal representative to execute a trust for sale where before the act the heir could not have done so (*Re Ingleby*, 13 L. R. Ir. 326).

VII. Trustees and Executors.

Appointment of new trustees, vesting of trust property, &c.

31.—(1.) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or

desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid. 44 & 45 Vict. c. 41, s. 31.

(2.) On an appointment of a new trustee, the number of trustees may be increased.

(3.) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.

(4.) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(6.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(8.) This section applies to trusts created either before or after the commencement of this act (*h*).

(*h*) This section applies to trustees for the purposes of the S. L. Acts (S. L. Act, 1890, s. 17, *post*, p. 724); and also to trustees of land held for religious or educational purposes (Trustees Appointment Act, 1890, s. 3; see *Re Coates to Parsons*, 34 Ch. D. 370). Where an appointment can be made under this section, application should not be made under the Trustee Act, 1850 (*Re Gibbons*, 45 L. T. 756; 30 W. R. 287; *Re Higginbottom*, 1892, W. N. 121. See *Re Soulby*, 21 W. R. 256; *Re Jackson*, 16 W. R. 572; *Re Shafto*, 29 Ch. D. 247).

44 & 45 Vict. c. 41, s. 31.

Vacancies.

Where a trustee had resided for twelve months abroad, a new trustee was appointed under this section (*Re Walker and Hughes*, 24 Ch. D. 698). It seems that a trustee who disclaims, refuses to act within this section (*D'Adhemar* v. *Bertrand*, 35 Beav. 19), although he has no legal estate in him (*Re Birchall, Birchall* v. *Ashton*, 1889, W. N. 31). A new trustee cannot be appointed under this section, in place of an infant (*Re Tallatire*, 1885, W. N. 191). When the trustees named in the will of a testator all die before him, *qu.* whether (notwithstanding sub-sect. 6) new trustees can be appointed under this section (*Re Ambler*, 59 L. T. 210; the case of a sole trustee, *Re Orde*, 24 Ch. Div. 271; *Re Lightbody*, 52 L. T. 40; 33 W. R. 452). As to a trustee becoming insane during the life of a testator, see *Newton* v. *Newton*, noticed in L. T. Jour., vol. 55, p. 56.

Who can appoint.

Where a deed executed before this act declared that certain persons should have "power to appoint new trustees," they were held to be "persons nominated for this purpose" within this section (*Re Walker and Hughes*, 24 Ch. D. 698). Where the person nominated for the purpose of appointing is a lunatic an appointment can be made under this section by the continuing trustees (*Re Blake*, 1887, W. N. 173). Where the persons nominated cannot agree, the personal representative of the last surviving trustee can appoint (*Re Sheppard*, 1888, W. N. 234). A surviving trustee who is about to retire can under sub-sect. 6 appoint (*Re Coates to Parsons*, 34 Ch. D. 370). But where the surviving trustee is abroad and will not appoint, application must be made to the court (*Re Clift*, 27 S. J. 199). So where he is incapable (*Re Lemann*, 22 Ch. D. 633). A deceased sole trustee is a "last surviving or continuing trustee," and his executor can appoint (*Re Shafto*, 29 Ch. D. 247). The personal representative is not bound to appoint under this section (*Re Knight*, 26 Ch. D. 82).

A judgment for the execution of the trusts of an instrument will not prevent the donee from exercising his power of appointing under this section (*Re Gadd, Eastwood* v. *Clark*, 23 Ch. D. 134; *Re Hall, Hall* v. *Hall*, 51 L. T. 901); but his nominee must be approved by the court (*Id.*; *Re Norris, Allen* v. *Norris*, 27 Ch. D. 333). Where there is no such judgment, the donee might possibly appoint a person whom the court would not have sanctioned (*Re Norris*, 27 Ch. D. 341); but he cannot appoint himself (*Re Skeats, Skeats* v. *Evans*, 42 Ch. D. 522).

Number of trustees.

The power in this section to increase the number of trustees only applies where a vacancy is being filled (*Re Gregson*, 34 Ch. D. 209); but even where there is no vacancy the court can increase the number, either under the Trustee Act, 1850 (*Ib.*), or under its general jurisdiction (*D'Adhemar* v. *Bertrand*, 35 Beav. 19). The appointment of a single trustee under sect. 27 of 23 & 24 Vict. c. 145 was held valid (*West of England Bank* v. *Murch*, 23 Ch. D. 138).

As to whether a corporation can be appointed a new trustee under this, see sect. 2, sub-sect. (xvii.); *Billing* v. *Brogden*, 1888, W. N. 238; *Law Guarantee Society* v. *Bank of England*, 24 Q. B. D. 406. As to appointing a separate set of trustees of property held on separate trusts, see Conv. Act, 1882, s. 5 (*post*, p. 630), and Conv. Act, 1892, s. 6 (*post*, p. 634).

An appointment made under this section will be free from any limitation to which a power in the trust instrument is subject (*Cecil* v. *Langdon*, 28 Ch. Div. 1; *Re Lloyd*, 57 L. J. Ch. 246).

Contrary intention.

Where the instrument of trust contains an express power of appointing new trustees which either is subject to restrictions, or is incomplete, this does not amount to a contrary intention within sub-sect. 7, so as to prevent the statutory power from applying free from the restrictions, or in cases not mentioned in the express power (*Re Lloyd*, 57 L. J. Ch. 246; *Cecil* v. *Langdon*, 28 Ch. Div. 1; *Re Coates to Parsons*, 34 Ch. D. 370; see the argument in *Re Jackson*, 16 W. R. 572).

Retirement of trustee.

32.—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged

from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this act, without any new trustee being appointed in his place. 44 & 45 Vict. c. 41, s. 32.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4.) This section applies to trusts created either before or after the commencement of this act.

Powers of new trustee appointed by court.

33.—(1.) Every trustee appointed by the Court of Chancery, or by the Chancery Division of the court, or by any other court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(2.) This section applies to appointments made either before or after the commencement of this act.

Vesting of trust property in new or continuing trustees.

34.—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

(2.) Where a deed by which a retiring trustee is discharged under this act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under act of parliament.

(4.) For purposes of registration of the deed in any registry,

44 & 45 Vict. c. 41, s. 34.

the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this act.

(5.) This section applies only to deeds executed after the commencement of this act.

Power for trustees for sale to sell by auction, &c.

35.—(1.) Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this act (*i*).

(*i*) In the case of instruments coming into operation before the commencement of this act, but executed after 28th August, 1860, see 23 & 24 Vict. c. 145, ss. 1, 2. The rules which, apart from statute, apply to trustees concurring with other persons in selling, are laid down by *Jessel*, M.R., in *Re Cooper and Allen* (4 Ch. D. 814).

Trustees receipts.

36.—(1.) The receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2.) This section applies to trusts created either before or after the commencement of this act.

Power for executors and trustees to compound, &c.

37.—(1.) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of

composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith. 44 & 45 Vict. c. 41, s. 37.

(3.) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies to executorships and trusts constituted or created either before or after the commencement of this act (*k*).

(*k*) This section (the effect of which may be "revolutionary," *Re Owens*, 47 L. T. 64), has been substituted for sect. 30 of 23 & 24 Vict. c. 145. The last mentioned section (which was not confined to mere money claims, *Re Warren, Weadon* v. *Reading*, 51 L. T. 561; 53 L. J. Ch. 1016), justified a compromise by an executrix with the testator's surviving partner and his creditors as to the sale of partnership real estate (*West of England Bank* v. *Murch*, 23 Ch. D. 138).

38.—(1.) Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being. Powers to two or more executors or trustees.

(2.) This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this act.

VIII. Married Women.

39.—(1.) Notwithstanding that a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. Power for court to bind interest of married woman.

(2.) This section applies only to judgments or orders made after the commencement of this act (*l*).

(*l*) This section does not give the court power to remove restraint generally, but only to make binding any particular disposition made by a married woman if the court thinks it is for her benefit (*Re Warren*, 49 L. T. 696; 52 L. J. Ch. 928). A strong case must be made before the jurisdiction will be exercised (*Re Little, Harrison* v. *Harrison*, 40 Ch. Div. 424). As to considering the benefit of the husband and children, see *Re Wood, Wood* v. *Kimber* (29 S. J. 183). The court requires to be satisfied that the application is in accordance with the married woman's free will (*Re Currey, Gibson* v. *Way*, 56 L. T. 80; *Musgrave* v. *Sandeman*, 48 L. T. 215); but will not always require a separate examination (*Harris* v. *Harford*, 1888, W. N. 190; see *Hodges* v. *Hodges*, 20 Ch. D. 755).

Orders have been made binding the property of married women in the following cases:—Where a married woman was harassed by creditors (*Hodges* v. *Hodges*, 20 Ch. D. 749; *Re Little, Re Harrison*, 36 Ch. D. 701; *Re C.'s Settlement*, 56 L. T. 299; 56 L. J. Ch. 556). To pay the debts of a married woman, the balance of the capital being invested in an annuity for her life (*Latham* v. *Latham*, 1889, W. N. 171). To enable leaseholds to be sold (*Re Tippet and Newbould*, 37 Ch. D. 444). To carry into effect Orders made.

44 & 45 Vict. c. 41, s. 39.

a sale under the Settled Estates Act, 1877 (*Re Landfield, Landfield* v. *Landfield*, 46 L. T. 227; 30 W. R. 377; see *Re Segrave*, 17 L. R. Ir. 373); or a scheme for partition and re-settlement (*Re Currey, Gibson* v. *Way*, 56 L. T. 80); or an exchange for the purpose of quieting the title (*Re Currey, Gibson* v. *Way*, 32 Ch. D. 365). To enable a profitable investment to be continued, which otherwise would have been unauthorised (*Re Wright*, 15 L. R. Ir. 331). To enable money to be raised for emigration (*Re Flood*, 11 L. R. Ir. 355). With a view to a mortgage (*Ex p. Thompson*, 1884, W. N. 28). To enable a married woman to carry out a compromise (*Sedgwick* v. *Thomas*, 48 L. T. 100; *Musgrave* v. *Sandeman*, *id.* 215; *Tamplin* v. *Miller*, 30 W. R. 422; *Harris* v. *Harford*, 1888, W. N. 190). To enable income to be applied in paying premiums on policies on the husband's life and interest on mortgages (*Re Milner*, 1891, 3 Ch. 547). The restraint was released on terms in *Re a Marriage Settlement* (30 S. J. 702).

Order refused.

An application under this section has been refused where the order might have caused a forfeiture (*Re Jordan, Kino* v. *Picard*, 54 L. T. 127; 55 L. J. Ch. 330); also where it was asked to enable a married woman to obtain a personal benefit by releasing a power of appointment (*Re Little, Harrison* v. *Harrison*, 40 Ch. Div. 480). See also *Re Warren* (49 L. T. 696; 52 L. J. Ch. 928).

The application under the section should, in general, be made by summons not by petition (*Re Lillwall*, 30 W. R. 243; *Latham* v. *Latham*, 1889, W. N. 171). But orders have been made at the trial of an action (*Sedgwick* v. *Thomas*, 48 L. T. 100); on a petition to sanction the compromise of an action (*Harris* v. *Harford*, 1888, W. N. 190); on a petition under the Settled Estates Act, 1877, to confirm a sale; in which case it was held unnecessary to entitle the petition in the matter of the Conv. Act, 1881 (*Re Landfield, Landfield* v. *Landfield*, 46 L. T. 227); on a summons under the Vendor and Purchaser Act, 1874 (*Re Tippet and Newbould*, 37 Ch. D. 444).

Service on the trustees of the settlement has been dispensed with (*Re Little, Re Harrison*, 36 Ch. Div. 701).

Other statutory powers of releasing restraint.

Notwithstanding a restraint on anticipation the court may charge costs on a fund preserved (23 & 24 Vict. c. 127, s. 28; *Re Keane, Lumley* v. *Desborough*, 12 Eq. 115); and may impound a married woman's interest to indemnify trustees (Trustee Act, 1888, sect. 6).

Power of attorney of married woman.

40.—(1.) A married woman, whether an infant or not, shall by virtue of this act have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this act relating to instruments creating powers of attorney shall apply thereto.

(2.) This section applies only to deeds executed after the commencement of this act (*m*).

(*m*) Under this section a married woman can appoint an attorney to receive her income, even if she is restrained from anticipation (*Stewart* v. *Fletcher*, 38 Ch. D. 627). For the law before the act, see *Oulds* v. *Sansom* (3 Taunt. 261); *Graham* v. *Jackson* (6 Q. B. 811); *Kenrick* v. *Wood* (9 Eq. 377). As to powers of attorney generally, see sects. 46—48 (*post*, p. 611), and sects. 8 and 9 of Conv. Act, 1882 (*post*, p. 630).

IX.—Infants.

Sales and leases on behalf of infant owner.

41. Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at

a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877 (*n*). 44 & 45 Vict. c. 41, s. 41.

(*n*) Land was held to be settled estate under this section where the interest of the infant was determinable on death under twenty-one (*Liddell* v. *Liddell*, 31 W. R. 238; 52 L. J. Ch. 207; see *Re Sparrow*, 1892, 1 Ch. 412; see S. L. Act, 1882, s. 59, *post*). 40 & 41 Vict. c. 18.

Management of land and receipt and application of income during minority.

42.—(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the

44 & 45 Vict. c. 41, s. 42.

income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but,

(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) This section applies only where that instrument comes into operation after the commencement of this act (*nn*).

(*nn*) It was said that sub-sects. 2 and 3 seemed to exclude any power to pay expenses of management out of corpus (*Re Jackson, Jackson* v. *Talbot*, 21 Ch. D. 787; where costs of repairs were raised by mortgage of an infant's estate).

Application by trustees of income of property of infant for maintenance, &c.

43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the

income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not (*o*). 44 & 45 Vict. c. 41, s. 43.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year (*p*).

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained (*q*).

(4.) This section applies whether that instrument comes into operation before or after the commencement of this act.

(*o*) This section only applies where the infant will become entitled on or before attaining twenty-one (*Re Judkin*, 25 Ch. D. 743); and only authorizes the application for maintenance of income to which, independently of the act, the infant would be entitled (*Re Dickson*, *Hill* v. *Grant*, 29 Ch. Div. 331). Where there is a direction to set apart the legacy, the infant would be so entitled to the income, and it may be applied under this section (*Re Medlock*, *Raffle* v. *Medlock*, 54 L. T. 828; 55 L. J. Ch. 738). Where residue is bequeathed to an infant, the executor, on the residue being ascertained, is a trustee within this section (*Re Smith*, *Henderson-Roe* v. *Hitchins*, 42 Ch. D. 302). Where the gift was to all the children of A. who should attain twenty-one, this section did not apply (*Re Jeffery*, *Burt* v. *Arnold*, 1891, 1 Ch. 671; see, however, *Re Burton*, *Banks* v. *Heaven*, 1892, 2 Ch. 38); and it would seem not to apply where the gift is absolute in the first place, but there is a gift over on the infant not attaining twenty-one (*Re Buckley*, 22 Ch. D. 583, decided on 23 & 24 Vict. c. 145, s. 26).

(*p*) Where the infant was tenant for life, income accumulated during minority belonged to her absolutely on attaining twenty-one (*Re Wells*, *Wells* v. *Wells*, 43 Ch. D. 281). Past accumulations may be applied for past maintenance (*Re Pitts*, *Collins* v. *Pitts*, 1884, W. N. 225, 242).

(*q*) This sub-section formed one of the grounds of the decision in *Re Dickson* (*sup.*) A direction to accumulate income and pay it to legatees when shares become payable is not an expression of contrary intention (*Re Thatcher*, 26 Ch. D. 427). See, in general, as to the cases in which the court will direct payments for maintenance notwithstanding directions to accumulate, *Re Allan*, *Havelock* v. *Havelock* (17 Ch. D. 807); *Re Collins*, *Collins* v. *Collins*, (32 Ch. D. 229); *Re Alford*, *Hunt* v. *Parry* (*id.* 383).

X.—Rentcharges and other Annual Sums.

44.—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the Remedies for recovery of annual sums charged on land.

44 & 45 Vict. c. 41, s. 44.

income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3.) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

(4.) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6.) This section applies only where that instrument comes into operation after the commencement of this act (*r*). 44 & 45 Vict. c. 41, s. 44.

(*r*) This section has been extended to the rentcharges created under the Copyhold Act, 1887 (50 & 51 Vict. c. 73, s. 16), but an owner of such a rentcharge can still pursue his other remedies, *e.g.*, by action (*Searle* v. *Cooke*, 43 Ch. Div. 533).

Redemption of quitrents and other perpetual charges.

45.—(1.) Where there is a quitrent, chief-rent, rentcharge, or other annual sum issuing out of land (in this section referred to as the rent), the Copyhold Commissioners shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the commissioners.

(3.) On proof to the commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

(4.) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the commissioners.

(5.) This section does not apply to tithe rentcharge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

(6.) This section applies to rents payable at, or created after, the commencement of this act.

(7.) This section does not extend to Ireland (*s*).

(*s*) The Board of Agriculture has now taken the place of the Copyhold Commissioners (45 & 46 Vict. c. 38, s. 48; 52 & 53 Vict. c. 30). As to the meaning of "quitrent," "chief-rent," and "rentcharge," see *ante*, pp. 105, 106.

XI.—Powers of Attorney.

Execution under power of attorney.

46.—(1.) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

44 & 45 Vict. c. 41, s. 46.

(2.) This section applies to powers of attorney created by instruments executed either before or after the commencement of this act (*t*).

(*t*) Sects. 46 to 48 should be read in connection with sects. 8 and 9 of the Conv. Act, 1882, *post*, p. 630.

Payment by attorney under power without notice of death, &c. good.

47.—(1.) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

(2.) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3.) This section applies only to payments and acts made and done after the commencement of this act (*u*).

(*u*) This section extends to all persons the protection which was given to trustees and executors by 22 & 23 Vict. c. 35, s. 26 (*ante*, p. 550), where see note.

Deposit of original instruments creating powers of attorney.

48.—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court of Judicature.

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Central Office.

(5.) General rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing, with the concurrence of the commissioners of her Majesty's Treasury, the fees to be taken therein.

(6.) This section applies to instruments creating powers of attorney executed either before or after the commencement of this act (*v*).

(*v*) See Rule 6 relating to this section (*post*, p. 635).

XII.—Construction and Effect of Deeds and other Instruments.

44 & 45 Vict. c. 41, s. 49.

49.—(1.) It is hereby declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal. Use of word grant unnecessary.

(2.) This section applies to conveyances made before or after the commencement of this act.

50.—(1.) Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person. Conveyance by a person to himself, &c.

(2.) This section applies only to conveyances made after the commencement of this act (*w*).

(*w*) According to the old common law, a person could not convey or assign real or personal estate to himself and another. As regards freeholds, this inconvenience was avoided by means of the Statute of Uses (See Williams' Real Property, p. 198, 14th ed.) Sect. 21 of 22 & 23 Vict. c. 35 (*ante*, p. 549), gave power to a person to assign to himself and another "personal property now by law assignable including chattels real." The power did not include choses in action which were not then assignable (Williams' Personal Property, p. 4, 12th ed.) A similar power has now been extended to freeholds and things in action by the above section.

As to M. W. P. Act, 1882, *ante*, p. 325.

51.—(1.) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body. Words of limitation in fee or in tail.

(2.) This section applies only to deeds executed after the commencement of this act.

52.—(1.) A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power. Powers simply collateral.

(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this act (*x*).

(*x*) Before this act powers simply collateral could not be released, but powers appendant or in gross might be (See *ante*, p. 296; Farwell on Powers, 10 *et seq.*; *Re Radcliffe, Radcliffe* v. *Bewes*, 1892, 1 Ch. 231). Any power may now be released under the above section, and may be disclaimed under sect. 6 of the Conv. Act, 1882, *post*, p. 630. The power to release, however, does not apply to powers given by the S. L. Act, 1882 (S. L. Act, 1882, sect. 50, *post*, p. 705). Nor does it apply to a power coupled with a duty (*Re Eyre, Eyre* v. *Eyre*, 49 L. T. 259; see *Saul* v. *Pattinson*, 54 L. T. 670; 55 L. J. Ch. 831).

44 & 45 Vict. c. 41, s. 52.

As to the release of a power of appointing among children or issue, see *Cunynghame* v. *Thurlow* (1 R. & M. 436, n.); *Smith* v. *Houblon* (26 Beav. 482); *Horner* v. *Swan* (T. & R. 430); *Re Little*, *Harrison* v. *Harrison* (40 Ch. D. 418). In a case since the Conv. Act, 1881, where a father released a power of appointment, in default of the exercise of which his children took equally, he was held absolutely entitled to the share of a deceased child (*Shirley* v. *Fisher*, 47 L. T. 109). In a similar case the release was held valid by the C. A. and the father was held entitled, on surrendering his life interest, to have the child's share transferred to him (*Re Radcliffe*, *Radcliffe* v. *Bewes*, 1892, 1 Ch. 227).

Construction of supplemental or annexed deed.

53.—(1.) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof.

(2.) This section applies to deeds executed either before or after the commencement of this act.

Receipt in deed sufficient.

54.—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2.) This section applies only to deeds executed after the commencement of this act.

Receipt in deed or indorsed, evidence for subsequent purchaser.

55.—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

(2.) This section applies only to deeds executed after the commencement of this act (*y*).

(*y*) A mortgagor who had executed a deed containing a receipt for the full amount named therein could only redeem from a transferee without notice, on payment of the full amount, though a less sum was really due on the mortgage (*Saunders* v. *Kent*, 1885, W. N. 147; see *Bickerton* v. *Walker*, 31 Ch. D. 151; *Gordon* v. *James*, 30 Ch. Div. 249).

Receipt in deed or indorsed, authority for payment to solicitor.

56.—(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this act (*z*).

(*z*) This section, which had been held not to extend to the case of

trustees selling (*Re Bellamy and Metropolitan Board*, 24 Ch. Div. 387), has now been extended to them (Trustee Act, 1888, s. 2). The solicitor producing the deed must be a solicitor acting for the payee (*Day* v. *Woolwich Society*, 40 Ch. Div. 491; see *Gordon* v. *James*, 30 Ch. Div. 256). The fact of a deed being in the office of a solicitor is not equivalent to its production (*Day* v. *Woolwich Society*, *sup.*) 44 & 45 Vict. c. 41, s. 56.

Sufficiency of forms in Fourth Schedule.

57. Deeds in the form of and using the expressions in the forms given in the fourth schedule to this act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this act, be sufficient.

Covenants to bind heirs, &c.

58. (1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

(3.) This section applies only to covenants made after the commencement of this act.

Covenants to extend to heirs, &c.

59. (1.) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

(2.) This section extends to a covenant implied by virtue of this act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this act.

Effect of covenant with two or more jointly.

60. (1.) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

(2.) This section extends to a covenant implied by virtue of this act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant,

44 & 45 Vict. c. 41, s. 60.

contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this act.

Effect of advance on joint account, &c.

61. (1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this act (*a*).

(*a*) The old joint account clause was usually inserted in the case of trustees investing on mortgages, and as between the trustees and a purchaser from them, or the mortgagor, the court refused to go behind the clause (*Re Harman & Uxbridge R. Co.*, 24 Ch. D. 726). As between the mortgagees *inter se*, the court has gone behind the clause, and on the evidence held the mortgagees to be tenants in common (*Re Jackson, Smith* v. *Sibthorpe*, 34 Ch. D. 732).

Grants of easements, &c. by way of use.

62.—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

(2.) This section applies only to conveyances made after the commencement of this act.

Provision for all the estate, &c.

63.—(1.) Every conveyance shall, by virtue of this act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or

which they respectively have power to convey in, to, or on the same. 44 & 45 Vict. c. 41, s. 63.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this act.

64. In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require. Construction of implied covenants.

XIII.—Long Terms.

65.—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided. Enlargement of residue of long term into fee simple.

(2.) Each of the following persons (namely):

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that,

44 & 45 Vict. c. 41, s. 60.

contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this act.

Effect of advance on joint account, &c.

61. (1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this act (*a*).

(*a*) The old joint account clause was usually inserted in the case of trustees investing on mortgages, and as between the trustees and a purchaser from them, or the mortgagor, the court refused to go behind the clause (*Re Harman & Uxbridge R. Co.*, 24 Ch. D. 726). As between the mortgagees *inter se*, the court has gone behind the clause, and on the evidence held the mortgagees to be tenants in common (*Re Jackson, Smith* v. *Sibthorpe*, 34 Ch. D. 732).

Grants of easements, &c. by way of use.

62.—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

(2.) This section applies only to conveyances made after the commencement of this act.

Provision for all the estate, &c.

63.—(1.) Every conveyance shall, by virtue of this act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or

which they respectively have power to convey in, to, or on the same. 44 & 45 Vict. c. 41, s. 63.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this act.

64. In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require. Construction of implied covenants.

XIII.—Long Terms.

65.—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided. Enlargement of residue of long term into fee simple.

(2.) Each of the following persons (namely):

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that,

44 & 45 Vict. c. 41, s. 65.

from and after the execution of the deed, the term shall be enlarged into a fee simple.

(3.) Thereupon, by virtue of the deed and of this act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure act or award.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this act (*b*).

(*b*) A rent of three shillings has been held to be a rent "having money value" (*Re Smith and Stott* (29 Ch. D. 1009, n.), but not a rent of one silver penny (*Re Chapman and Hobbs*, 29 Ch. D. 1007). As to the terms to which the section applies, see Conv. Act, 1882, s. 11 (*post*, p. 632).

XIV.—Adoption of Act.

Protection of solicitor and trustees adopting act.

66.—(1.) It is hereby declared that the powers given by this act to any person, and the covenants, provisions, stipulations, and words which under this act are to be deemed included or implied in any instrument, or are by this act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connexion with, or applied to, any

such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connexion with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this act would allow of his doing so. 44 & 45 Vict. c. 41, s. 66.

(2.) But nothing in this act shall be taken to imply that the insertion in any such instrument, or the adoption in connexion with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor, they shall also be protected in like manner.

XV.—Miscellaneous.

Regulations respecting notice.

67.—(1.) Any notice required or authorized by this act to be served shall be in writing.

(2.) Any notice required or authorized by this act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3.) Any notice required or authorized by this act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4.) Any notice required or authorized by this act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5.) This section does not apply to notices served in proceedings in the court.

44 & 45 Vict. c. 41, s. 68.

Short title of 5 & 6 Will. 4, c. 62.

68. The act described in Part II. of the first schedule to this act shall, by virtue of this act, have the short title of the Statutory Declarations Act, 1835, and may be cited by that short title in any declaration made for any purpose under or by virtue of that act, or in any other document, or in any act of parliament.

XVI.—Court; Procedure; Orders.

Regulations respecting payments into court and applications.

69.—(1.) All matters within the jurisdiction of the court under this act shall, subject to the acts regulating the court, be assigned to the Chancery Division of the court.

(2.) Payment of money into court shall effectually exonerate therefrom the person making the payment.

(3.) Every application to the court shall, except where it is otherwise expressed, be by summons at chambers (*c*).

(4.) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the court thinks fit.

(7.) The court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

(8.) General rules for purposes of this act shall be deemed rules of court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly.

39 & 40 Vict. c. 59, s. 17.

(9.) The powers of the court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and rules for regulating proceedings in that court shall be from time to time made by the chancellor of the Duchy of Lancaster, with the advice and consent of a judge of the High Court acting in the Chancery Division, and of the vice-chancellor of the County Palatine (*d*).

(10.) General rules, and rules of the Court of Chancery of the County Palatine, under this act may be made at any time after the passing of this act, to take effect on or after the commencement of this act.

(*c*) See *Re Lillwall*, 1882, W. N. 6; 30 W. R. 243.

(*d*) Under 52 & 53 Vict. c. 47, s. 10, the powers of the court may be exercised by the Palatine Court of Durham.

Orders of court conclusive.

70.—(1.) An order of the court under any statutory or other jurisdiction shall not as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority of the court, and purporting

to be in pursuance of the Settled Estates Act, 1877, notwithstanding the exception in section forty of that act, or to be in pursuance of any former act repealed by that act, notwithstanding any exception in such former act. 44 & 45 Vict. c. 41, s. 70. 40 & 41 Vict. c. 18, s. 40.

(3.) This section applies to all orders made before or after the commencement of this act, except any order which has before the commencement of this act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this act pending for having it set aside or determined to be invalid (*e*).

(*e*) An order will be conclusive even where the blot appears on the face of it (*Re Hall Dare*, 21 Ch. D. 41).

XVII.—Repeals.

71.—(1.) The enactments described in Part III. of the second schedule to this act are hereby repealed. Repeal of enactments in Part III. of Second Schedule; restriction on all repeals.

(2.) The repeal by this act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this act; but this provision shall not be construed as qualifying the provision of this act relating to section forty of the Settled Estates Act, 1877, or any former act repealed by that act (*f*).

(*f*) Where a mortgage was made prior to 1882, the mortgagee can still exercise the powers given by 23 & 24 Vict. c. 145 (*Re Solomon and Meagher*, 40 Ch. D. 508).

XVIII.—Ireland.

72.—(1.) In the application of this act to Ireland the foregoing provisions shall be modified as in this section provided. Modifications respecting Ireland.

(2.) The court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that court shall, subject to the acts regulating that court, be assigned to the Chancery Division of that court; but general rules under this act may direct that any of those matters be assigned to the land judges of that Division.

(4.) The proper office of the Supreme Court of Judicature in Ireland shall be substituted for the central office of the Supreme Court of Judicature.

(5.) General rules for purposes of this act for Ireland shall be deemed rules of court within the Supreme Court of Judicature 40 & 41 Vict. c. 57, s. 69.

44 & 45 Vict. c. 41, s. 72.

Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this act, to take effect on or after the commencement of this act.

Death of bare trustee intestate, &c.

37 & 38 Vict. c. 78.

73.—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation.

(2.) This section extends to Ireland only.

SCHEDULES.

THE FIRST SCHEDULE.

Acts affected.

Part I. (*g*).

1 & 2 Vict. c. 110.—An act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.

2 & 3 Vict. c. 11.—An act for the better protection of purchasers against judgments, crown debts, lis pendens, and fiats in bankruptcy.

18 & 19 Vict. c. 15.—An act for the better protection of purchasers against judgments, crown debts, cases of lis pendens, and life annuities or rentcharges.

22 & 23 Vict. c. 35.—An act to further amend the law of property and to relieve trustees.

23 & 24 Vict. c. 38.—An act to further amend the law of property.

23 & 24 Vict. c. 115.—An act to simplify and amend the practice as to the entry of satisfaction on crown debts and on judgments.

27 & 28 Vict. c. 112.—An act to amend the law relating to future judgments, statutes, and recognizances.

28 & 29 Vict. c. 104.—The Crown Suits, &c. Act, 1865.

31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.

Part II. (*h*).

5 & 6 Will. 4, c. 62.—An act to repeal an act of the present session of parliament, intituled "An act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits;" and to make other provisions for the abolition of unnecessary oaths.

(*g*) See Conv. Act, 1882, sect. 2 (1), *post*, p. 627.
(*h*) See Conv. Act, 1881, sect. 68, *ante*, p. 620.

44 & 45 Vict. c. 41.

THE SECOND SCHEDULE.

REPEALS.

A description or citation of a portion of an act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the description or citation.

PART I. (*i*).

22 & 23 Vict. c. 35 ... in part.	An act to further amend the law of property and to relieve trustees ..... Sections four to nine.	in part; namely,—
23 & 24 Vict. c. 126... in part.	The Common Law Procedure Act, 1860 ..... Section two.	in part; namely,—

PART II. (*k*).

15 & 16 Vict. c. 86 ... in part.	An act to amend the practice and course of proceeding in the High Court of Chancery ..... Section forty-eight.	in part; namely,—

PART III. (*l*).

8 & 9 Vict. c. 119 ...	An act to facilitate the conveyance of real property.	
23 & 24 Vict. c. 145... in part.	An act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills..... Parts II. and III. (sections eleven to thirty).	in part; namely,—

(*i*) See sect. 14 (7), *ante*, p. 588. (*l*) See sect. 71 (1), *ante*, p. 621.
(*k*) See sect. 25 (6), *ante*, p. 597.

THE THIRD SCHEDULE.

STATUTORY MORTGAGE.

PART I. (*m*).

Deed of Statutory Mortgage.

THIS INDENTURE made by way of statutory mortgage the day of 1882 between *A.* of [*&c.*] of the one part and *M.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ now paid to *A.* by *M.* of which sum *A.* hereby acknowledges the receipt *A.* as mortgagor and as beneficial owner hereby conveys to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

*** *Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.*

(*m*) See sect. 26 (1), *ante*, p. 598.

44 & 45 Vict. c. 41.

PART II. (*n*).

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *M.* of [*&c.*] of the one part and *T.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *M.* by *T.* being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum *M.* hereby acknowledges the receipt *M.* as mortgagee hereby conveys and transfers to *T.* the benefit of the said mortgage.

In witness &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum *A.* hereby acknowledges the receipt *A.* as mortgagee with the concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said mortgage.

In witness &c.

(C.)

Statutory Transfer and Statutory Mortgage combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WHEREAS the principal sum of £ only remains due in respect of the said mortgage as the mortgage money and no interest is now due and payable thereon AND WHEREAS *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* of which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid * *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [*&c.*] To hold to and to the use of *C.* in fee simple for securing payment on the day of 1882 of† the sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

[*Or, in case of further advance, after* aforesaid *at* * *insert* and also in consideration of the further sum of £ now paid by *C.* to *B.* of which sum *B.* hereby acknowledges the receipt, *and after* of *at* † *insert* the sums of £ and £ making together]

*** *Variations to be made, as required, in case of the deed being made by indorsement or in respect of any other thing.*

(*n*) See sect. 27 (1), *ante*, p. 599.

PART III. (*o*)

44 & 45 Vict. c. 41.

Deed of Statutory Re-conveyance of Mortgage.

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between *C.* of [*&c.*] of the one part and *B.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [*&c.*] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mortgagee hereby conveys to *B.* all the lands and hereditaments now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness &c.

*** *Variations as noted above.*

(*o*) See sect, 29, *ante*, p. 600.

THE FOURTH SCHEDULE (*p*).

SHORT FORMS OF DEEDS.

I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the day of 1882 between *A.* of [*&c.*] of the one part and *B.* of [*&c.*] and *C.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account of which sum *A.* hereby acknowledges the receipt *A.* hereby covenants with *B.* and *C.* to pay to them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to *B.* and *C.* interest thereon at the same rate by equal half-yearly payments on the day of and the day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as beneficial owner hereby conveys to *B.* and *C.* All that [*&c.*] To hold to and to the use of *B.* and *C.* in fee simple subject to the proviso for redemption following (namely) that if *A.* or any person claiming under him shall on the day of 1882 pay to *B.* and *C.* the sum of £ and interest thereon at the rate aforesaid then *B.* and *C.* or the persons claiming under them will at the request and cost of *A.* or the persons claiming under him re-convey the premises to *A.* or the persons claiming under him And *A.* hereby covenants with *B.* as follows [*here add covenant as to fire insurance or other special covenant required*].

In witness, &c.

II.—*Further Charge.*

THIS INDENTURE made the day of 18 between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage dated the day of 18 and made between the same parties for securing the sum of £ and interest at [*four*] per centum per annum on property at [*&c.*] WITNESSETH that in consideration of the further sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account [*add receipt and covenant as in the foregoing mortgage*] and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to *B.* and *C.* of the sum of £ and the interest thereon hereinbefore covenanted to be paid as well as the sum of £ and interest secured by the same indenture.

In witness, &c.

44 & 45 Vict. c. 41.

III.—*Conveyance on Sale.*

THIS INDENTURE made the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] and *C.* of [*&c.*] of the second part and *M.* of [*&c.*] of the third part WHEREAS by an indenture dated [*&c.*] and made between [*&c.*] the lands hereinafter mentioned were conveyed by *A.* to *B.* and *C.* in fee simple by way of mortgage for securing £ and interest and by a supplemental indenture dated [*&c.*] and made between the same parties those lands were charged by *A.* with the payment to *B.* and *C.* of the further sum of £ and interest thereon AND WHEREAS a principal sum of £ remains due under the two before-mentioned indentures but all interest thereon has been paid as *B.* and *C.* hereby acknowledge NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ paid by the direction of *A.* to *B.* and *C.* and of the sum of £ paid to *A.* those two sums making together the total sum of £ paid by *M.* for the purchase of the fee simple of the lands hereinafter mentioned of which sum of £ *B.* and *C.* hereby acknowledge the receipt and of which total sum of £ *A.* hereby acknowledges the payment and receipt in manner before-mentioned *B.* and *C.* as mortgagees and by the direction of *A.* as beneficial owner hereby convey and *A.* as beneficial owner hereby conveys and confirms to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple discharged from all money secured by and from all claims under the before-mentioned indentures [*Add if required*, And *A.* hereby acknowledges the right of *M.* to production of the documents of title mentioned in the Schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof.]

In witness, &c.

[The Schedule above referred to.

To contain list of documents retained by A.]

IV.—*Marriage Settlement.*

THIS INDENTURE made the day of 1882 between *John M.* of [*&c.*] of the first part *Jane S.* of [*&c.*] of the second part and *X.* of [*&c.*] and *Y.* of [*&c.*] of the third part WITNESSETH that in consideration of the intended marriage between *John M.* and *Jane S. John M.* as settlor hereby conveys to *X.* and *Y.* All that [*&c.*] To hold to *X.* and *Y.* in fee simple to the use of *John M.* in fee simple until the marriage and after the marriage to the use of *John M.* during his life without impeachment of waste with remainder after his death to the use that *Jane S.* if she survives him may receive during the rest of her life a yearly jointure rentcharge of £ to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rentcharge to the use of *X.* and *Y.* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of *John M.* and *Jane S.* successively according to seniority in tail male with remainder [*insert here, if thought desirable*, to the use of the same first and other sons successively according to seniority in tail with remainder] to the use of all the daughters of *John M.* and *Jane S.* in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of *John M.* in fee simple [*Insert trusts of term of 500 years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition, and other powers and provisions, if and as desired.*]

In witness, &c.

(*p*) See sect. 57, *ante*, p. 615.

45 & 46 Vict. c. 39, s. 1.

CONVEYANCING ACT, 1882.

45 & 46 VICTORIÆ, CAP. 39.

An Act for further improving the Practice of Conveyancing; and for other purposes. [10th August 1882.]

BE it enacted as follows:

Preliminary.

Short titles; commencement; extent; interpretation.

1.—(1.) This act may be cited as the Conveyancing Act, 1882; and the Conveyancing and Law of Property Act, 1881 (in this act referred to as the Conveyancing Act of 1881) and this act may be cited together as the Conveyancing Acts, 1881, 1882.

44 & 45 Vict. c. 41.

(2.) This act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this act referred to as the commencement of this act.

(3.) This act does not extend to Scotland.

(4.) In this act and in the schedule thereto—

(i.) Property includes real and personal property, and any debt, and any thing in action, and any other right or interest in the nature of property, whether in possession or not;

(ii.) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser;

3 & 4 Will. 4, c. 74.

(iii.) The act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance" is referred to as the Fines and Recoveries Act; and the act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance in Ireland" is referred to as the Fines and Recoveries (Ireland) Act.

4 & 5 Will. 4, c. 92.

Searches.

Official negative and other certificates of searches for

2.—(1.) Where any person requires, for purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to

45 & 46 Vict. c. 39, s. 2.

judgments, crown debts, &c.

be made in that office by any act described in Part I. of the first schedule to the Conveyancing Act of 1881 (*a*), or by any other act, he may deliver in the office a requisition in that behalf, referring to this section.

(2.) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

(3.) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

(4.) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

(5.) General rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the Commissioners of her Majesty's Treasury, the fees to be taken therein; which rules shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made, at any time after the passing of this act, to take effect on or after the commencement of this act (*b*).

39 & 40 Vict. c. 59.
44 & 45 Vict. c. 68.

(6.) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanour.

(7.) Nothing in this section or in any rule made thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such rule had not been enacted or made.

(8.) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

(9.) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

(10.) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

(11.) Nothing in this section applies to deeds inrolled under the Fines and Recoveries Act, or under any other act, or under any statutory rule. 45 & 46 Vict. c. 39, s. 2. 3 & 4 Will. 4, c. 74.

(12.) This section does not extend to Ireland.

(*a*) See *ante*, p. 622.
(*b*) See rules, *post*, p. 635.

Notice.

3.—(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless— Restriction on constructive notice.

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4.) This section applies to purchases made either before or after the commencement of this act; save that, where an action is pending at the commencement of this act, the rights of the parties shall not be affected by this section (*c*).

(*c*) In a case where this section was much discussed, the same solicitor acted for mortgagor and mortgagee. The court refused to impute to the mortgagee notice either of facts known to the mortgagor, or of facts which had come to the knowledge of the solicitor when acting in previous transactions for other mortgagees of the same property (*Re Cousins*, 31 Ch. D. 671). The inquiry which ought reasonably to be made by an intending mortgagee is, to investigate the title: *Gainsborough* v. *Watcombe Co.*, 53 L. T. 116; where a mortgagee was held entitled as a purchaser for value without notice, on the ground that an investigation would have disclosed no flaw.

Leases.

4.—(1.) Where a lease is made under a power contained in a settlement, will, act of parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the Contract for lease not part of title to lease.

45 & 46 Vict. c. 39, s. 4.

purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.

(2.) This section applies to leases made either before or after the commencement of this act (*d*).

(*d*) See V. & P. Act, 1874, sect. 2, rule 1, *ante*, p. 566; Conv. Act, 1881, sect. 13, *ante*, p. 586; S. L. Act, 1881, s. 31 (4), *post*, p. 696.

Separate Trustees.

Appointment of separate sets of trustees.

5.—(1.) On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part.

(2.) This section applies to trusts created either before or after the commencement of this act (*e*).

(*e*) See Conv. Act, 1892, sect. 6, *post*, p. 634; *Savile* v. *Couper* (36 Ch. D. 520); *Re Moss' Trusts* (37 Ch. D. 513); *Re Paine* (28 Ch. D. 725); and the cases quoted *ante*, p. 521. The trusts must be permanently distinct (*Re Hetherington*, 34 Ch. D. 211).

Powers.

Disclaimer of power by trustees.

6.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2.) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this act (*f*).

(*f*) See Conv. Act, 1881, sect. 52, and note, *ante*, p. 613; and as regards release of powers by married women see note, *ante*, p. 296. A renunciation of executorship was held to be a disclaimer of a power of sale (*Re Fisher and Haslett*, 13 L. R. Ir. 546). The power given by the Settled Land Acts cannot be disclaimed (S. L. Act, 1882, s. 50, *post*, p. 705).

[Sect. 7, referring to acknowledgments by married women, is inserted *ante*, p. 306.]

Powers of Attorney.

Effect of power of attorney, for value, made absolutely irrevocable.

8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

45 & 46 Vict. c. 39, s. 8.

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this act.

Effect of power of attorney, for value or not, made irrevocable for fixed time.

9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this act.

Executory Limitations.

Restriction on executory limitations.

10.—(1.) Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

45 & 46 Vict. c. 39, s. 10.

(2.) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this act.

Long Terms.

Amendment of enactment respecting long terms.

11. Section sixty-five of the Conveyancing Act of 1881 (*g*) shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

(i.) Any term liable to be determined by re-entry for condition broken; or

(ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

(*g*) *Ante*, p. 617.

Mortgages.

Reconveyance on mortgage.

12. The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881 (*h*), to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

(*h*) *Ante*, p. 589.

Saving.

Restriction on repeals in this act.

13. The repeal by this act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this act.

55 & 56 Vict. c. 13, s. 1.

CONVEYANCING AND LAW OF PROPERTY ACT, 1892.

55 & 56 VICTORIÆ, CAP. 13.

An Act to amend the Conveyancing and Law of Property Act, 1881. [20th June, 1892.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows:

Preliminary.

Short title and extent. 44 & 45 Vict. c. 41. 45 & 46 Vict. c. 39.

1.—(1.) This act may be cited as the Conveyancing and Law of Property Act, 1892, and the Conveyancing and Law of Property Act, 1881, and the Conveyancing Act, 1882, and this act shall be read together and may be cited together as the Conveyancing Acts, 1881, 1882, and 1892.

(2.) This act does not extend to Scotland.

Leases, Under-leases, Forfeiture.

Costs of waiver, and forfeiture in case of bankruptcy or execution.

2.—(1.) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved, under the provisions of the Conveyancing and Law of Property Act, 1881, or of this act.

(2.) Sub-section six of section fourteen of the Conveyancing and Law of Property Act, 1881 (*a*), is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section six shall cease to be applicable thereto.

(3.) Sub-section two of this section is not to apply to any lease of—

(*a.*) Agricultural or pastoral land:
(*b.*) Mines or minerals:
(*c.*) A house used or intended to be used as a public-house or beershop:
(*d.*) A house let as a dwelling-house, with the use of any

55 & 56 Vict. c. 13, s. 2.

furniture, books, works of art, or other chattels not being in the nature of fixtures:

(*e.*) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

(*a*) *Ante*, p. 588.

No fine to be exacted for licence to assign.

3. In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent.

Power of court to protect under-lessees on forfeiture of superior leases.

4. Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

Extension of definitions of "lease," "under-lease," and "under-lessee."

5. In section fourteen of the Conveyancing and Law of Property Act, 1881, as amended by this act, and in this act, "lease" shall also include an agreement for a lease where the lessee has become entitled to have his lease granted, and "under-lease" shall also include an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted, and in this act "under-lessee" shall include any person deriving title under or from an under-lessee (*b*).

(*b*) See Conv. Act, sect. 14 (3), *ante*, p, 587.

Trustees.

Trustee may be appointed for separate

6. A separate set of trustees or a separate trustee may be appointed under the fifth section of the Conveyancing Act,

1882, of a part only of the trust property, notwithstanding that no new trustees or trustee are to be appointed of other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; and every appointment already made of a separate set of trustees shall be valid notwithstanding that there was no retiring trustee of other parts of the trust property, and that no new trustees were appointed of such other parts thereof (*c*).

55 & 56 Vict. c. 13, s. 6.

parts of property though no new trustee be appointed of other parts.

(*c*) See the cases quoted *ante*, p. 630.

RULES UNDER SECTION 2 OF THE CONVEYANCING ACT, 1882 (*d*).

1. Every requisition for an official search shall state the name and address of the person requiring the search to be made. Every requisition and certificate shall be filed in the office where the search was made.

2. Every person requiring an official search to be made pursuant to section 2 of the Conveyancing Act, 1882, shall deliver to the officer a declaration according to the Forms I. and II. in the Appendix, purporting to be signed by the person requiring the search to be made, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of the said section. The declaration may be made in the requisition, or in a separate document.

3. Requisitions for searches under section 2 of the Conveyancing Act, 1882, shall be in the Forms III. to VI. in the Appendix, and the certificates of the results of such searches shall be in the Forms VII. to X., with such modifications as the circumstances may require.

4. Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name, to a date not more than one calendar month subsequent to the date of the certificate, a requisition in writing in the Form XI. in the Appendix may be left with the proper officer, who shall cause the search to be continued, and the result of the continued search shall be endorsed on the original certificate and upon any office copy thereof which may have been issued, if produced to the officer for that purpose. The endorsement shall be in the Form XII. in the Appendix with such modifications as circumstances require.

5. Every person shall upon payment of the prescribed fee be entitled to have a copy of the whole or any part of any deed or document enrolled in the Enrolment Department of the Central Office.

(*d*) *Ante*, p. 627.

RULE UNDER THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (*e*).

6. An alphabetical index of the names of the grantors of all powers of attorney filed under section 48 of the Conveyancing and Law of Property Act, 1881, shall be prepared and kept by the proper officer, and any person may search the index upon payment of the prescribed fee. No person shall take copies of or extracts from any power of attorney or other document filed under that section and produced for his inspection. All copies or extracts which may be required shall be made by the office.

(*e*) *Ante*, p. 612.

(Signed) SELBORNE, C. NATH. LINDLEY, L.J.
COLERIDGE, L.C.J. H. MANISTY, J.
G. JESSEL, M.R. EDW. FRY, J.

APPENDIX.

Form I.—Declaration by Separate Instrument as to Purposes of Search.

Supreme Court of Judicature. Central Office.

To the Clerk of Enrolments *or* The Registrar of
Royal Courts of Justice, London.

In the matter of A. B. and C. D.

I declare that the search (*or* searches) in the name (*or* names) of required to be made by the requisition for search, dated the is (*or* are) required for the purposes of a sale (*or* mortgage, *or* lease, *or as the case may be*), by A. B. to C. D.

Signature, address, and description.

Dated .

Form II.—Declaration as to Purposes of Search contained in the Requisition.

I declare that the above-mentioned search is required for the purposes of a sale (*or* mortgage, *or* lease, *or as the case may be*), by A. B. to C. D.

Form III.—Requisition for Search in the Enrolment Office, under the Conveyancing Act, 1882, s. 2.

Supreme Court of Judicature. Central Office.

Requisition for Search.

To the Clerk of Enrolments, Royal Courts of Justice, London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for deeds and other documents enrolled during the period from 18 to 18 both inclusive, in the following name (*or* names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search

Dated .

FORM IV.—REQUISITION FOR SEARCH IN THE BILLS OF SALE DEPARTMENT, UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

Requisition for Search.

To the Registrar of Bills of Sale, Royal Courts of Justice, London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for instruments registered or re-registered as bills of sale during the period from 18 to 18 both inclusive in the following name (*or* names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search.

Dated .

FORM V.—REQUISITION FOR SEARCH IN THE REGISTRY OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

Requisition for Search.

To the Registrar of Certificates of Acknowledgments of Deeds by Married Women, Royal Courts of Justice, London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882 search for certificates of Acknowledgments of Deeds by Married Women during the period from 18 to 18 both inclusive, according to the particulars mentioned in the schedule hereto.

THE SCHEDULE.

Surname.	Christian Name or Names of Wife and Husband.	Date of Certificate if the Search relates to a particular Certificate.	Date of Deed, if the Search relates to a particular Deed.	County, Parish, or Place in which the Property is situate, or other description of the Property.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search.

Dated .

Forms.

FORM VI.—REQUISITION FOR SEARCH IN THE REGISTRY OF JUDGMENTS UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

Requisition for Search.

To the Registrar of Judgments, Royal Courts of Justice, London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for judgments, revivals, decrees, orders, rules, and lis pendens, and for judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptances of office for the period from 18 to 18 , both inclusive and for executions for the period from the 29th July 1864 (*or as the case may require*) to the 18 , both inclusive, and for annuities for the period from the 26th April 1855 (*or as the case may require*) to the 18 , both inclusive, in the following name (*or* names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(*Add declaration, Form II.*)

(*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*)

Signature, address, and description of person requiring the search.

Dated .

FORM VII.—CERTIFICATE OF SEARCH BY ENROLMENT DEPARTMENT UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office, Enrolment Department.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Enrolment Office for deeds and other documents in the name (*or* names) of for the period from to , both inclusive, and that no deed or other document has been enrolled in the said office in that name (*or* in any one or more of those names) during the period aforesaid.

or and that except the described in the schedule hereto no deed or document has been enrolled in that name (*or* in any one or more of those names) during the period aforesaid.

THE SCHEDULE.

Dated .

FORM VIII.—CERTIFICATE OF SEARCH BY THE REGISTRAR OF BILLS OF SALE UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature. Central Office, Bills of Sale Department.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Register of Bills of Sale in the name (*or* names) of for the period from 18 to 18 both inclusive, and that no instrument has been registered or re-registered as a bill of sale in that name (*or* in any one or more of those names) during that period.

or, and that except the described in the schedule hereto, no instrument has been registered or re-registered as a bill of sale in that name (*or* in any one or more of those names) during the period aforesaid.

THE SCHEDULE.

Dated .

FORM IX.—CERTIFICATE OF SEARCH BY REGISTRAR OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

Registry of Certificates of Acknowledgments of Deeds by Married Women.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Office of the Registrar of Certificates of Acknowledgments of Deeds by Married Women in the name (*or* names) of for the period from to 18 , both inclusive, for a certificate dated the *or* for certificates of acknowledgment of a deed dated the .

or for certificates of acknowledgments of deeds relating to (*fill in the description of the property from the Requisition*)
and that no such certificate has been filed in that name (*or* in any one or more of those names) during the period aforesaid.

or and that except the certificate (*or* certificates) described in the Schedule hereto, no such certificate has been filed in that name (*or* in any one or more of those names) during the period aforesaid.

Surname.	Christian Names of Wife and Husband.	Date of Certificate.	Date of Deed.	County, Parish, or Place in which Property situated, or other description of the Property.

Dated day of 188 .

Forms.

FORM X.—CERTIFICATE OF SEARCH BY REGISTRAR OF JUDGMENTS UNDER CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

The Registry of Judgments.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Office of the Registrar of Judgments for judgments, revivals, decrees, orders, rules, lis pendens, judgments at the suit of the Crown, Statutes, recognizances, Crown bonds, inquisitions, and acceptances of office, for the period from 18 to 18 , both inclusive, and for executions for the period from 18 to 18 , both inclusive, and for annuities for the period from to 18 , both inclusive, in the name (*or* names) of and that no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name (*or* in any one or more of those names) during the respective periods covered by the aforesaid searches.

or and that except the mentioned in the Schedule hereto, no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, Statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name (*or* in any one or more of those names) during the respective periods covered by the aforesaid search.

THE SCHEDULE.

Dated the day of 188 .

FORM XI.—REQUISITION FOR CONTINUATION OF SEARCH UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature. Central Office.

Requisition for continuation of Search.

To the Clerk of Enrolments *or* The Registrar of
Royal Courts of Justice, London, W.C.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, continue the search for [ ], made pursuant to the requisition dated the day of 18 , in the name (*or* names) of , from the day of to the day of 18 , both inclusive.

Signature, address, and description of person requiring the search.

Dated .

FORM XII.—CERTIFICATE OF RESULT OF CONTINUED SEARCH UNDER THE CONVEYANCING ACT, 1882, s. 2, TO BE ENDORSED ON ORIGINAL CERTIFICATE.

This is to certify that the search (*or* searches) mentioned in the within written certificate has (*or* have) been diligently continued to the day

of , 18 , and that up to and including that date [except the mentioned in the schedule hereto (*these words to be omitted where nothing is found*)], no deed or other document has been enrolled, *or* no instrument has been registered, or re-registered, as a bill of sale, *or* no certificate has been filed, *or* no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution or annuity, has been registered or re-registered in the within-mentioned name (*or* in any one or more of the within-mentioned names).

Dated .

FEES under Sect. 48 *of the Conveyancing and Law of Property Act*, 1881.

	£	s.	d.
On depositing a power of attorney - - - - -	0	2	0
On an application to search for a power of attorney so deposited, and inspecting the same, and the affidavit or other documents deposited therewith, for each hour or part of an hour, not exceeding on one day 10*s*. - - - -	0	2	6
If an office copy is required, and it exceeds 2*s*. 6*d*., the fee for search and inspection is to be allowed.			
Copies of powers of attorney and other documents so deposited presented at the office and stamped or marked as office copies to be charged for as office copies.			

2. The following fees, by the order as to Court Fees dated the 6th August, 1880, directed to be inserted in the schedule to the order as to Court Fees made on the 28th October, 1875, are hereby repealed :—

Searches and Inspections.

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
For an official certificate of the result of a search in one name in any register or index under the custody of the clerk of inrolments, the registrar of bills of sale, the registrar of certificates of acknowledgments of deeds by married women, or the registrar of judgments - - - -	0	5	0	0	5	0
For every additional name, if included in same certificate - - - - - - -	0	2	0	0	2	0
For a duplicate copy of certificate, if not more than three folios - - - - - - -	0	1	0	0	1	0
For every additional folio - - - - -	0	0	6	0	0	6
For a continuation search if made within fourteen days of date of official certificate (the result to be indorsed on such certificate) - - - -	0	1	0	0	1	0

3. Instead of the fees so repealed, the following fees shall henceforth be chargeable in respect of the matters hereinafter mentioned (viz.) :—

Searches and Inspections.

	£	s.	d.
For an official certificate of the result of a search in one name in any register or index under the custody of the clerk of inrolments, the registrar of bills of sale, the registrar of certificates of acknowledgments of deeds by married women, or the registrar of judgments, if not more than five folios - - - - - - - - -	0	5	0

Fees.		£	s.	d.
	For every additional folio - - - - - - - -	0	0	6
	For every additional name, if included in the same certificate - - - - - - - - - -	0	2	0
	For an office copy of the certificate of search, if not more than three folios - - - - - - - -	0	1	0
	For every additional folio - - - - - - - -	0	0	6
	For a continuation search, if made within one calendar month of date of official certificate (the result to be endorsed on such certificate) - - - - - - - -	0	1	0

4. This order shall come into operation on the 1st January 1883.

(Signed) CHARLES C. COTES.
HERBERT J. GLADSTONE.
(Lords of the Treasury.)

(Signed) SELBORNE, C.
COLERIDGE, L.C.J.
G. JESSEL, M.R.
NATH. LINDLEY, L.J.
H. MANISTY, J.
EDW. FRY, J.

SETTLED ESTATES ACT, 1877.

40 & 41 VICTORIÆ, CAP. 18.

An Act to consolidate and amend the Law relating to Leases and Sales of Settled Estates.

[28th June, 1877.]

WHEREAS it is expedient to consolidate and amend the law relating to leases and sales of settled estates: 40 & 41 Vict. c. 18, s. 1.

Be it enacted as follows:

1. This act may be cited for all purposes as "The Settled Estates Act, 1877" (*a*). Short title.

(*a*) This act is a re-enactment with amendments of the Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), and the four amending acts (21 & 22 Vict. c. 77; 27 & 28 Vict. c. 45; 37 & 38 Vict. c. 33; and 39 & 40 Vict. c. 30), all which are repealed by this act. Such of the cases decided under the last-mentioned acts as are applicable to the present act are given in the notes.

2. The word "settlement" as used in this act shall signify any act of parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively (*b*). Interpretation of "settlement" and "settled estates."

The term "settled estates" as used in this act shall signify all hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement (*c*); and for the purposes of this act a tenant-in-tail after possibility of issue extinct shall be deemed to be a tenant for life.

All estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement.

In determining what are settled estates within the meaning of this act, the court shall be governed by the state of facts, and by the trusts or limitations of the settlement at the time of the said settlement taking effect.

(*b*) This section re-enacts the provisions of 19 & 20 Vict. c. 120, s. 1; 21 & 22 Vict. c. 77, s. 1; and 27 & 28 Vict. c. 45, s. 3.

A will and a sub-settlement were held together to constitute a "settlement" (*Re Dendy*, 4 Ch. D. 879).

40 & 41 Vict. c. 18, s. 2.

Accruer was held succession within the Act of 1856 (*Re Goodwin*, 3 Giff. 620; see, however, *Re Bardin*, 7 W. R. 711; 5 Jur. N. S. 1378).

Cases under old act.

(c) The following were held to be settled estates within the Act of 1856:—Land limited to a person for life with remainder subject to a power of appointment to his heir (*Beioley* v. *Carter*, 4 Ch. 230); land devised in trust for several in fee, subject to the payment of one moiety of the income to B. for life (*Re Shepheard*, 8 Eq. 571); land devised in trust for A. on a contingency, with a gift over in default (*Re Horne*, 29 L. T. 830; see *Re Bardin*, 7 W. R. 711; and as to an estate in fee with an executory devise over, the construction being doubtful, see *Re Williams* 20 W. R. 967); land limited on trust for A. for life, and on her death on trust for sale (*Re Morgan*, 9 Eq. 578; *Carlyon* v. *Truscott*, 20 Eq. 348); land devised in trust for sale, the proceeds to go in succession (*Re Laing*, 1 Eq. 416; *Re Greene*, 10 Jur. N. S. 1098; *Collett* v. *Collett*, 2 Eq. 203; *Re Chamberlain*, 23 W. R. 852; *Re Morgan*, 49 L. J. Ch. 577; *Dixie* v. *Dixie*, 1881, W. N. 49). Where an undivided share of an estate was settled it was held that the whole must be considered a settled estate (*Re Shepheard*, 8 Eq. 571; see *Re Goodwin*, 3 Giff. 620). As to copyholds, see *Re Adair* (16 Eq. 124).

Cases under the sect.

Under sect. 41 of the Conv. Act, 1881 (*ante*, p. 606), land vested in an infant in fee or for a leasehold interest at a rent is a settled estate within this act. Land was held a settled estate under this section, where the interest of the infant was determinable on death under twenty-one (*Liddell* v. *Liddell*, 31 W. R. 238; see *Re Sparrow*, 1892, 1 Ch. 412).

Interpretation of "the court."

3. The expression "the court" in this act shall, so far as relates to estates in England, mean the High Court of Justice, and all causes and matters in respect of such estates commenced or continued under this act shall, subject to the provisions of the Judicature Acts, be assigned to the Chancery Division of the High Court of Justice in like manner as if such causes and matters had arisen under an act of parliament by which, prior to the passing of the Judicature Acts, exclusive jurisdiction in respect to such causes and matters had been given to the Court of Chancery, or to any judges or judge thereof respectively.

The expression "the court" in this act shall, so far as relates to estates in Ireland, means the Court of Chancery in Ireland.

Power to authorize leases of settled estates.

4. It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, to authorize leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed (*d*):

First. Every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease, so far as relates to estates in England twenty-one years, or so far as relates to estates in Ireland thirty-five years, and for a mining lease or a lease of water mills, way leaves, water leaves, or other rights or easements forty years, and for a repairing lease sixty years, and for a building lease ninety-nine years: Provided always, that any such lease (except an agricultural lease) may be for such term of years as the court shall direct,

where the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such a lease for a longer term than the term hereinbefore specified in that behalf (*e*): 40 & 41 Vict. c. 18, s. 4.

Secondly. On every such lease shall be reserved the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine: Provided always, that in the case of a mining lease, a repairing lease, or a building lease a peppercorn rent or any smaller rent than the rent to be ultimately made payable may, if the Court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease (*f*):

Thirdly. Where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned, namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate or by virtue of any declaration in the settlement is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise as the court shall deem expedient (*g*):

Fourthly. No such lease shall authorize the felling of any trees except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorized by the lease:

Fifthly. Every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf.

(*d*) This section substantially re-enacts 19 & 20 Vict. c. 120, s. 2, and 21 & 22 Vict. c. 77, ss. 2 and 4. By this section, however, the term for Irish agricultural leases is extended from twenty-one to thirty-five years, and leases at a small rent for the first five years are allowed.

This section does not give a general power, which must be exercise-able at the instance of some one, but a modified power, subject to the restrictions of the act as to who can petition, &c. (*Taylor* v. *Taylor*, 1 Ch. D. 432). It requires the court to have regard to the interests of all parties (*Vine* v. *Raleigh*, 24 Ch. D. 241).

(*e*) On a surrender and new grant under sect. 7 (*post*, p. 646), an unexpired underlease does not prevent the new lease taking "effect in possession" (*Re Ford*, 8 Eq. 309). A lease with a covenant to grant a new lease at the end of the term will not be sanctioned (*Re Farnell*, 33 Ch. D. 599). A mining lease may include any land necessary for working the minerals (*Re Revely*, 11 W. R. 744; *Re Wallace*, 1869, W. N. 66). Building leases have been authorized for 600 years (*Re Cross*, 27 Beav. 592); or for 999 years (*Re Carr*, 9 W. R. 776).

(*f*) In estimating the "best rent," the value of a surrendered lease

40 & 41 Vict. c. 18, s. 4.

may be taken into account (*Re Rawlins*, 1 Eq. 286). Where a building agreement provided that part of the land was to be let at a peppercorn rent, the court considered that this act could not safely be resorted to for granting the leases (*Cust* v. *Middleton*, 3 D. F. & J. 33).

(*g*) On the separate devolution of the surface and the minerals, the rent set aside will pass with the surface (*Re Scarth*, 10 Ch. D. 499).

Leases of infants' land.

Leases of infants' land may be granted (1) under this act (see sect. 41 of the Conv. Act, 1881, *ante*, p. 606); or (2) under S. L. Act, 1882, ss. 59, 60, *post*, p. 711; or (3) under 1 Will. 4, c. 65; as to which, see Seton, 742, 4th ed.; *Re Letchford* (2 Ch. D. 719); *Re Griffiths* (29 Ch. D. 248); R. S. C. Ord. 55, r. 2 (9).

Form of order.

For forms of orders under this section, see Seton, 1485 *et seq.*, 4th ed. And see *Re Boyd* (I. R. 8 Eq. 56), for form of order sanctioning mining lease of infant's land.

Compare with the provisions of sections 4—15 of the present act, the powers of a tenant for life under sections 6—17 of the S. L. Act, 1882, *post*, p. 680 *et seq.*

Leases may contain special covenants.

5. Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions, and stipulations as the court shall deem expedient with reference to the special circumstances of the demise (*h*).

(*h*) The court will not under this section sanction a covenant in a lease to grant a new lease at the end of the term (*Re Farnell*, 33 Ch. D. 599). See the S. E. Act Orders, No. 25 (*post*, p. 668), and Seton, 1491, 1492, 4th ed.

Parts of settled estates may be leased.

6. The power to authorize leases conferred by this act shall extend to authorize leases either of the whole or any parts of the settled estates, and may be exercised from time to time.

Leases may be surrendered and renewed.

7. Any leases, whether granted in pursuance of this act or otherwise, may be surrendered either for the purpose of obtaining a renewal of the same or not, and the power to authorize leases conferred by this act shall extend to authorize new leases of the whole or any part of the hereditaments comprised in any surrendered lease (*i*).

(*i*) This section is a substantial re-enactment of the provisions of 19 & 20 Vict. c. 120, s. 5, and 21 & 22 Vict. c. 77, s. 5. See *Re Ford* (8 Eq. 309); *Re Rawlins* (1 Eq. 286).

For forms of order, see Seton, 1492, 4th ed.

Power to authorize leases to extend to preliminary contracts.

8. The power to authorize leases conferred by this act shall extend to authorize preliminary contracts to grant any such leases, and any of the terms of such contracts may be varied in the leases.

Powers of leasing to include powers to lords of settled manors to give licences to their copyhold or customary tenants to grant leases.

9. All the powers to authorize and to grant leases contained in this act shall be deemed to include respectively powers to authorize the lords of settled manors and powers to the lords of settled manors to give licences to their copyhold or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorized or granted of freehold hereditaments under this act.

Mode in which leases

10. The power to authorize leases conferred by this act may be exercised by the court either by approving of particular leases or by ordering that powers of leasing, in conformity with the

provisions of this act, shall be vested in trustees in manner hereinafter mentioned. 40 & 41 Vict. c. 18, s. 10.

11. When application is made to the court either to approve of a particular lease or to vest any powers of leasing in trustees, the court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorized. may be authorized. What evidence to be produced on an application to authorize leases.

12. When a particular lease or contract for a lease has been approved by the court, the court shall direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the court shall direct (*k*). After approval of a lease, court to direct who shall be the lessor.

(*k*) Under this section the court has directed the tenant for life to execute the lease (*Re Farnell*, 33 Ch. D. 599).
For form of order, see Seton, 1491, 4th ed.

13. Where the court shall deem it expedient that any general powers of leasing any settled estates conformably to this act should be vested in trustees, it may by order vest any such power accordingly either in the existing trustees of the settlement or in any other persons, and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the court shall direct; and in every such case the court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the court may also authorize the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid (*l*). Powers of leasing may be vested in trustees.

(*l*) This section is a re-enactment in similar terms of 19 & 20 Vict. c. 120, s. 10, the decisions under which are accordingly applicable to the present section.

It has been said that it is intended that the persons in whom the court vests leasing powers shall be the persons making the application (*Vine* v. *Raleigh*, 24 Ch. D. 241). General powers have been vested to grant the following leases: building leases, for 600 years (*Re Cross*, 27 Beav. 592), or for 999 years (*Re Hoyle*, 12 W. R. 1124; *Re Elliott*, 1879, W. N. 135); mining leases (*Re Dorning*, 14 W. R. 125; *Folson* v. *Sheard*, 5 Ch. Div. 19; *Re Green*, 10 Jur. N. S. 1098), together with way-leaves (*Re Wallace*, 1869, W. N. 66); leases in accordance with a model settled in chambers (*Re Hemingway*, 7 W. R. 279, see *Re Chambers*, 28 Beav. 653; *A. G.* v. *Christchurch*, 3 Giff. 514; *Re Jersey*, 9 W. R. 609). A general power was refused where some of the remaindermen opposed (*Re Hutchinson*, 14 W. R. 473).

40 & 41 Vict. c. 18, s. 13.

Where a power of leasing in the settlement was subject to a consent, the court refused to vest a power under this section except subject to the same consent (*Re Hurle*, 2 H. & M. 196). General powers vested under this section in two sets of trustees over two different properties will not authorize a joint mining lease at a single undivided rent (*Folson* v. *Sheard*, 5 Ch. Div. 19). Where an order has been made under this section, proceedings under it must be stayed before leases can be granted under the S. L. Act, 1882 (*Re Poole*, 50 L. T. 585).

For form of order, see Seton, 1487, 1490, 4th ed.

Conditions that leases be settled by the court not to be inserted in orders made under this act.

14. Provided always, that in orders under this act for vesting any powers of leasing in any trustees or other persons, no conditions shall be inserted requiring that the leases thereby authorized should be submitted to or be settled by the court or a judge thereof or be made conformable with a model lease deposited in the judge's chambers, save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the court that there is some special reason rendering the insertion of such a condition necessary or expedient (*m*).

(*m*) For a case where the lease was ordered to be settled in chambers, see *Re Farnell* (33 Ch. D. 599). See also the cases quoted under sect. 13 (*ante*).

Conditions where inserted, may be struck out.

15. Provided also, that in all cases of orders (whether under this act or under the corresponding enactment of the acts hereby repealed) in which any such condition as last aforesaid shall have been inserted, it shall be lawful for any party interested to apply to the court to alter and amend such order by striking out such condition, and the court shall have full power to alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state; but nothing herein contained shall make it obligatory on the court to act under this provision in any case in which from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the court that there is any special reason why in the case in question such a condition is necessary or expedient (*n*).

(*n*) This section corresponds to 27 & 28 Vict. c. 45, s. 2 (See *Re Hoyle*, 12 W. R. 1124; *Re Dorning*, 14 W. R. 125; *Re Russell*, 22 W. R. 399; *Re Riley*, 30 W. R. 78).

For form of order, see Seton, 1492, 4th ed.

Court may authorize sales of settled estates and of timber.

16. It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, from time to time to authorize a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates, and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the court for

the time being is or shall be required in the sale of lands sold under a decree of the court (*o*). 40 & 41 Vict. c. 18, s. 16.

(*o*) This section is a substantial re-enactment of 19 & 20 Vict. c. 120, s. 11, the decisions under which appear to be applicable.

The existence of a power of sale in the settlement will not prevent an order authorizing a sale under this section (Sect. 38, *post*, p. 658; *Re Thompson*, Johns. 418); but in such case a sale will only be authorized subject to any consents limiting the power (*Re Hurle*, 2 H. & M. 196). A sale has been authorized under this section notwithstanding the opposition of a contingent remainderman (*Re Spurway*, 10 Ch. D. 230; see further as to consents of persons interested, sects. 24—29, *post*, p. 652, and notes). The court refused to authorize a sale to the tenant for life without inquiry (*Re Hilton*, 1866, W. N. 107), or to give trustees a general power of sale (*Re Peacock*, 15 W. R. 100; see *Re Elliott*, 1879, W. N. 135); but where the settlement gave a general power after the death of a tenant for life, a general power was given by the court during his life (*Re Andrews*, 38 L. T. 877; 26 W. R. 811). A sale may be ordered with an indefeasible title (25 & 26 Vict. c. 53, s. 49). The minerals under the land may be excepted from a sale (Sect. 19, *post*), or the minerals may be sold apart from the surface (*Re Mallin*, 9 W. R. 588; *Re Gray*, 1875, W. N. 106; *Re Law*, 7 Jur. N. S. 511). And in the latter case wayleaves may be granted, and a rent reserved in respect of surface damage (*Re Milward*, 6 Eq. 248). Where part of the property sold was copyhold, it was ordered to be enfranchised, and the whole sold as freehold (*Re Adair*, 16 Eq. 124). Property not subject to settlement should not be included in an order under this section (*Re Thompson*, Johns. 418); but may be if the owner consents (*Grey* v. *Jenkins*, 26 Beav. 356; see *Re Spurway*, 10 Ch. D. 230; *Re Goodwin*, 3 Giff. 620). As to the effect of an order for sale dealing with such property, see note to sect. 40 (*post*, p. 658); *Re Shepheard* (8 Eq. 571). The consideration for a sale of leaseholds under this section may be a rent-charge during the remainder of the term sold (*Re Grove*, 1888, W. N. 47). And under sect. 18 (*post*), the consideration for a building sale may be a fee farm rent (See *Re Carr*, 9 W. R. 776). In *Re Eyre* (4 K. & J. 268), it was said that the conveyance must be settled by the judge whether the parties differed or not; but in a later case this was only required when the parties differed (*Re Sheffield*, 1876, W. N. 152). As to a sale out of court, see R. S. C. Ord. 51, r. 1 a; the note to sect. 9 of the Partition Act, 1868 (*post*, p. 744); and the note *ante*, p. 598. It seems that an order under this section will prevent a sale under the S. L. Act, 1882, until the proceedings are stayed (*Re Barrs-Haden*, 49 L. T. 645; 32 W. R. 194; see *Re Poole*, 50 L. T. 585).

For forms of orders, see Seton, 1496—1501, 4th ed. The order for sale may be varied by inserting the name of a new trustee (*Scott* v. *Heisch*, 1875, W. N. 211).

Compare with the provisions of sects. 16—22 of the present act, the powers of a tenant for life under sects. 3, 4, 16 and 17 of the S. L. Act, 1882, *post*, p. 677 *et seq.*

[*Sect.* 17 *is now repealed by sect.* 64 *of the S. L. Act*, 1882, *but somewhat similar provisions are contained in sect.* 36 *of the S. L. Act*, 1882, *post*, *p.* 697, *where see note.*]

18. When any land is sold for building purposes it shall be lawful for the court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the court shall approve (*p*). Consideration for land sold for building may be a fee-farm rent.

(*p*) A grant at a fee-farm rent was authorized (*Re Carr*, 9 W. R. 776), but a general power to trustees to make such grants was refused (*Re Elliott*, 1879, W. N. 135).

40 & 41 Vict. c. 18, s. 19.

Minerals, &c. may be excepted from sales.

19. On any sale of land, any earth, coal, stone, or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants or submit to any restrictions which the court may deem advisable (*q*).

(*q*) For form of order excepting minerals, see Seton, 1498, 4th ed. And see the special covenant into which a purchaser was required to enter (*Re Mallin*, 9 W. R. 588).

Court may authorize dedication of any part of settled estates for streets, roads, and other works.

20. It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not; and the court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the court shall be deemed advisable (*r*).

(*r*) This section is a substantial re-enactment of 19 & 20 Vict. c. 120, s. 14, the decisions under which appear to be applicable.

The object of this and the following section is the development of land as a building estate, and the court cannot sanction drainage for agricultural purposes (*Re Poynder*, *Dickson-Poynder* v. *Cook*, 45 L. T. 403). The court will not direct roads to be made except where they are beneficial to the property in its actual state, or will be in a state immediately contemplated (*Re Hurle*, 2 H. & M. 196). The court has authorized leases on the terms of the lessees making roads (*Re Chambers*, 28 Beav. 653). The court will not require plans to be laid before it in every case (*Re Hargreaves*, 15 W. R. 54).

For forms of orders, see Seton, 1506—1508, 4th ed.

As to laying out and making and executing and maintaining streets, roads, and other works, and expenses thereof.

21. Where any part of any settled estates is directed to be laid out for such purposes as aforesaid, the court may direct that any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, including all necessary or proper fences, pavings, connexions, and other works incidental thereto respectively, be made and executed, and that all or any part of the expenses in relation to such laying out and making and execution be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estates, or be raised and paid out of the rents and profits of the settled estates or any part thereof, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income; and the court may also give such directions as it may deem advisable for any repair or maintenance of any such streets, roads, paths, squares, gardens,

or other open spaces, sewers, drains, or watercourses, or other works, out of any such rents, profits, income, or accumulations during such period or periods of time as to the court shall seem advisable.

40 & 41 Vict. c. 18, s. 21.

22. On every sale or dedication to be effected as hereinbefore mentioned the court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the court shall direct (*s*).

How sales and dedications are to be effected under the direction of the court.

(*s*) The wording of this section corresponds with 19 & 20 Vict. c. 120, s. 15, the decisions under which appear to be applicable.

Where land was sold and a person appointed to convey, the legal estate, which was outstanding in mortgagees who were bound by the order, passed by the conveyance (*Eyre* v. *Saunders*, 28 L. J. Ch. 439). Where the land was vested in eleven persons, the court refused to order one to convey for all (*Re Hole*, 1868, W. N. 70). Where one of two trustees directed to convey died before completion, a new trustee was appointed and the order varied (*Scott* v. *Heisch*, 33 L. T. 498). The effect of a conveyance under this section being the same as a revocation of the uses of the settlement, the land is freed from succession duty (*Re Warner*, 17 Ch. D. 711).

For form of order, see Seton, 1497, 1498, 1506, 4th ed.

23. Any person entitled to the possession or to the receipts of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life or any greater estate, and also any person entitled to the possession or to the receipt of the rents and profits of any settled estates as the assignee of any person who but for such assignment would be entitled to such estates for a term of years determinable with any life, or for an estate for any life or any greater estate, may apply to the court by petition in a summary way to exercise the powers conferred by this act (*t*).

Application by petition to exercise powers conferred by this act.

(*t*) This section corresponds with 19 & 20 Vict. c. 120, s. 16, with the addition, however, of the words relating to an assignee. The decisions under the latter section appear to be applicable.

The following have been held proper persons to petition. A widow and her children, where she was entitled during widowhood with remainder to her children (*Williams* v. *Williams*, 9 W. R. 888); trustees where there was no equitable tenant for life (*Vine* v. *Raleigh*, 24 Ch. D. 238; see *Re Smith*, 1878, W. N. 196), but not in such a case a receiver (24 Ch. D. 243). *Jessel*, M.R., considered that the words of the section did not apply to a tenant for life whose life estate was subject to a power of management in others (*Taylor* v. *Taylor*, 1 Ch. D. 432; 20 Eq. 302; but see 3 Ch. Div. 147). Orders have been made on the petition of a tenant for life and the trustees of prior terms (*Ex p. Puxley*, I. R. 2 Eq. 237; *Re Harris*, 42 L. T. 583; and see *Re Smith*, 1878, W. N. 196; *Re Williams*, 20 W. R. 967). Where one share was settled after the petition had been presented, the trustees of the settled share were joined as co-petitioners (*Re Wilkinson*, 21 W. R. 537). It was said by *Jessel*, M.R., that no person other than those described can petition (*Taylor* v. *Taylor*, 1 Ch. D. 431; but see *Re Harris*, *sup.*) It seems that a petition is necessary although an action is

40 & 41 Vict. c. 18, s. 23.

pending (*Harvey* v. *Clark*, 25 Beav. 7). The assignee of a tenant for life can petition under this act for a sale (*Re Ebsworth and Tidy*, 42 Ch. Div. 23). He could not sell under the S. L. Act, 1882; see s. 50. *post*, p. 705).

As to the title, &c., of the petition, see S. E. Act Orders (*post*, p. 665); *Re Burnley* (23 W. R. 546). See the rules adopted by the Practice Masters stated in the Annual Practice. See also as to petitions, R. S. C. Ord. 52, rr. 16, 17.

With whose consent such application to be made.

24. Subject to the exceptions hereinafter contained, every application to the court must be made with the concurrence or consent of the following parties; namely,

Where there is a tenant-in-tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant-in-tail, or if there is more than one such tenant-in-tail, then the first of such tenants-in-tail and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant-in-tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant-in-tail:

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child (*u*).

(*u*) The reference to exceptions ("the exceptions hereinafter contained") in the present section is wider than the similar reference in 19 & 20 Vict. c. 120, s. 17; but except in this respect the wording of the two sections is identical. The following cases were decided on the older section. It did not apply to petitions dealing with purchase-money (*Re Cleveland*, 1 Dr. & Sm. 481; *Re Sexton Barnes*, 10 W. R. 416). The concurrence was held necessary, of remaindermen (*Re Merry*, 15 W. R. 307); of persons interested in a term for raising portions (*Re Boughton*, 12 W. R. 34), or in the proceeds of a trust for sale after the death of the tenant for life (*Re Ives*, *Bailey* v. *Holmes*, 3 Ch. D. 690), or interested contingently under a subsettlement (*Re Dendy*, 4 Ch. D. 879). Trustees could only concur on behalf of unborn persons (*Grey* v. *Jenkins*, 26 Beav. 351; *Eyre* v. *Saunders*, 4 Jur. N. S. 830), not living *cestuis que trusts* (*Re Boughton*; *Re Ives*; *Re Dendy*, *sup.*)

Court may dispense with consent in respect of certain estates.

25. Provided always, that where an infant is tenant-in-tail under the settlement, it shall be lawful for the court, if it shall think fit, to dispense with the concurrence or consent of the person, if only one, or all or any of the persons, if more than one, entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant (*v*).

(*v*) See *Camden* v. *Murray* (27 S. J. 652).

Notice to be given to persons who do not consent to or concur in the application.

26. Provided always, that where on an application under this act the concurrence or consent of any such person as aforesaid shall not have been obtained, notice shall be given to such person in such manner as the court to which the application shall be made shall direct, requiring him to notify within a time to be

specified in such notice whether he assents to or dissents from such application, or submits his rights or interests so far as they may be affected by such application to be dealt with by the court, and every such notice shall specify to whom and in what manner such notification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice and within the time thereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the court (*w*). 40 & 41 Vict. c. 18, s. 26.

(*w*) This section corresponds in substance with 37 & 38 Vict. c. 33, s. 2. As to the mode of giving notices required by this section, see S. E. Act, Ords. Nos. 4—9, 11, 12, and 22, *post*, p. 665, *et seq.* The court has ordered notice to be given to a person of unsound mind (*Re Crabtree*, 10 Ch. 201); to a married woman resident out of the jurisdiction (*Re Rylar*, 24 W. R. 949); to an infirm person (*Re Slark*, 1875, W. N. 224); to persons who might be included in a class determinable at a future date (*Re Chamberlain*, 23 W. R. 852); and to infants contingently entitled (*Re Dendy*, 4 Ch. D. 879). Notification in writing of submission to the court by a married woman is sufficient without separate examination (*Re Stanley*, 1889, W. N. 164).

Notice as well as consent may now be dispensed with under sect. 27 of the present act. It has been dispensed with in the case of a child *en ventre sa mère* (*Re Rayner*, 1891, W. N. 152), and annuitants whose security was increased (*Re Harris*, 42 L. T. 583), and was not required to persons subsequent to an infant tenant in tail (*Ib.*) Before the present act it was dispensed with in the case of infants contingently entitled (*Re Chamberlain*, 23 W. R. 852); persons of unsound mind remotely interested (*Re Franklin*, 7 W. R. 45; *Re Turbutt*, 2 N. R. 158). Leave to effect service out of the jurisdiction of proceedings under the act was refused in *Re Mewburn* (22 W. R. 752), but granted in *Re Rylar* (24 W. R. 949). See S. E. Act, Ord. No. 4, *post*, p. 665; *Re Busfield* (32 Ch. Div. 132).

For form of order, see Seton, 1474, 1475, 4th ed.

27. Provided also, that where on an application under this act the concurrence or consent of any such person as aforesaid shall not have been obtained, and in case such person cannot be found, or in case it shall be uncertain whether he be living or dead, or in case it shall appear to the court that such notice as aforesaid cannot be given to such person without expense disproportionate to the value of the subject-matter of the application, then and in any such case the court, if it shall think fit, either on the ground of the rights or interests of such person being small or remote, or being similar to the rights or interests of any other person or persons, or on any other ground, may by order dispense with notice to such person, and such person shall thereupon be deemed to have submitted his rights and interests to be dealt with by the court (*x*). Court may dispense with notice under certain circumstances.

(*x*) See note to sect. 26 (*ante*).

28. An order may be made upon any application notwithstanding that the concurrence or consent of any such person as aforesaid shall not have been obtained or shall have been refused, but the court in considering the application shall have regard to Court may dispense with consent, having regard to the

40 & 41 Vict. c. 18, s. 28.

number and interests of parties.

the number of persons who concur in or consent to the application, and who dissent therefrom, or who submit or are to be deemed to submit their rights or interests to be dealt with by the court, and to the estates or interests which such persons respectively have or claim to have in the estate as to which such application is made; and every order of the court made upon such application shall have the same effect as if all such persons had been consenting parties thereto (*y*).

(*y*) This section corresponds with 37 & 38 Vict. c. 33, s. 3.

The court will not dispense with the consent of persons equal in number and nearly equal in interest to the applicants (*Taylor* v. *Taylor*, 1 Ch. D. 433; 3 Ch. Div. 145). The consents of the following persons have been dispensed with: a remainderman whose estate was contingent on the death of four children without issue (*Re Spurway*, 10 Ch. D. 230; see *Re Hooke*, 1875, W. N. 29); a married woman having a small share (*Re Cundee*, 37 L. T. 271; *Re Thorp*, 1876, W. N. 251; see *Re Rylar*, 24 W. R. 949); a married woman having a contingent interest represented by trustees (*Re Kilmorey*, 26 W. R. 54); an infant remainderman born since the presentation of the petition (*Re Lewis*, 24 W. R. 103); a person too infirm to concur in writing (*Re Slark*, 1875, W. N. 224); and also (in cases decided before 37 & 38 Vict. c. 33) persons only remotely interested (*Re Cholmondely*, 1866, W. N. 388); tenants for life in remainder (*Re Hutchinson*, 14 W. R. 473); and persons who could not be presently ascertained (*Beioley* v. *Carter*, 4 Ch. 230; *Re Strutt*, 16 Eq. 629).

For form of order, see Seton, 4th ed. 1475, 1486.

Petition may be granted without consent, saving rights of non-consenting parties.

29. Provided nevertheless, that it shall be lawful for the court, if it shall think fit, to give effect to any petition subject to and so as not to affect the rights, estate, or interest of any person whose concurrence or consent has been refused, or who has not submitted or is not deemed to have submitted his rights or interests to be dealt with by the court, or whose rights, estate, or interest ought in the opinion of the court to be excepted (*z*).

(*z*) This section corresponds to 19 & 20 Vict. c. 120, s. 18, but is considerably wider. Under that section the rights of legatees having charges on the estate have been left unaffected (*Re Legge*, 6 W. R. 20; *Re Parry*, 34 Beav. 462).

For form of order, see Seton, 1488, 1489, 1499, 4th ed..

Notice of application to be served on all trustees, &c.

30. Notice of any application to the court under this act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who in the opinion of the court ought to be so served, unless the court shall think fit to dispense with such notice (*a*).

(*a*) The wording of this section corresponds with 19 & 20 Vict. c. 120, s. 19. See as to notice, the note to sect. 26 (*ante*, p. 653).

As to notices under this section, see S. E. Act Orders, Nos. 16, 18, 22 (*post*, p. 667, 668). For form of order, see Seton, 1487, 4th ed.

Notice of application to be given

31. Notice of any application to the court under this act shall, if the court shall so direct, but not otherwise, be inserted

in such newspapers as the court shall direct, and any person or body corporate, whether interested in the estate or not, may apply to the court by motion for leave to be heard in opposition to or in support of any application which may be made to the court under this act; and the court is hereby authorized to permit such person or corporation to appear and be heard in opposition to or support of any such application, on such terms as to costs or otherwise, and in such manner, as it shall think (*b*).

40 & 41 Vict. c. 18, s. 31.

in newspapers if court direct.

(*b*) The wording of this section corresponds with 19 & 20 Vict. c. 120, s. 20, the following words, however, being added: "if the court shall so direct, but not otherwise." It has been said that the court will only so direct in exceptional cases (*Re Chilcott*, 1877, W. N. 259; see S. E. Act Orders Nos. 18—21, *post*, p. 667, Form 13, *post*, p. 674; Seton, 1476, 1486, 4th ed.)

The following cases were decided under the former act. Substantial agreement between the petition and the advertisements is sufficient (*Re Whiteley*, 8 Eq. 574; *Re Bicknell*, 14 Eq. 467; *Re Snell*, 19 W. R. 1000); especially where all parties are before the court (*Re Hemsley*, 16 Eq. 315). Where the petition is amended, the court did not necessarily direct fresh advertisements to be issued unless the amendment involved new facts and new parties (*Re Bunbury*, 13 W. R. 370; *Ex parte Puxley*, I. R. 2 Eq. 237). As to dispensing with the repetition of advertisements, see further *Re Horton* (34 Beav. 386); *Re Corbet* (1866, W. N. 318); *Re Wilkinson* (9 Eq. 71); *Re Marshall* (15 Eq. 66); *Re Wilkinson* (21 W. R. 537); *Re Kentish Town Estate* (1 J. & H. 230); *Wheeler* v. *Tootel* (16 W. R. 273).

32. The court shall not be at liberty to grant any application under this act in any case where the applicant, or any party entitled, has previously applied to either House of Parliament for a private act to effect the same or a similar object, and such application has been rejected on its merits, or reported against by the judges to whom the bill may have been referred (*c*).

No application under this act to be granted where a similar application has been rejected by Parliament.

(*c*) See S. E. Act Orders, No. 17 (*post*, p. 667). A rejection by either House will be presumed to have been on the merits if the contrary is not shown (*Re Wilson*, 1 L. T. 25).

33. The court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by this act shall be placed on the settlement or on any copies thereof, or otherwise recorded in any way it may think proper, in all cases where it shall appear to the court to be practicable and expedient for preventing fraud or mistake (*d*).

Notice of the exercise of powers to be given as directed by the court.

(*d*) See S. E. Act Orders, No. 23 (*post*, p. 668); *Re Cross* (27 B. 292); *Re Burnley* (1868, W. N. 148).

For form of order, see Seton, 1488, 4th ed.

34. All money to be received on any sale effected under the authority of this act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same, so far as relates to estates in England, shall be paid into court ex parte the applicant in the matter of this act, and so far as relates to estates in Ireland, shall be paid into the Bank of Ireland to the

Payment and application of moneys arising from sales or set aside out of rent, &c. reserved on mining leases.

40 & 41 Vict. c. 18, s. 24.

account of the Accountant-General ex parte the applicant in the matter of this act; and such money shall be applied as the court shall from time to time direct to some one or more of the following purposes, namely,—

So far as relates to estates in England the purchase or redemption of the land tax, and so far as relates to estates in Ireland the purchase or redemption of rentcharge in lieu of tithes, crown rent, or quit rent (*e*);

The discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled (*f*).

(*e*) The express provision as to the redemption of tithe rentcharge, crown rent, or quit rent on Irish estates is new. But with this exception this section corresponds with 19 & 20 Vict. c. 120, s. 23, the decisions under which appear to be applicable.

Discharge of incumbrances.

(*f*) A charge created to pay a fine on renewal has been discharged out of money received on a sale under this act (*Re Barber*, 18 Ch. D. 624), and an assessment for paving a new street (*Re Hilliard*, 38 L. T. 93).

Purchase of other hereditaments to be settled.

Where money received on a sale under this act was laid out in land, the court required new trustees to be appointed to accept a conveyance (*Re Sexton Barnes*, 10 W. R. 416). Moneys liable to be laid out in the purchase of hereditaments, &c., may be applied in payment of the expenses of laying out roads and streets (Sects. 20 & 21, *ante*, p. 650).

Buildings and repairs.

It has been laid down in general that under this section money may be applied in erecting new buildings on the settled land, whether in addition to existing buildings or in substitution for ruinous buildings (*Drake* v. *Trefusis*, 10 Ch. 367; *Re Leigh*, 6 Ch. 887; *Re Speer*, 3 Ch. D. 262; *Donaldson* v. *Donaldson*, 3 Ch. D. 743; *Vine* v. *Raleigh*, 1891, 2 Ch. 13; as to a mansion house burnt down, see *Jesse* v. *Lloyd*, 48 L. T. 656); but cannot be applied in executing repairs or permanent improvements (*Drake* v. *Trefusis*, *sup.*; *Brunskill* v. *Caird*, 16 Eq. 493; see, however, *Re Newman*, 9 Ch. 681; *Re Leadbitter*, 30 W. R. 678). Compare the order made under the original jurisdiction of the court in *Conway* v. *Fenton* (40 Ch. D. 512), where land and money were settled on A. for life with remainder over, and part of the money was laid out in repairing buildings on the land: as to which, see also *Re Household* (27 Ch. D. 553); *Re Jackson*, *Jackson* v. *Talbot* (21 Ch. D. 786). Compare also the effect of the Thellusson Act on a trust for repairs, discussed in *Re Mason*, *Mason* v. *Mason*, 1891, 3 Ch. 467. Under this section money will not be applied in repaying to the tenant for life money expended by him in new buildings (*Re Leigh*, 6 Ch. 887; see *Jesse* v. *Lloyd*, 48 L. T. 656).

Other investments.

Where money received on a sale under this act had been invested in consols until it could be applied under this section, the court permitted the consols to be sold and the proceeds re-invested under sect. 21 of the S. L. Act, 1882 (*Re Tennant*, 40 Ch. D. 594). Proceeds arising from leaseholds for lives sold under this act (as to which there was a trust for renewal out of rents) were invested in ordinary securities and the income paid to the tenant for life (*Re Barber*, 18 Ch. D. 624).

Payment to persons becoming absolutely entitled.

The concluding words of the section are similar to those of sect. 69 of the L. C. C. Act, 1845, under which it has been held that trustees with a power of sale are "persons becoming absolutely entitled" (*Re Hobson*, 7 Ch. Div. 708; *Ex p. Bowman*, 1888, W. N. 179; but see *Re Smith*, 40 Ch. Div. 391; compare the wider language of the S. L. Act, 1882, s. 21,

sub-s. ix., *post*, p. 688). Money received from sales under the S. E. Act, 1877, has been paid to trustees to be held on the trusts of the settlement (*Re Morgan*, 9 Eq. 587; *Re Hemsley*, 29 L. T. 173; see *Re Evans*, 14 Ch. D. 511). 40 & 41 Vict. c. 18, s. 34.

Before payment out to a tenant in tail, a disentailing deed should be executed (*Re Broadwood*, 1 Ch. D. 438; *Re Reynolds*, 3 Ch. Div. 61; *contra*, *Re Wood*, 20 Eq. 372); and an affidavit of no incumbrances should be made (*Thornhill* v. *Millbank*, 12 W. R. 523). Where the survivor of a husband and wife was entitled absolutely in default of issue, and the wife was past child-bearing, money was paid to their joint account on the execution of a deed acknowledged by the wife (*Re Belt*, 37 L. T. 272; 25 W. R. 901). Payment of the purchase-money of a lunatic's land into court to the credit of a lunacy is not a payment "to a person becoming absolutely entitled" (*Re Barker*, 17 Ch. Div. 241).

As to the effect of this section on conversion, see *Re Lloyd* (9 P. D. 65), and note to sect. 8 of the Partition Act, 1868, *post*, p. 742.

For form of order as to appointment of trustees to receive rents or proceeds of sales, &c., see Seton, 1490, 1496, 1498, 4th ed.

35. The application of the money in manner aforesaid may, if the court shall so direct, be made by the trustees (if any) without any application to the court, or otherwise upon an order of the court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land (*g*). Trustees may apply moneys in certain cases without application to court.

(*g*) This section corresponds to 19 & 20 Vict. c. 120, s. 24, under which the following cases were decided. The court directed the application of money by the trustees in *Re Peacock* (15 W. R. 100); *Re Hoare* (30 W. R. 177). Petitions under this section are not affected by sect. 24, *ante*, p. 652, as to consents (*Re Cleveland*, 1 Dr. & S. 481), or by sect. 31, *ante*, p. 654, as to advertisements (*Re Sexton Barnes*, 10 W. R. 416); as to service, see *Re Bolton* (19 W. R. 429).

For form of order, see Seton, 1496, 4th ed.

36. Until the money can be applied as aforesaid, the same shall be invested as the court shall direct in some or one of the investments in which cash under the control of the court is for the time being authorised to be invested, and the interest and dividends of such investments shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land (*h*). Until money can be applied to be invested, and dividends to be paid to parties entitled.

(*h*) The order should specify the particular investment (*Re Taylor*, 28 W. R. 594). The mode of investment must be according to the course of the court (*Re Woodcock*, 13 Eq. 183; see Supreme Court Funds Rules, 1886). As to what investments are authorized for cash under the control of the court, see R. S. C. Ord. 22, r. 17. An investment on mortgage has been authorized (*Wall* v. *Hall*, 11 W. R. 298).

For form of order as to an investment, see Seton, 1490, 1496, 1500, 4th ed.

37. Where any purchase money paid into court under the provisions of this act, shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the court on the petition of any party interested in Court may direct application of money in respect of leases or reversions as may appear just.

40 & 41 Vict. c. 18, s. 37.

such money to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be (*i*).

(*i*) For an order as to the proceeds of leaseholds, see *Re Walsh* (7 L. R. Ir. 554).

Court may exercise powers repeatedly, but may not exercise them if expressly negatived.

38. The court shall be at liberty to exercise any of the powers conferred on it by this act, whether the court shall have already exercised any of the powers conferred by this act in respect of the same property or not; but no such powers shall be exercised if an express declaration that they shall not be exercised is contained in the settlement: Provided always, that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the court from exercising any of the powers conferred by this act, if it shall think that the powers contained in the settlement ought to be extended (*j*).

(*j*) See *Re Hurle* (2 H. & M. 196); *Re Cleveland* (22 W. R. 818), decided under 19 & 20 Vict. c. 120, s. 26, which was in somewhat wider terms.

Court not to authorize any act which could not have been authorized by the settlor.

39. Nothing in this act shall be construed to empower the court to authorize any lease, sale, or other act beyond the extent to which in the opinion of the court the same might have been authorized in and by the settlement by the settlor or settlors.

Acts of the court in professed pursuance of this act not to be invalidated.

40. After the completion of any lease or sale or other act under the authority of the court, and purporting to be in pursuance of this act, the same shall not be invalidated on the ground that the court was not hereby empowered to authorize the same, except that no such lease, sale, or other act shall have any effect against such person as herein mentioned whose concurrence or consent ought to be obtained, or who ought to be served with notice, or in respect of whom an order dispensing with such service ought to be obtained in the case where such concurrence or consent has not been obtained and such service has not been made or dispensed with (*k*).

(*k*) Orders under this section are valid in favour of a purchaser, notwithstanding any want of jurisdiction, and notwithstanding the exception in this section (Conv. Act, 1881, s. 70, *ante*, p. 620); even if the irregularity appear on the face of the order (*Re Hall Dare*, 21 Ch. D. 41; see also *Beioley* v. *Carter*, 4 Ch. 232; *Re Shepheard*, 8 Eq. 571; *Re Clough*, 15 Eq. 284, decided under 19 & 20 Vict. c. 120, s. 28).

Costs.

41. It shall be lawful for the court, if it shall think fit, to order that all or any costs or expenses of all or any parties of and incident to any application under this act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement and subject to the same limitations; and the court may also

direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the court shall direct (*l*). 40 & 41 Vict. c. 18, s. 41.

(*l*) For form of order as to costs, see Seton, 4th ed., 1488, 1491, 1497, 1499, 1500, 1506; *Re Tunstall* (14 L. T. 352).

42. General rules and orders of court for carrying into effect the purposes of this act, and for regulating the times and form and mode of procedure, and generally the practice of the court in respect of the matters to which this act relates, and for regulating the fees and allowances to all officers and solicitors of the court in respect to such matters, shall be made so far as relates to proceedings in England by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other judges of the Supreme Court of Judicature to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein, and so far as relates to proceedings in Ireland by any three or more of the following persons, of whom the Lord Chancellor of Ireland shall be one, namely, the Lord Chancellor of Ireland, the Lord Chief Justice of Ireland, the Master of the Rolls in Ireland, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and four other judges of the superior courts in Ireland to be from time to time appointed for the purpose by the Lord Chancellor of Ireland in writing under his hand, such appointment to continue for such time as shall be specified therein, and such rules and orders may from time to time be rescinded or altered by the like authorities respectively, and all such rules and orders shall take effect as general orders of the court (*m*). Rules and orders.

(*m*) See S. E. Act Orders (*post*, 665 *et seq.*) The part of this section relating to England has been repealed (42 & 43 Vict. c. 78, s. 29).

43. All general rules and orders made as aforesaid shall be laid before each House of Parliament within forty days after the making thereof if parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing session, and if an address is presented to her Majesty by either House of Parliament within the next subsequent forty days on which the said house shall have sat, praying that any such rule or order may be annulled, her Majesty may thereupon by order in council annul the same, and the rule or order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same. Rules and orders to be laid before Parliament.

40 & 41 Vict. c. 18, s. 44.

Concurrent jurisdiction of the Court of Chancery of the County Palatine of Lancaster.

44. The powers vested in the High Court of Justice by this act may, so far as relates to estates within the County Palatine of Lancaster, be exercised also by the Court of Chancery of the said County Palatine; and general rules and orders of court for the purposes aforesaid, so far as relates to proceedings in the said court of the said County Palatine, shall be made by the Chancellor of the Duchy and County Palatine of Lancaster, with the advice and consent of any one or more of the persons authorized under this act to concur in the making of general rules and orders relating to proceedings in England, and also with the advice and consent of the Vice-Chancellor of the said County Palatine (*n*).

(*n*) As to lands within the County Palatine of Durham, see 52 & 53 Vict. c. 47, s. 10.

Application for lease or sale in Ireland may be made to Landed Estates Court.

45. It shall and may be lawful for any person who under the provisions of this act may make an application to the court of Chancery in Ireland for the lease or sale of a settled estate, instead of making such application to the said Court of Chancery in Ireland to apply to the Landed Estates Court, Ireland, for the purpose of having the lease or sale of such settled estate under the said last-mentioned court; and thereupon it shall be lawful for the said Landed Estates Court, Ireland, to exercise all the powers conferred upon the Court of Chancery in Ireland in relation to leases or sales of such nature under the provisions of this act, save that the judge in the case of a sale shall himself execute the conveyance to the purchaser under such sale, and save that such conveyance shall have the like operation and effect, and confer such indefeasible title to the purchaser as if such sale had been made and such conveyance had been executed upon an application for the sale of an incumbered estate under the act of the twenty-first and twenty-second years of her Majesty, chapter seventy-two: Provided always, that the Landed Estates Court, Ireland, shall make such investigation of the title and circumstances of the said estates as shall appear expedient, and also in cases of sales as in other cases preliminary to sales conducted in the said Landed Estates Court, Ireland: Provided also, that every decision and order in the course of such proceedings shall be subject to appeal to the Court of Appeal in Chancery as in other cases under the said act (*o*).

(*o*) The Landed Estates] Court jurisdiction is now transferred to the High Court of Justice of Ireland (40 & 41 Vict. c. 57, ss. 4, 7, 36).

Tenants for life, &c. may grant leases for twenty-one years.

46. It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the

possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, without any application to the court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland, to take effect in possession at or within one year next after the making thereof; provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee (*p*).

40 & 41 Vict. c. 18, s. 46.

(*p*) The above section is somewhat wider in terms than 19 & 20 Vict. c. 120, s. 32. Under the latter section it was held that a person entitled to part of the income of an estate absolutely, and to the rest after payment thereout of certain charges and expenses, was not "entitled to the receipt of the rents and profits" (*Taylor* v. *Taylor*, 20 Eq. 297). In a case under the present section, it was said that an improper motive would not invalidate a lease, if the terms of the section were strictly complied with (*Davies* v. *Davies*, 38 Ch. D. 502). The lessor has a discretion as to what are proper covenants, which cannot be controlled unless there be an outrageous omission in this respect (*Ib.*) A lease exempting the lessee from liability for "fair wear and tear and damage by tempest," was void as "made without impeachment of waste" (*Ib.*) The appointment of a receiver will prevent the grant of a lease under this section, except with the leave of the court (*Vine* v. *Raleigh*, 24 Ch. D. 248). See, further, as to a tenant for life's power of leasing, S. L. Act, 1882, ss. 6 *et seq.* (*post*, p. 680 *et seq.*)

47. Every demise authorized by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person, under or by virtue of the same settlement if the estates be settled, and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same.

Against whom such leases shall be valid.

48. The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this act.

Evidence of execution of counterpart lease by lessee.

49. All powers given by this act, and all applications to the court under this act, and consents to and notifications respecting such applications, may be executed, made, or given by, and all

Provision as to infants, lunatics, &c.

40 & 41 Vict. c. 18, s. 49.

notices under this act may be given to guardians on behalf of infants, and by or to committees on behalf of lunatics, and by or to trustees or assignees of the property of bankrupts, debtors in liquidation, or insolvents: Provided nevertheless, that in the cases of infant or lunatic tenants-in-tail no application to the court or consent to or notification respecting any application may be made or given by any guardian or committee without the special direction of the court (*q*).

(*q*) Under sect. 36 of 19 & 20 Vict. c. 120, which was in similar terms, but referred to consents only, and not to notifications, the following cases were decided: That the consent of the father of an infant was not sufficient (*Re Chaddick*, 7 W. R. 334; see *Re Salisbury*, 2 Ch. Div. 39), nor the consent of a testamentary guardian (*Re James*, 5 Eq. 334); that an infant petitioner who was a married woman, must be examined (*Re Broadwood*, 7 Ch. 323; see now sect. 52, *post*, p. 663); that the court could not appoint a guardian to consent for a person of unsound mind (*Re Clough*, 15 Eq. 284; see, however, *Re Venner*, 6 Eq. 249); that the committee of a lunatic must obtain leave before consenting (*Re Woodcock*, 3 Ch. 229; see R. S. C. Ord. 16, r. 21; 53 Vict. c. 5, s. 120).

As to appointing a guardian to give consents, &c., under this section, see S. E. Act Orders, Nos. 5—12 (*post*, p. 665 *et seq.*) For form of order, see Seton, 1474, 1475, 4th ed.

A married woman applying to the court, or consenting to be examined apart from her husband.

50. Where a married woman shall apply to the court, or consent to an application to the court, under this act, she shall first be examined apart from her husband, touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband or not; and no clause or provision in any settlement restraining anticipation shall prevent the court from exercising, if it shall think fit, any of the powers given by this act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding (*r*).

(*r*) This section is a re-enactment in similar terms of 19 & 20 Vict. c. 120, s. 37, the decisions under which appear to be applicable.

The examination is necessary in the case of a married woman who is an infant (*Re Broadwood*, 7 Ch. 323). It was required where she was entitled to a jointure charged on the estate (*Re Turbutt*, 2 N. R. 487); or had out of her separate estate purchased the interest of her husband, who was tenant for life (*Re Fowles*, 1887, W. N. 208). But it was dispensed with where the married woman's interest was remote, and was represented by trustees (*Re De Tabley*, 11 W. R. 936; *Re Tibbett*, 17 W. R. 394; *Re Kilmorey*, 26 W. R. 54); where her interest was small (*Re Cundee*, 37 L. T. 271); where the court was satisfied that the order would be beneficial, and that the delay necessary for her examination would be prejudicial (*Re Halliday*, 12 Eq. 199; *Re Thorne*, 20 W. R. 587; but see *Re Johnson*, 1869, W. N. 87); where she was married between the presentation of the petition and the hearing (*Re Marshall*, 15 Eq. 66); where she was married after 31st December, 1882 (*Riddell* v. *Errington*, 26 Ch. D. 220); or, where she was married before that date, in respect of property acquired since that date (*Re Harris*, 28 Ch. D. 171); where she had given

a notification in writing under sect. 26 (*ante*, p. 652; *Re Stanley*, 1889, W. N. 164). In the case of applications under this act for sanction to the investment in land of funds in court, it seems that sect. 32 of the S. L. Act, 1882 (*post*, p. 696), does not enable the examination to be dispensed with (*Re Arubin*, 52 L. T. 728). 40 & 41 Vict. c. 18, s. 50.

As to when the examination may be taken, see S. E. Act Orders, No. 13 (*post*, p. 667; *Re Foster*, 1 De G. & J. 386; *Re Packer*, 39 L. J. Ch. 220; *Re Turbutt*, 2 N. R. 487). It was taken in court at the hearing of the petition (*Re Taylor*, 14 Eq. 557).

An affidavit of no settlement is not necessary on an application under this act, unless it is for payment out of money (*Re Standish*, 25 W. R. 8).

Examination of married woman how to be made when residing within the jurisdiction of the court, and how when residing without such jurisdiction.

51. The examination of such married woman, when resident within the jurisdiction of the court to which such application is made, shall be made either by the court or by some solicitor duly appointed by the court for that purpose, who shall certify under his hand that he has examined her apart from her husband, and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same. And when the married woman is resident out of the jurisdiction of the court to which such application is made, her examination may be made by any person appointed for that purpose by the court, whether he is or is not a solicitor of the court, and such person shall certify under his hand to the effect hereinbefore provided in respect of the examination of a married woman resident within the jurisdiction. And the appointment of any such person not being a solicitor shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the court (*s*).

(*s*) This section is a re-enactment in substantially similar terms of 19 & 20 Vict. c. 120, s. 38, and 21 & 22 Vict. c. 77, s. 6, the decisions under which appear to be applicable.

The solicitor appointed must be in actual practice in England (*Re Noyes*, 6 W. R. 7; *Turner* v. *Turner*, 2 De G. & J. 534), and not acting for the husband (*Re Noyes*, *sup.*), or any of the parties to the proceedings (*Re Brealy*, 24 Beav. 220). But the husband's solicitor may attest the signatures of the married woman and the commissioner (*Re Lewis*, 24 W. R. 103). A British consul abroad was appointed to take the examination (*Re Johnson*, 1869, W. N. 87). See S. E. Act Orders, No. 14 (*post*, p. 667).

For form of order, see Seton, 1476, 1486, 4th ed.

As to application by or consent of married women, whether of full age or under age.

52. Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants.

53. Nothing in this act shall be construed to create any obligation on any person to make or consent to any application to the court or to exercise any power.

No obligation to make or consent to application, &c.

Tenants for life, &c. to be deemed en-

54. For the purposes of this act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected

40 & 41 Vict. c. 18, s. 54.

by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid unless they shall concur therein.

titled notwithstanding incumbrances.

55. Provided always, that nothing in this act shall authorise any sale or lease beyond the term of twenty-one years of any settled estates in respect of which, under the act of the thirty-fourth and thirty-fifth years of King Henry the Eighth, chapter twenty, "to embar feigned recovery of lands wherein the King's Majesty is in reversion," or under any other act of parliament, the tenants in tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown.

Exception as to entails created by act of parliament.

Saving rights of lords of manors.

56. Nothing in this act shall authorize the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor.

To what settlements this act to extend.

57. This act shall, except as hereinafter provided, apply to all matters existing at the time of the passing of this act, whether proceedings are actually pending or not, and any proceedings in any such matter may be continued or taken under this act as if the matter originated under this act, or may be continued or taken under the acts hereby repealed, or partly under this act and partly under the said repealed acts as occasion may require: Provided always, that the provisions in this act contained respecting demises to be made without application to the court shall extend only to settlements made after the first day of November one thousand eight hundred and fifty-six.

Repeal of acts specified in schedule.

58. The acts specified in the schedule to this act are hereby repealed: Provided always, that this repeal shall not affect anything done or any proceeding taken under any enactment hereby repealed.

Saving.

59. Nothing in this act shall interfere with the exercise of any powers to authorize or grant leases conferred by any act of parliament not expressly repealed by this act.

Extent of act.

60. This act shall not extend to Scotland.

Commencement of act

61. This act shall commence on the first day of November one thousand eight hundred and seventy-seven.

Schedule.

Session and Chapter.	Title or Short Title.
19 & 20 Vict. c. 120 ..	An Act to facilitate leases and sales of Settled Estates.
21 & 22 Vict. c. 77 ..	An Act to amend and extend the Settled Estates Act of 1856.
27 & 28 Vict. c. 45 ..	An Act to further amend the Settled Estates Act of 1856.
37 & 38 Vict. c. 33 ..	The Leases and Sales of Settled Estates Amendment Act, 1874.
39 & 40 Vict. c. 30 ..	The Settled Estates Act, 1876.

ORDERS UNDER THE SETTLED ESTATES ACT, 1877.

1. The words "settlement," "settled estates," and "the court" in these orders shall have the same interpretation as in the act.

The words "the act" in these orders shall mean the Settled Estates Act, 1877, "the petition" shall mean a petition under the act, and "the judge" shall mean the judge of the court with whose name the petition shall be marked, or to whom the petition shall be transferred.

2. All petitions, notices, affidavits, and other proceedings under the act shall be entitled "In the matter of the estates settled" [by the settlor or settlors, naming one of them and referring to the instrument by which the settlement shall have been created, and mentioning the parish or place and county in which the lands, messuages, or tenements proposed to be dealt with are situate] "and in the matter of the Settled Estates Act, 1877," and every such petition shall be marked with the words "In the High Court of Justice, Chancery Division," and with the title of the judge before whom it is intended to be heard (see Form No. 1 in the Appendix hereto). Upon the presentation of the petition, a day shall be appointed for hearing not less (unless the judge gives special leave) than eight clear days after such presentation, and in the computation of such eight clear days, Sundays and other days on which the offices are closed shall not be reckoned; and every petition shall, in the body thereof, or in a schedule thereto, or by a plan thereto annexed, contain a detailed description of the property proposed to be dealt with by such petition sufficient to identify the same.

3. When a petition has been put into the paper for hearing, and by reason of the parties not being ready, or for any other cause, the judge allows it to stand over generally, it may be put into the paper for a subsequent day, without any application to the court or judge, on the petitioner or his solicitor applying for that purpose to the secretary of the Lord Chancellor or Master of the Rolls (as the case may be), and notice of the appointment of such subsequent day shall be given by the petitioner, or his solicitor, two clear days before the day fixed to the other parties entitled to appear on such petition.

4. The notice required to be given by the 26th section of the act if given before the hearing (or if given after the hearing, and the judge shall not otherwise direct) may, without any other direction of the court, be given within the jurisdiction of the court, except in the case of a person of unsound mind, not so found by inquisition, by delivering to the person to be served a notice (in the form No. 3 in the Appendix hereto) with such variations as circumstances require, and the time to be specified in such notice for the person served to deliver or leave a notification shall—(*a*) in case the person to be served is a guardian of an infant, be such as shall be directed by the judge in the order appointing the guardian, and in case the person to be served is a married woman, or a committee of a lunatic, not less than twenty-eight clear days after the service; (*b*) and in other cases not less than fourteen clear days after the service. In case the person to be served is of unsound mind, not so found by inquisition, or out of the jurisdiction of the court, or it is desired to serve such notice on any person within the jurisdiction of the court in any other manner than above provided, an application shall be made at chambers ex parte by the petitioner for directions as to the manner in which such notice shall be given, and as to the time to be specified in such notice within which the notification is to be made by the person served.

5. Where it is desired that any guardian of an infant shall make or consent to any application to the court under the act, or make any notifi-

Orders under Settled Estates Act, 1877.

cation respecting any application to the court, or that notice may be given to any such guardian on behalf of an infant, the court may appoint a guardian to such infant for the purposes of the act, and an application for such appointment may, after the petition is presented, be made at chambers by the petitioner by summons. And if an infant is the petitioner the petition may be presented by the infant by his next friend, and after the petition has been presented and answered, and a guardian appointed, the word "guardian" shall be substituted in the petition for the words "next friend," and the name of the guardian (if the next friend and guardian shall not be the same person) for the name of the next friend.

6. In the case of a lunatic or infant tenant in tail by his committee or guardian applying or consenting to an application, or giving a notification respecting an application, an application may be made at chambers by the petitioner after the petition is presented that such committee or guardian may be directed to so apply or consent, or give a notification, and in the case of an infant such application may be combined with the application to appoint a guardian.

7. In cases where the committees or guardians of lunatic or infant tenants in tail shall be served with notice of the application in pursuance of the 26th section of the act, an application may be made at chambers by the petitioner, before the expiration of the time specified in such notice, that such committees or guardians may notify that they either assent to or dissent from such application, or submit their rights or interests so far as they may be affected by such application to be dealt with by the court.

8. Upon an application to appoint a guardian to an infant for any such purpose as aforesaid, the summons shall be served upon the parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, of the infant, if there be any such parent or guardian, unless the court or judge shall dispense therewith.

9. Upon any application that a committee or guardian of a lunatic or infant tenant in tail may be directed to make or consent to any application on behalf of such lunatic or infant, or to notify that the lunatic or infant assents to or dissents from such application, or submits his rights or interests so far as they are affected by such application to be dealt with by the court, the summons shall be served on the committee of such lunatic, or the guardian appointed or proposed to be appointed of such infant, for such purpose.

10. Upon an application to appoint a guardian of an infant the following facts shall be proved:—

1. The age of the infant.
2. Whether he has any parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, and, if so, whether such parent or guardian has any interest in the application, and if he has the nature of such interest, and whether or not adverse to the interest of the infant.
3. Where and under whose care the infant is residing, and at whose expense he is maintained.
4. In what way the proposed guardian is connected with the infant, and why proposed and how qualified to be appointed.
5. That the proposed guardian has no interest in the application, or if he has the nature of his interest, and that it is not adverse to the interest of the infant.
6. The consent of the guardian to act.

11. Upon an application that a committee of a lunatic tenant in tail may be directed to make or consent to any application, or to give any notification respecting any application, the authority of the judge or judges entrusted with the care and commitment of the custody of the persons and estates of lunatics to such committee to act on behalf of the lunatic shall be produced, and if it shall appear thereby that such judge or judges are of opinion that it is proper and consistent with a due regard

for the interest of the lunatic that the committee shall make or consent to the application or give any specific notification respecting the application, such authority shall, unless the court or judge shall for any special reason require further evidence, be sufficient evidence upon which the court or judge may direct the committee to act in conformity with such authority.

12. Upon an application that a guardian of an infant tenant in tail may be directed to make or consent to any application or to give any notification respecting any application, evidence is to be produced to satisfy the judge that it is, and the guardian is to make an affidavit that he believes that it is, proper and consistent with a due regard for the interest of such infant that such direction shall be given.

13. The examination of a married woman under sects. 50 and 51 of the act may be taken at any time after the petition is presented and answered.

14. When it is desired that a married woman resident within the jurisdiction of the court shall be examined otherwise than by the court, a solicitor who is a perpetual commissioner to take acknowledgments of deeds by married women may be appointed for that purpose by the judge at chambers in the Form No. 7 in the Appendix hereto without summons or order, upon the request of the petitioner and a certificate of the solicitor for the petitioner in the Form No. 7 in the Appendix hereto that the person to be appointed is not a solicitor for the petitioner, or for any party whose concurrence or consent to the application is required, but where an examination by such solicitor will cause unreasonable expense, delay, or inconvenience, or where the married woman is resident out of the jurisdiction of the court, an application by summons may be made ex parte by the petitioner at chambers to appoint a solicitor if such woman is resident within the jurisdiction of the court, and if not so resident a person, whether a solicitor or not, to take such examination.

15. Upon every petition the court shall be satisfied by sufficient evidence that it is proper and consistent with a due regard for the interests of all parties entitled under the settlement that the powers should be exercised; and it shall be stated in the affidavit why and upon what ground it is deemed to be so.

16. Upon every petition where there are any trustees seised or possessed of any estate in trust for any of the persons whose consent or concurrence to or in the application is required, evidence is to be produced that notice of the application has been served on such trustees.

17. Upon every petition evidence shall be produced to satisfy the court that neither the applicant nor any party entitled has previously applied to either House of Parliament for a private act to effect the same or a similar object, or if any such application has been made that the same was not rejected on its merits or reported against by the judges to whom the bill may have been referred.

18. If upon the hearing of any petition the court shall be of opinion that notice ought to be served on any person who shall not have been served, or that notice of the application ought to be inserted in any newspaper, the court shall give directions accordingly, and the petition shall stand over generally or to such time as the court shall direct.

19. When the court shall at the hearing have directed notice of any application to be inserted in any newspapers, any person may, within the time specified in the notice, apply to the court by motion, either ex parte or upon notice to the petitioner, for leave to be heard in opposition to or in support of the application, but if such motion shall be made ex parte and the court shall think fit to give such leave, it shall be subject to such order as the court shall think fit to make as to costs.

20. Any such person having obtained leave under the last preceding order shall be at liberty, upon reasonable notice, to inspect and peruse the petition at the office of the solicitor for the petitioner, upon payment of a fee of 13*s*. 4*d*. on each inspection, and shall be entitled (either without or after such inspection) to be furnished with a copy of such petition upon such application, terms, and conditions as are provided by Rules 8, 9, 12,

Orders under Settled Estates Act, 1877.

and 13 of Order V. of the Additional Rules of Court, under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875. [See R. S. C. Ord. 66, r. 7.]

21. Any order made on an ex parte motion giving leave to such person to be heard on any application shall be served on the solicitor for the petitioner.

22. Any person served with a notice, pursuant to the 26th section of the act, requiring him to notify whether he assents to or dissents from the application or submits his rights or interests so far as they may be effected by such application to be dealt with by the court, and any trustee or other person served with notice pursuant to the 30th section of the act, shall be at liberty, upon reasonable notice to the petitioner's solicitor, to inspect and peruse the petition without payment of any fee, and he shall be entitled to be furnished with a copy thereof upon such application, terms, and conditions as are provided by Rules 8, 9, 12, and 13 of Order V. of the Additional Rules of Court, under the Supreme Court of Judicature Act, 1875, dated 12th August 1875. [See R. S. C. Ord. 66, r. 7.]

23. In all cases in which land in a register county or district is affected by the exercise of any powers conferred on the court by the act, and the court shall direct notice to be recorded, pursuant to the 33rd section of the act, such notice may be given by directing a memorial of the order to be registered. And in all cases in which the court shall not think it practicable or expedient that notice under the said section should be recorded as therein mentioned, the order shall state that no record of the order need be made.

24. Every order shall state, in addition to the names of the petitioners, the names of the persons other than the petitioners who concur or consent or to whom notice of the application has been given, or who (under Order 19) may have obtained leave to be heard in opposition to or in support of the application, and whether any notification was received from the persons to whom notice has been given, and if any has been received the purport thereof, and also the names of the persons, if any, notice to whom has been dispensed with, and whether the order is made subject to any and what rights, estate, or interest of any person whose concurrence or consent has been refused, or who shall not or shall not be deemed to have submitted his rights or interests to be dealt with by the court, or whose rights or interests ought, in the opinion of the court, to be excepted.

25. In cases where the court authorizes a lease the order shall direct that the lease shall contain such conditions as are required by the act, and such other covenants, conditions, and stipulations as the court shall deem expedient with reference to the special circumstances, or may direct the same to contain such covenants, conditions, and stipulations as may be approved by the judge at chambers without directing the lease to be settled by the judge.

26. The Rules 1, 2, 3, and 6 of Order 57 (as to time) in the schedule to the Supreme Court of Judicature Act, 1875, shall be applicable to these orders, and to all proceedings under the act. [See R. S. C. Ord. 64, rr. 1, 2, 3, and 7.]

27. The forms set forth in the Appendix hereto shall be adhered to, subject only to such variations as may be necessary to meet the circumstances of the case or direction of the court.

28. In all cases not provided for by the act, or these orders, the existing forms and mode of procedure and general practice of the court on similar proceedings shall apply to proceedings under the act.

29. The fees and allowances to solicitors of the court in respect to proceedings under the act shall be such as are provided by Order 6 of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875, and are applicable to such proceedings, and solicitors shall be entitled to charge and be allowed for a request and certificate under the 14th Order (of these Orders), and for attendances at the judges' chambers to procure the appointment of an examiner thereon, a

fee of 13*s*. 4*d*. if the lower scale of fees is applicable, and 1*l*. 1*s*. 0*d*. in other cases. [See R. S. C. Ord. 65, r. 27.]

30. The fees to be taken by the officers of the court in respect to proceedings under the act shall be such as are provided by the orders under the Supreme Court of Judicature Act, 1875, dated 28th October, 1875, and are applicable to such proceedings; and every request under the 14th Order (of these Orders) shall bear a stamp of 2*s*. if the lower scale of fees is applicable, and 3*s*. in other cases.

31. Every petition under the act shall set forth the name, address, and description of the petitioner, and also a place within three miles from the site of Temple Bar, London, where he may be served with any order of the court or of the judge in chambers, or notice relating to the subject of such petition.

32. The judge in person sitting in court or in chambers in the case of any petition may by special order dispense with all or any of the preceding orders so far as they are applicable to such petition in any case in which he shall think fit, and upon such terms and conditions (if any) as he may deem proper.

33. These orders shall come into operation on the 7th day of January, 1879, and shall apply to any petition presented on or after that date.

34. These orders may be cited as "The Settled Estates Act Orders, 1878."

CAIRNS, C.
G. JESSEL, M.R.
RICHARD MALINS, V.C.
JAMES BACON, V.C.
CHARLES HALL, V.C.
EDWARD FRY.

December, 1878.

APPENDIX.

No. 1.—FORM of TITLE of PETITION and other proceedings.

In the High Court of Justice, Chancery Division,
The Master of the Rolls (*or* the Vice-Chancellor Malins, *or other Vice-Chancellor*).
In the matter of estates settled by *A. B.* (*or A. B. and others*) by will dated (*or* deed dated) consisting of certain lands (*or* messuages or tenements) in in the parish of in the county of .
And in the matter of the Settled Estates Act, 1877.

No. 2.—FORM of SUMMONS for directions as to service of notice pursuant to the 26th section of the act.

(*Title same as petition.*)

Let all parties concerned attend at my chambers at on at o'clock on the hearing of an application on the part of [the petitioners] that notice of the application intended to be made by a petition presented in the above matters on the day of requiring *A. B.* and *C. D.* severally to notify whether he assents to or dissents from such application, or submits his rights and interests so far as they may be affected by such application to be dealt with by the court, may be given by [*state the manner in which it is proposed to give the notice, and the time within which the notification is to be required*] or in such other manner as the judge may think fit.

Dated this day of .

This summons was taken out by of , solicitors for the applicant.

Orders under Settled Estates Act, 1877.

No. 3.—Form of Notice pursuant to section 26 of the act.

In the High Court of Justice, Chancery Division,
The Master of the Rolls (*or* the Vice-Chancellor Malins *or other Vice-Chancellor*).

(*Title same as petition.*)

Take notice that [*name petitioners and their addresses as in petition*] have presented a petition in the above matters praying that [*as in petition, but describing the lands, messuages, or tenements as in the petition*], and it is intended to apply to the said court for an order in accordance with such prayer, and you are [severally] hereby required to notify in writing within after the service hereof whether you assent to or dissent from such application, or submit your rights or interests so far as they may be affected by such application to be dealt with by the court, such notification is to be delivered to the petitioners' solicitors, or left for them at the address specified at the foot hereof, and may be so delivered by transmitting the same to them by post at such address.

If no notification shall be so delivered or left within the time above limited, you will be deemed to have submitted your rights and interests to be dealt with by the court.

In the event of your dissenting from such application and desiring to be heard in opposition to the application you are by your notification to require notice to be given to or left for you or your solicitor at a place to be specified within three miles from the site of Temple Bar, London, of the day on which the petition is fixed for hearing.

You or your solicitor can, upon reasonable notice to the under-named *A. & B.* inspect and peruse the petition without payment of any fee, and you are entitled at your own expense to have a copy of such petition furnished to you.

Dated the day of .

A. & B.

[*Address within three miles of the site of Temple Bar, London.*]
Petitioners' Solicitors.

To [*name the person or all persons to be served pursuant to the above section*].

Note.—A copy of the above notice, with a notification at the foot thereof to be filled up by you, is sent herewith.

No. 4.—Form to accompany Notice pursuant to section 26 of the act.

Copy Notice.

In pursuance of a notice, of which the above is a copy, served on me on the day of , I hereby notify that I *

Dated this day of .

To Messrs. .†

* Here insert "assent to the application," or "dissent from the application," or "submit my rights and interests so far as they may be affected by the application to be dealt with by the court."

And if you dissent and desire to be heard in opposition thereto, add "And I desire to be heard in opposition to the application, and require notice to be given to at [*naming a place within three miles of the site of Temple Bar, London*] of the day fixed for the hearing of the petition."

† Signature and address.

Orders under Settled Estates Act, 1877.

No. 5.—Form of Summons for Appointment of a Guardian of an Infant, and for leave for the Guardian to make or consent to an Application.

(*Title same as petition.*)

Let all parties concerned attend at my chambers at , on , at o'clock, on the hearing of an application on the part of [the petitioners].

That *A. B.* or some other proper person may be appointed guardian of *C. D.*, an infant, and that *E. F.* or some other proper person may be appointed guardian of *G. H.*, an infant, for the purpose of making on behalf of such infants (or consenting on behalf of such infants to) an application proposed to be made by a petition presented on the day of , by the above-named applicants for an order in accordance with the prayer of such petition, and (in case the infants are tenants-in-tail) that such guardians may be directed to make (or consent to) such application.

Dated this .

This summons was taken out by , of , solicitors for the applicants.

No. 6.—Form of Summons for Appointment of a Guardian of an Infant to be served with notice of an Application, and for leave for the Guardian to deliver a notification pursuant to such Notice.

(*Title same as petition.*)

Let all parties concerned attend at my chambers at , on , at o'clock, on the hearing of an application on the part of [the petitioners].

That *A. B.* or some other proper person may be appointed guardian of *C. D.*, an infant, and that *E. F.* or some other proper person may be appointed guardian of *G. H.*, an infant, for the purpose of being served with a notice requiring them on behalf of such infants, within clear days after service thereof, to notify whether they assent to or dissent from an application proposed to be made by a petition presented on the day of by the above-named applicants for an order in accordance with the prayer of such petition, or submit the infant's rights or interests so far as they may be affected by such application to be dealt with by the court, and (in case the infants are tenants-in-tail) that such guardians may be directed to notify that they, on behalf of such infants, assent to (or dissent from) such application (or submit the infant's rights or interests, so far as they may be affected by such application to be dealt with by the court.

Dated this day of .

This summons was taken out by , of , solicitors for the applicants.

No. 7.—Form of Request to appoint a person to examine a Married Woman.

(*Title same as petition.*)

The petitioners , in a petition presented in these matters on the day of , request that *A. B.* of, &c. [*C. D.* of, &c,, and *E. F.* of, &c.], being a solicitor [*or* solicitors], and a perpetual commissioner [*or* perpetual commissioners] to take the acknowledgment of deeds by married women, may be appointed for the purpose of any or either of them examining the petitioners *G.* the wife of *H. I.*, and *K.* the

Name such as may be required to examine all the married women who are to be examined.

Orders under Settled Estates Act, 1877.

wife of *L. M.*, and *N.* the wife of *O. P.*, of, &c., respectively touching their knowledge of the nature and effect of the application intended to be made by the petition, and to ascertain whether they the said *G. I.* and *K. M.* respectively freely desire to make such application, and whether she the said *N. P.* freely desires to consent to such application.

We, the solicitors for the petitioners, hereby certify that neither of them, the said *A. B.*, *C. D.* and *E. F.* is the solicitor for the petitioner, or for any party whose concurrence or consent to the application is required.

Dated this day of .

A. and B. solicitors for the petitioners.
Address.

The Master of the Rolls [*or* the Vice-Chancellor] appoints the said for the purposes mentioned in the above request.

E. F.,
Chief Clerk.

No. 8.—Form of Summons to appoint persons to examine Married Women.

Let all parties concerned attend at my chambers at on , at o'clock, on the hearing of an application on the part of , the petitioners in a petition presented in this matter on the day of , that *A. B.* of, &c., and C. D. of, &c. [*and if the married women are within the jurisdiction, add being solicitors*] be appointed for the purpose of any or either of them examining the petitioners *G.* the wife of *H. I.*, and *K.* the wife of *L. M.*, and *N.* the wife of *O. P.*, of, &c., respectively touching their knowledge of the nature and effect of the application intended to be made by the said petition, and to ascertain whether they the said *G. I.* and *K. M.* freely desire to make such application, and whether she the said *N. P.* freely desires to consent to such application.

Dated this day of .

This summons was taken out by of , solicitors for the applicant.

No. 9.—Form of Examination of a Married Woman making or assenting to an Application.

(*Title same as petition.*)

The examination of the petitioner *G.* the wife of *H. J.*, and *K.* the wife of *L. M.*, and of *N.* the wife of *O. P.* of* .

* Insert the names of all who can be conveniently examined by the same person and at the same time.

We, the said *G. J.*, *K. M.*, and *N. P.*, having been this day respectively examined apart from our respective husbands touching our knowledge of the nature and effect of an application intended to be made to the High Court of Justice by a petition presented in this matter on the day of by us the said *G. J.* and *K. M.* and others, for answer thereto severally say that we are aware of the nature and effect of the said intended application, and we the said *G. J.* and *K. M.* severally freely desire to make such application, and I, the said *N. P.*, freely desire to consent to such application. As witness our hands this day of .

Witness to the signature of the said *G. J.*, *K. M.*, and *N. P.*
Q. R.,
address.

[*To be at the foot of the above Examination.*]

No. 10.—Form of Certificate of Examination of Married Women making or assenting to an Application.

I, the undersigned *A. B.*, being the person appointed by the Master of the Rolls or the Vice-Chancellor for the purpose of examining the above-named *G.* the wife of *H. I.*, *K.* the wife of *L. M.*, and *N.* the wife of *O. P.*, hereby certify that I have this day of examined the said *G. I.*, *K. M.*, and *N. P.* apart from their respective husbands touching their knowledge of the nature and effect of the application intended to be made by the petition above referred to, and I have taken such examination in writing as above set forth, and I further certify that at the time of such examination I explained to them the nature and effect of the said application, and I am satisfied that they were aware of the nature and effect of such application, and that they the said *G. I.* and *K. M.* freely desire to make the said application, and that the said *N. P.* freely desires to consent to the said application.

No. 11.—Form of Affidavit verifying Examination.

(*Title as in petition.*)

I, *Q. R.* of , make oath and say that I was present and did see *G. I.*, *K. M.*, and *N. P.* respectively named in the above petition, sign the examination or paper writing annexed hereto and now produced and shown to me marked A, and that the signatures *G. I.*, *K. M.*, and *N. P.* attached thereto are respectively the proper handwritings of *G.* the wife of *H. I.* of , *K.* the wife of *L. M.* of , and *N.* the wife of *O. P.* of . And I further say that I was present and did see *A. B.* sign the certificate or paper writing annexed hereto and now produced and shown to me marked B, and that the signature *A. B.* attached thereto is the proper handwriting of *A. B.* of &c. And I say that the signature *Q. R.* attached to the said paper writings as a witness is my handwriting.

No. 12.—Form of Notice pursuant to the 30th section of the Act.

(*Title same as petition.*)

In the High Court of Justice, Chancery Division,
Master of the Rolls [*or* the Vice-Chancellor Malins *or other Vice-Chancellor*].

Take notice that [*name petitioners and their addresses as in petition*] have presented a petition in the above matters praying that [*as in petition, but describing the lands, messuages, or tenements, as in the petition*], and it is intended to apply to the said court for an order in accordance with such prayer. This notice is given to you in pursuance of the above act because you are seised or possessed of an estate in trust for , whose consent or concurrence to or in the application is required by the act. You or your solicitors can upon reasonable notice to the under-named *A.* and *B.* inspect and peruse the petition at the address specified at the foot hereof without payment of any fee, and you are entitled at your expense to have a copy of such petition furnished to you.

Dated this day of .

A. & *B.*
Address,
Solicitors for the petitioners.

To [*name the persons to be served pursuant to the above section*].

Orders under Settled Estates Act, 1877.

No. 13.—Form of Notice to be inserted in newspapers if directed pursuant to the 31st section.

(*Title as in petition.*)

By direction of the Master of the Rolls (or the Vice-Chancellor) notice is hereby given that an application by petition has been made to the court of the said judge for a sale or for powers to grant leases of the above-mentioned hereditaments (or otherwise according to the circumstances), and the court has directed the application to be adjourned (or adjourned till), and any person, whether interested in the estate or not, may on or before apply to the said court by motion for leave to be heard in opposition to or in support of such application. The petition may be inspected on application to Messrs. *A.* and *B.* of , the solicitors for the petitioners.

SETTLED LAND ACT, 1882.

45 & 46 Victoriæ, cap. 38.

An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon. [10th August, 1882.]

Be it enacted as follows:

I.—Preliminary.

45 & 46 Vict. c. 38, s. 1.

Short title; commencement; extent.

1.—(1.) This act may be cited as the Settled Land Act, 1882.

(2.) This act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this act referred to as the commencement of this act.

(3.) This act does not extend to Scotland (*a*).

(*a*) As to the general object of the act, see the remarks of *Chitty*, J., *Cardigan* v. *Curzon-Howe* (30 Ch. D. 536).

II.—Definitions.

Definition of settlement, tenant for life, &c.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes

of this act a settlement, and is in this act referred to as a settlement, or as the settlement, as the case requires (*b*). 45 & 46 Vict. c. 38, s. 2.

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this act settled land, and is, in relation to the settlement, referred to in this act as the settled land (*c*).

(4.) The determination of the question whether land is settled land, for purposes of this act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect (*d*).

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this act the tenant for life of that land, and the tenant for life under that settlement (*e*).

(6.) If, in any case, there are two or more persons so entitled (*f*) as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this act.

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is encumbered or charged in any manner or to any extent (*g*).

(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this act, are for purposes of this act trustees of the settlement (*h*).

(9.) Capital money arising under this act, and receivable for the trusts and purposes of the settlement, is in this act referred to as capital money arising under this act (*i*).

(10.) In this act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land (*j*); income includes rents and profits; and possession includes receipt of income:

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings;

45 & 46 Vict. c. 38, s. 2.

and a building lease is a lease for any building purposes or purposes connected therewith:

(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

(v.) Manor includes lordship, and reputed manor or lordship:

(vi.) Steward includes deputy steward, or other proper officer, of a manor:

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

(viii.) Securities include stocks, funds, and shares:

(ix.) Her Majesty's High Court of Justice is referred to as the court:

(x.) The Land Commissioners for England as constituted by this act are referred to as the Land Commissioners (*k*):

(xi.) Person includes corporation.

Sub-sect. (1). Settlement.

(*b*) The "settlement" may consist of two or more documents (*Wheelwright* v. *Walker*, 23 Ch. D. 759; *Re Earle and Webster*, 24 Ch. D. 148). And where a will directed property to be held upon the trusts of a pre-existing settlement, the will and settlement constituted for the purposes of this act one settlement (*Re Mundy*, 1891, 1 Ch. 399). So where the limitations of the will and deed were stated independently (*Re Byng*, 1892, 2 Ch. 219). But every derivative settlement is not necessarily part of the "settlement" for the purposes of this act (*Re Knowles*, 27 Ch. D. 707; see S. L. Act, 1890, s. 4, *post*, p. 643. See in connection with sub-sect. 1 the cases under S. E. Act, 1877, *ante*, p. 644).

Sub-sect. (3). Settled land.

(*c*) Sub-sect. 3 does not extend to an undivided share (*Re Collinge*, 36 Ch. D. 518; see, however, sub-sect. 10, cl. (i.)). Where two properties are limited by the same instrument to the same uses, except that one is subject to a term, they together form one settled estate (*Re Stamford*, 43 Ch. D. 84). It is doubtful whether properties limited by the same instrument to the same tenant for life and after his death to different remaindermen constitute one settled estate (*Id.* 43 Ch. D. 91).

Sub-sect. (4).

(*d*) The time of the settlement taking effect is, in the case of a will, the death of the testator (*Re Stamford*, 43 Ch. D. 90).

Sub-sect. (5). Tenant for life.

(*e*) "Beneficially entitled" means entitled for his own benefit, if there is anything to be derived from the estate, and not simply as trustee for others. A person may be "beneficially entitled" even though he actually receives nothing (*Re Jones*, 26 Ch. Div. 743; *Re Atkinson*, *Atkinson* v. *Bruce*, 30 Ch. D. 612; see sect. 2, sub-sect. 7). A trust to pay rents during a person's life to him, his wife and children, or one or more of them, does not make him a tenant for life (*Re Atkinson*, 31 Ch. Div. 577). Where land was limited to trustees during the life of A. on trust to sell the life estate and hand over the proceeds to A. and B., and A. covenanted not to take the life estate *in specie*, it was held that A. and B. could together

sell as the tenant for life (*Re Hale and Smyth*, 55 L. T. 151). Where there was a trust in a will for accumulation of rents during the life of the testator's son, who was his heir, such heir was on the expiration of the period allowed by the Thellusson Act held to be a tenant for life or person having the powers of a tenant for life (*Re Atherton*, 1891, W. N. 85). "Entitled to possession" means possession as contradistinguished from reversion (*Re Atkinson, Atkinson* v. *Bruce*, 30 Ch. D. 612). As to persons who have the same powers as a tenant for life, see sects. 58—63, *post*, p. 709, and cases there quoted. 45 & 46 Vict. c. 38, s. 2.

(*f*) "So entitled" in this sub-section means entitled for life (*Re Atkinson, Atkinson* v. *Bruce*, 31 Ch. Div. 577; *Re Collinge*, 36 Ch. D. 516). Where trustees have power to distribute rents between one or more of several persons during the life of one of them, these persons do not together constitute a tenant for life (*Re Atkinson, sup.*) It has been held that when one undivided moiety is vested in A. in fee, the tenant for life of the other moiety cannot sell such moiety alone (*Re Collinge*, 36 Ch. D. 516); but see sect. 2, sub-sect. 10, cl. (i.) Sub-sect. (6).

(*g*) Even if the incumbrances exceed the income (*Re Jones*, 26 Ch. Div. 740). A disposition of the entire rent is not an incumbrance within this sub-section (*Re Strangways, Hickley* v. *Strangways*, 34 Ch. D. 427). See sect. 50 (*post*, p. 705). Sub-sect. (7).

(*h*) See S. L. Act, 1890, s. 16, *post*, p. 724. Trustees with a power of sale subject to the consent of another are trustees for the purposes of this act (*Constable* v. *Constable*, 32 Ch. D. 233), unless that consent cannot be obtained (*Re Johnstone*, 17 L. R. Ir. 172); and will be such trustees for the purposes of a sale of heirlooms, though the power of sale does not extend to the heirlooms (*Constable* v. *Constable, sup.*). Trustees holding realty on trusts declared of personalty, which included a power to call in and vary investments, were held trustees for the purposes of this act (*Re Garnett Orme and Hargreave*, 25 Ch. D. 595). Sub-sect. (8). Trustees of the settlement.

(*i*) The following sections refer expressly to sources from which capital may be derived, viz., S. L. Act, 1882, sects. 11, 18, 22 (7), 31 (1) (ii.), 34, 35 (2), 37 (2); S. L. Act, 1884, s. 4; S. L. Act, 1889, s. 3; S. L. Act, 1890, s. 11 (1). As to moneys which may be treated as capital moneys, see sects. 32, 33 (*post*, p. 696); *Re Mackenzie* (23 Ch. D. 750); *Re Tennant* (40 Ch. D. 594); *Re Mundy* (1891, 1 Ch. 406); *Clarke* v. *Thornton* (35 Ch. D. 314). Moneys arising from an exercise of the powers of a tenant for life under sect. 3 are capital moneys (*Cardigan* v. *Curzon-Howe*, 41 Ch. Div. 375). Sub-sect. (9). Capital money.

(*j*) Land includes copyholds (*Re Price, Leighton* v. *Price*, 27 Ch. D. 552), or a dignity which descends to heirs, such as a baronetcy (*Re Rivett-Carnac*, 30 Ch. D. 136; see *Re Aylesford*, 32 Ch. D. 162), or tithes (*Re Esdaile, Esdaile* v. *Esdaile*, 54 L. T. 637). As to the concluding words of the clause, see *Re Jones* (26 Ch. Div. 740). Sub-sect. (10) (i.)

(*k*) The powers and duties of the Land Commissioners are now vested in the Board of Agriculture (52 & 53 Vict. c. 30). Sub-sect. (10) (x.)

III.—Sale; Enfranchisement; Exchange; Partition.

General Powers and Regulations.

3. A tenant for life—

(i.) May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; and Powers to tenant for life to sell, &c.

(ii.) Where the settlement comprises a manor, may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without

45 & 46 Vict. c. 38, s. 3.

any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

(iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

(iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition (*l*).

(*l*) The act confers on tenants for life the power of sale and other powers of an absolute owner, but does not make saleable what is in its nature inalienable, as a dignity (*Re Rivett-Carnac*, 30 Ch. D. 140). In selling the tenant for life is a trustee for all parties (sect. 53); but he may sell to increase his own income (*Wheelwright* v. *Walker*, 23 Ch. D. 759; *Re Sebright*, 33 Ch. D. 436; see *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 539). It has been said that he may sell from ill-will, or caprice, or because the remainderman is disliked (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 540; *Wheelwright* v. *Walker*, *sup.*; *Re Chaytor*, 25 Ch. D. 654; see, however, the cases quoted under sect. 53, *post*, p. 707). The tenant for life may sell, notwithstanding that he has assigned his own interest (sect. 50, *post*, p. 705; *Re Sebright*, 33 Ch. D. 429; *Re Ailesbury*, 1892, 1 Ch. 506), but in such case the sale is without prejudice to the assignee's rights (*Cardigan* v. *Curzon-Howe*, 40 Ch. D. 341); and may sell, notwithstanding that the remainderman has assigned his interest (*Wheelwright* v. *Walker*, 23 Ch. D. 752).

A remainderman cannot restrain the tenant for life from selling on the ground that the property may increase in value (*Thomas* v. *Williams*, 24 Ch. D. 558). In an early case under the act it was held that he might restrain him from selling until trustees under the act had been appointed (*Wheelwright* v. *Walker*, 23 Ch. D. 752). As between the tenant for life and a purchaser from him, however, the fact that there were no trustees at the time of the contract, or that (if there were any) no notice (See sect. 45, *post*, p. 701), had been given to them, is not a defect of the title of the tenant for life to sell (*Hatten* v. *Russell*, 38 Ch. D. 344; *Marlborough* v. *Sartoris*, 32 Ch. D. 616). It would seem that a purchaser may require the appointment of trustees before completion (*Hatten* v. *Russell*, 38 Ch. D. 345). But where persons have been appointed under sect. 60 (*post*, p. 711) to exercise a tenant for life's powers, no trustee need ever be appointed (*Re Dudley*, 35 Ch. D. 338). The restrictions imposed by a private act on a sale by trustees do not affect a sale by the tenant for life under this section (*Re Chaytor*, 25 Ch. D. 651). A decree for the execution of the trusts of the settlement does not prevent the tenant for life from selling without the sanction of the court (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531). For the case where an order for sale has been previously made in an action, see *Taylor* v. *Poncia* (25 Ch. D. 646); or under the S. E. Act, 1877; *Re Barrs-Haden* (49 L. T. 661; 32 W. R. 194); *Re Poole* (50 L. T. 585; 32 W. R. 956).

Where trustees had contracted for an immediate sale, but, in consequence of their power of sale not arising till after the death of a tenant for life, could not make a good title, they could not force the purchaser to accept a conveyance from the tenant for life under this act (*Re Bryant and Barningham*, 44 Ch. Div. 218).

45 & 46 Vict. c. 38, s. 4.

Regulations respecting sale, enfranchisement, exchange, and partition.

4.—(1.) Every sale shall be made at the best price that can reasonably be obtained.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life, and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England (*m*).

(*m*) Having regard to sub-sect. (1), a tenant for life was restrained from selling at a less price than that offered by the remainderman (*Wheelwright* v. *Walker*, 48 L. T. 867). When the sale or exchange is made for the erection of dwellings for the working classes, see S. L. Act, 1890, s. 18 (*post*, p. 725); and 53 & 54 Vict. c. 70, s. 74. As to granting and reserving easements on an exchange or partition, see S. L. Act, 1890, s. 5 (*post*, p. 721).

Special Powers.

Transfer of incumbrances on land sold, &c.

5. Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

45 & 46 Vict. c. 38, s. 6.

IV.—Leases.

General Powers and Regulations.

Power for tenant for life to lease for ordinary or building or mining purposes.

6. A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i.) In case of a building lease, ninety-nine years:

(ii.) In case of a mining lease, sixty years:

(iii.) In case of any other lease, twenty-one years (*n*).

(*n*) Where there has been an order under the S. E. Act, 1877, granting a power of leasing to trustees, a tenant for life cannot exercise the powers of this section until that order is stayed (*Re Poole*, 50 L. T. 585; 32 W. R. 956). As to a tenant for life refusing to lease, see *Re Mansel* (1884, W. N. 209).

Further provisions as to leases by a tenant for life are contained in sects. 7 and 8 of the S. L. Act, 1890, *post*, p. 721.

Regulations respecting leases generally.

7.—(1.) Every lease shall be by deed (*o*), and be made to take effect in possession not later than twelve months after its date.

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case (*p*).

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

(5.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated (*q*).

(*o*) A writing is sufficient where the term does not extend beyond three years (S. L. Act, 1890, s. 7, sub-s. 3, *post*, p. 721). Compare note to 8 & 9 Vict. c. 106, s. 3, *ante*, p. 486.

(*p*) The fine will be capital money (S. L. Act, 1884, s. 4, *post*, p. 717). The words "any money laid out" do not include a past voluntary expenditure (*Re Chawner*, 1892, 2 Ch. 196).

(*q*) See further S. L. Act, 1890, s. 7 (*post*, p. 721). As to renewable leases, see *Re Farnell*, 33 Ch. D. 599. And when a lease is made for the erection of dwellings for the working classes, see S. L. Act, 1890, s. 18 (*post*, p. 725), and 53 & 54 Vict. c. 70, s. 74.

Building and Mining Leases.

Regulations respecting building leases.

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the

lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this act, for or in connexion with building purposes. 45 & 46 Vict. c. 38, s. 8.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed (*r*).

(*r*) The words in sub-sect. 1, "in consideration of the lessee having erected buildings," do not include the case of past voluntary expenditure (*Re Chawner*, 1892, 2 Ch. 195). As to whether a lease of land let in connection with building land, but not itself built upon, is a building lease, see *Re Sabin* (1885, W. N. 197).

As to inserting an option of purchase in a building lease under this section, see S. L. Act, 1889 (*post*, p. 720).

9.—(1.) In a mining lease— Regulations respecting mining leases.

(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf (*s*); and

(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased,

45 & 46 Vict. c. 38, s. 9.

an improvement authorized by this act, for or in connexion with mining purposes.

(*s*) The rent may vary according to the price of the minerals (S. L. Act, 1890, s. 8, *post*, p. 722).

Variation of building or mining lease according to circumstances of district.

10.—(1.) Where it is shown to the court with respect to the district in which any settled land is situate, either—

(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this act, or in perpetuity; or

(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this act, or except in perpetuity;

the court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order (*t*).

(*t*) When the tenant for life was an infant of eighteen, and the trustees asked for power to grant building leases for 200 years, power was only given subject to the approval of the court in each case (*Cecil* v. *Langdon*, 51 L. T. 618; 54 L. J. Ch. 313). A mining lease for ninety-nine years has been sanctioned under this section (*Re Powell*, *Allaway* v. *Oakeley*, 1884, W. N. 67). As to a conveyance in fee for building, see S. L. Act, 1890, s. 9, *post*, p. 722.

Part of mining rent to be set aside.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits (*u*).

(*u*) Compare the corresponding provision of the S. E. Act, 1877, s. 4 (*ante*, p. 645). A person deemed, under sect. 63 (*post*, p. 713), to be a tenant for life is to be treated as impeachable for waste (*Re Ridge*, *Hellard* v. *Moody*, 31 Ch. Div. 504). For an instance of contrary intention, see *Re Newcastle* (24 Ch. D. 129). For form of summons for payment into court of rent set aside, see R. S. L. Act, Form 10 (*post*, p. 730).

Where a lease of mines is granted by the tenant for life under sect. 12,

sub-sect. (i.), to give effect to a contract of the settlor, the right of the tenant for life to rents is the same as if the lease has been granted by the settlor, sect. 11 not applying (*Re Kemeys-Tynte*, 1892, 2 Ch. 211). 45 & 46 Vict. c. 38, s. 11.

Special Powers.

Leasing powers for special objects.

12. The leasing power of a tenant for life extends to the making of—

(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title (*v*); and

(ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

(iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this act, or otherwise, as the case may require.

(*v*) See *Re Kemeys-Tynte* (1892, 2 Ch. 211).

Surrenders.

Surrender and new grant of leases.

13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(6.) Every new or other lease shall be in conformity with this act.

45 & 46 Vict. c. 38, s. 14.

Copyholds.

Power to grant to copyholders licences for leasing.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this act empowered to make of freehold land.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

V.—Sales, Leases, and other Dispositions.

[*Sect.* 15 *was repealed and other provisions substituted by S. L. Act*, 1890, *s.* 10, post, *p.* 722.]

Streets and open Spaces.

Dedication for streets, open spaces, &c.

16. On or in connexion with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,—

(i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connexion therewith; and

(ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

Surface and Minerals apart.

45 & 46 Vict. c. 38, s. 17.

Separate dealing with surface and minerals, with or without way-leaves, &c.

17.—(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, way-leaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals (*w*).

(*w*) In the following cases land has been sold separately from the minerals: *Re Newcastle*, 24 Ch. D. 129; *Re Brown*, 27 Ch. D. 179. See, as to the power of trustees to dispose of land and minerals separately, 25 & 26 Vict. c. 108, *post*, p. 735.

Mortgage.

Mortgage for equality money, &c.

18. Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this act (*x*).

(*x*) For form of summons, see R. S. L. Act, Form 11, *post*, p. 731. See S. L. Act, 1890, s. 11, *post*, p. 723.

Undivided Share.

Concurrence in exercise of powers as to undivided share.

19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this act, with any person entitled to or having power or right of disposition of or over another undivided share (*y*).

(*y*) It has been held that a tenant for life of an undivided share cannot sell alone (*Re Collinge*, 36 Ch. D. 516). See *ante*, p. 677, note (*f*); *Re Powell, Allaway* v. *Oakley* (1884, W. N. 67).

Conveyance.

Completion of sale, lease, &c. by conveyance.

20.—(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in

45 & 46 Vict. c. 38, s. 20.

exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge.

(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of (*z*)—

(i.) All estates, interests, and charges having priority to the settlement; and

(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and (*a*)

(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls (*b*).

(*z*) A building lease granted by a tenant by the curtesy as absolute owner was held by virtue of this section to operate as a good lease under the act (*Mogridge* v. *Clapp*, 66 L. T. 558).

(*a*) Sub-sect. 2 (ii.) includes all estates and interests created subsequently to the settlement, and therefore includes not only charges for raising portions, but a mortgage of his life interest by the tenant for life (*Re Sebright*, 33 Ch. D. 438; but see *Cardigan* v. *Curzon-Howe*, 40 Ch. D. 343).

(*b*) Where copyholds are devised to trustees, and the tenant for life sells before they have been admitted, only one fine is payable (*Re Naylor and Spendla*, 34 Ch. Div. 217).

45 & 46 Vict. c. 38, s. 21.

VI.—Investment or other Application of Capital Trust Money.

Capital money under act; investment, &c. by trustees or court.

21. Capital money arising under this act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others of the following modes (namely) (*c*):

(i.) In investment on government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or Ireland incorporated by special act of parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities (*d*):

(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land (*e*):

(iii.) In payment for any improvement authorized by this act (*f*):

(iv.) In payment for equality of exchange or partition of settled land:

(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

45 & 46 Vict. c. 38, s. 21.

(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge (*g*):

(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this act (*h*):

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

(*c*) Nothing can be done under this section with regard to capital moneys until they have been actually received, so they cannot be charged (*Round* v. *Turner*, 1889, W. N. 38). Money bequeathed to trustees to be laid out in land to be settled has been applied under this section as capital money (*Re Mackenzie*, 23 Ch. D. 750; see *Re Mundy*, 1891, 1 Ch. 399). So also purchase-money arising from a sale under the S. E. Act, 1877, and ordered to be applied under sect. 34 (*ante*, p. 655) of that act (*Re Tennant*, 40 Ch. D. 594). As to the application of purchase-money of interests in land less than fee simple, see sect. 34, *post*, p. 697. The court will not allow trustees to retain investments unauthorized by the trust representing trust funds other than capital money, even though such investments are authorized by this section for capital money (*Fox* v. *Dolby*, 1883, W. N. 29).

Sub-sect. (i.). (*d*) As to what investments are by law authorized for trust money, see 52 & 53 Vict. c. 32; which authorizes (amongst other investments) any stocks, funds, or securities authorized for the investment of cash under the control of the court (as to which see R. S. C. Ord. 22, r. 17), and also real securities. The latter words include long terms (Trustee Act, 1888, s. 9); and would justify an investment on land improvement charges (27 & 28 Vict. c. 114, s. 60). As to investment on the debenture stock of a local authority, see *Re Maberly*, *Maberly* v. *Maberly* (33 Ch. D. 455).

Sub-sect. (ii.). (*e*) The word "incumbrances," as used in sub-sect. (ii.) includes a mortgage of a long term (*Re Frewen*, *Frewen* v. *James*, 38 Ch. D. 383); an annuity charged on tithes (*Re Esdaile*, *Esdaile* v. *Esdaile*, 54 L. T. 637); a temporary rent-charge for improvements authorized by this act (S. L. Act, 1887, *post*, p. 719; *Re Sudeley*, 37 Ch. D. 123; see *Re Knatchbull*, 29 Ch. Div. 588); a charge under 46 & 47 Vict. c. 61, s. 29. It would not include a jointure (*Re Knatchbull*, 27 Ch. D. 353). Moneys arising from a sale of heirlooms may be applied in discharge of incumbrances on the settled land (*Re Marlborough*, *Marlborough* v. *Marjoribanks*, 32 Ch. Div. 1). Capital moneys may be applied in the discharge of an incumbrance on part of the settled estate (*Re Chaytor*, 25 Ch. D. 651; but see *Re Sebright*, 33 Ch. D. 437). As to whether capital money arising from a portion of the settled estate exclusively subject to a charge can be applied in discharge of incumbrances affecting the other portion, see *Re Stamford* (43 Ch. D. 95).

Sub-sect. (iii.). (*f*) Under sub-sect. (iii.) the works in payment for which capital money may be applied are works within sect. 25, and they do not include ordinary repairs (*Clarke* v. *Thornton*, 35 Ch. D. 311; but see *Re Houghton*, 30 Ch. D. 101). Capital moneys were applied for improvements which the settlement had given the trustees power to make, but if made had thrown upon income (*Clarke* v. *Thornton*, *sup.*; *Re Stamford*, 56 L. T. 484). Where a settled estate comprised land subject to a charge from which the remaining portion of the estate was exempt, capital moneys arising from the charged portion were under the circumstances applied for the improvement of the remainder (*Re Stamford*, 43 Ch. D. 84). Where the settlement was composed of two instruments, evidence was required that the proposed improvements were proper under both instruments (*Re Byng*, 1892, 2 Ch. 228).

Sub-sect. (ix.). (*g*) Payment has been made to two persons who had a joint general power of appointment (*Re Winstanley*, 54 L. T. 840).

When the purchase-money of settled land has been paid into court

under the Lands Clauses Act, the court has ordered payment out to trustees for sale as being persons empowered to give an absolute discharge (*Re Rutland*, 31 W. R. 947; 49 L. T. 196; *Re Rathmines*, 15 L. R. Ir. 576), and also to trustees appointed under sect. 38 of this act (*Re Wright*, 24 Ch. D. 662; *Re Harrop*, *id.* 717; *Re Bolton*, 52 L. T. 728; *Re Wootton*, 1890, W. N. 158). But the power is discretionary, and the court may refuse to allow it (*Re Smith*, *Ex p. L. & N. W. R. Co.*, 40 Ch. Div. 386). 45 & 46 Vict. c. 38, s. 21.

(*h*) As to the meaning of the words "incidental to" in sub-sect. (x.), see *Cardigan* v. *Curzon-Howe* (41 Ch. Div. 375); *Re Stamford* (43 Ch. D. 90). The tenant for life's costs of defending an action to restrain him from selling which was dismissed with costs were allowed, so far as not recovered from the plaintiff, out of capital moneys (*Re Llewellin*, *Llewellin* v. *Williams*, 37 Ch. Div. 317). So also the proper costs of an unsuccessful attempt by a tenant for life to sell (*Re Smith*, 1891, 3 Ch. 65). As a general rule the cost of obtaining the concurrence of the mortgagees of the life estate cannot be paid out of the capital moneys where there are no special circumstances (*Cardigan* v. *Curzon-Howe*, 41 Ch. Div. 375; see, however, *Re Beck*, 24 Ch. D. 608), nor the costs of appointing a guardian to an infant tenant for life to act in a sale (*Re Rudd*, 1887, W. N. 251). As to surveyor's costs, see *Re Stamford* (43 Ch. D. 89); *Re Eyton* (1888, W. N. 254). See further the note under sect. 46, *post*, p. 703, as to the costs of applications under this act. Sub-sect. (x.). Costs.

Compare with the provisions of the above section the more limited provisions of sect. 34 of the S. E. Act, 1877 (*ante*, p. 655), and the note thereto.

22.—(1.) Capital money arising under this act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the court, as the case may be, accordingly. Regulations respecting investment, devolution, and income of securities, &c.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(3.) The investment or other application under the direction of the court shall be made on the application of the tenant for life, or of the trustees.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

(5.) Capital money arising under this act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

(6.) The income of those securities shall be paid or applied as

45 & 46 Vict. c. 38, s. 22.

the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7.) Those securities may be converted into money, which shall be capital money arising under this act (*i*).

(*i*) The option referred to in sub-sect. 1 cannot be exercised by the tenant for life unless there are trustees, who must accordingly be appointed before completion (*Hatten* v. *Russell*, 38 Ch. D. 345).

Where money has been paid into court, it may be paid out to the trustees of the settlement (S. L. Act, 1890, s. 14, *post*, p. 724). See before the last-mentioned act *Cookes* v. *Cookes* (34 Ch. D. 498).

Trustees under this act who have received capital moneys will not be authorized to transmit the same abroad for investment without the consent of all persons interested (*Re Lloyd*, *Edwards* v. *Lloyd*, 54 L. T. 643).

Under sub-sect. 5, money arising from the sale of heirlooms devolves as the heirlooms would have (*Re Marlborough*, *Marlborough* v. *Marjoribanks*, 32 Ch. Div. 1).

For form of summons under the section, see R. S. L. Act, Forms 9—11, *post*, p. 730.

Investment in land in England.

23. Capital money arising under this act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same.

Settlement of land purchased, taken in exchange, &c.

24.—(1.) Land acquired by purchase, or in exchange, or on partition shall be made subject to the settlement in manner directed in this section.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to

the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge (*j*). 45 & 46 Vict. c. 38, s. 24.

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights, and privileges over and in relation to land.

(*j*) Sub-sect. 5 includes not only charges taking priority over the settlement, but also charges created by the settlement itself (*Re Stamford*, 43 Ch. D. 93).

VII.—Improvements.

Improvements with Capital Trust Money.

25. Improvements authorized by this act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely): Description of improvements authorized by act.

(i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:

(ii.) Irrigation; warping:

(iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure:

(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:

(v.) Groynes; sea walls; defences against water:

(vi.) Inclosing; straightening of fences; re-division of fields:

(vii.) Reclamation; dry warping:

(viii.) Farm roads; private roads; roads or streets in villages or towns:

(ix.) Clearing; trenching; planting:

(x.) Cottages for labourers, farm-servants, and artizans, employed on the settled land or not:

(xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes:

(xii.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:

(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption:

45 & 46 Vict. c. 38, s. 25.

(xiv.) Tramways; railways; canals; docks:
(xv.) Jetties, piers, and landing-places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:
(xvi.) Markets and market-places:
(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land:
(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid:
(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines:
(xx.) Reconstruction, enlargement, or improvement of any of those works (*k*).

(*k*) For other authorized improvements, see S. L. Act, 1890, s. 13, *post*, p. 723. Under sect. 25 of S. L. Act, 1882, the following improvements have been held authorized:—A sea wall (See sub-sect. iv.; *Re Bethlehem Hospitals*, 30 Ch. D. 541); improvements at a mineral spring (See sub-sects. xiii. and xx.; *Re Hotchkin*, 35 Ch. D. 41); pumps for mines (*Re Mundy*, 1891, 1 Ch. 399); water supply works (*Re Lytton's Will*, 38 Ch. Div. 20); drainage of a mansion-house, building of cottages and an agent's house, and the rebuilding of stables (*Re Houghton*, 30 Ch. D. 102); farm buildings, &c. (See sub-sect. xi.; *Re Newton*, 1890, W. N. 24; 61 L. T. 787); but not "silos" as being in the nature of an experiment (*Re Broadwater*, 53 L. T. 745; 33 W. R. 738); as to re-roofing, see *Re Newton* (*sup.*) Even where the settlement authorized the application of income for the purpose, capital moneys were allowed to be applied for improvements (*Clarke* v. *Thornton*, 35 Ch. D. 307; *Re Stamford*, 56 L. T. 484; see *Vine* v. *Raleigh*, 1891, 2 Ch. 25); but not for ordinary repairs (*Clarke* v. *Thornton*, *sup.*; see, however, as to repairs, *Re Houghton*, 30 Ch. D. 108).

The execution of an order under sect. 55 of the 27 & 28 Vict. c. 114, is not alone sufficient to show that the particular works are improvements within this section (*Re Newton*, *sup.*)

As to dwellings for the working classes, see S. L. Act, 1890, s. 18 (*post*, p. 725), and 53 & 54 Vict. c. 70, s. 74; and as to other authorized agricultural improvements, see 46 & 47 Vict. c. 61, s. 29.

On the question of expending capital money in improvements or repairs, compare the note to sect. 34 of the S. E. Act, 1877, *ante*, p. 656.

Approval by Land Commissioners of scheme for improvement and payment thereon.

26.—(1.) Where the tenant for life is desirous that capital money arising under this act shall be applied in or towards payment for an improvement authorized by this act, he may submit for approval to the trustees of the settlement, or to the court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the

whole or part of any work or operation comprised in the improvement, on— 45 & 46 Vict. c. 38, s. 26.

(i.) A certificate of the Land Commissioners (*l*) certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the court, which certificate shall be conclusive as aforesaid; or on

(iii.) An order of the court directing or authorizing the trustees to so apply a specified portion of the capital money.

(3.) Where the capital money to be expended is in court, then, after a scheme is approved by the court, the court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the court, or on such other evidence as the court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement (*m*).

(*l*) Now the Board of Agriculture (52 & 53 Vict. c. 30).

(*m*) Under S. L. Act, 1890, s. 15, *post*, p. 724, the court may authorize capital money to be applied for improvements already executed, though no scheme had been previously submitted (See before last-mentioned act *Re Hotchkin*, 35 Ch. Div. 41; *Re Broadwater*, 53 L. T. 745).

If the trustees do not approve the scheme it may be submitted to the court, and the court may authorize the trustees to comply (*Clarke* v. *Thornton*, 35 Ch. D. 313).

Where the money was in court and the infant tenant in tail appeared, the court, though there were no trustees, authorized a payment under this section (*Clarke* v. *Thornton*, 35 Ch. D. 316). Where a scheme had been approved, and in carrying it out additional expense was of necessity incurred, it was allowed out of capital money (*Re Lytton's Will*, 38 Ch. Div. 20).

As regards land improvement charges, this section was held not to be retrospective (*Re Knatchbull*, 27 Ch. D. 349), but see now S. L. Act, 1887, *post* p. 719, and cases there quoted. For forms under this section, see R. S. L. Act, Forms 12—16 (*post*, p. 731).

Concurrence in improvements.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorised by this act, or in contributing to the cost thereof.

Obligation on tenant for life and successors to maintain, insure, &c.

28.—(1.) The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this act, and where a

45 & 46 Vict. c. 38, s. 28.

building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this act.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this act, and the fact and particulars of fire insurance, if any.

(4.) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act (*n*).

(*n*) Improvements effected by means of land improvement charges are within this section (S. L. Act, 1887, s. 2, *post*, p. 719).

Execution and Repair of Improvements.

Protection as regards waste in execution and repair of improvements.

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

Improvement of Land Act, 1864.

45 & 46 Vict. c. 38, s. 30.

Extension of 27 & 28 Vict. c. 114, s. 9.

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that act, but only as regards applications made to the Land Commissioners after the commencement of this act, all improvements authorized by this act.

VIII.—Contracts.

Power for tenant for life to enter into contracts.

31.—(1.) A tenant for life—

(i.) May contract to make any sale, exchange, partition, mortgage, or charge; and

(ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this act; and any such consideration, if paid in money, shall be capital money arising under this act; and

(iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this act; and

(iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

(v.) May enter into a contract for or relating to the execution of any improvement authorized by this act, and may vary or rescind the same; and

(vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this act, and may vary or rescind the same.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

(3.) The court may, on the application of the tenant for life, or of any such successor, or of any person interested in any

45 & 46 Vict. c. 38, s. 31.

contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

(4.) Any preliminary contract under this act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof (*o*).

(*o*) A tenant for life may convey so as to effectuate a contract made by his predecessor (S. L. Act, 1890, s. 6, *post*, p. 721). In connection with sub-sect. (4), see Conv. Act, 1882, sect. 4 (*ante*, p. 629).

For form of summons, see R. S. L. Act, Form 17 (*post*, p. 732).

IX.—Miscellaneous Provisions.

Application of money in court under Lands Clauses and other acts.
8 & 9 Vict. c. 18.
23 & 24 Vict. c. 106.
32 & 33 Vict. c. 18.
40 & 41 Vict. c. 18.

32. Where, under an act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other act, public, local, personal, or private, money is at the commencement of this act in court, or is afterwards paid into court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the act under which the money is in court, that money may be invested or applied as capital money arising under this act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this act) according to the same procedure, as if the modes of investment or application authorized by this act were authorised by the act under which the money is in court (*p*).

(*p*) Orders have been made under this section for payment out to trustees of money which was in court under the Lands Clauses Act (*Re Harrop*, 24 Ch. D. 717; *Re Rutland*, 31 W. R. 947); under a local act (*Re Wright*, 24 Ch. D. 662; *Re Rathmines*, 15 L. R. Ir. 576); or under a private estates act (*Re Bolton*, 52 L. T. 728). In the last case the court declined to direct the trustees to give notice of the investments to the remaindermen. Purchase-money of lands belonging absolutely to a charity, in court under the Lands Clauses Act, was held within this section (*Re Byron's Charity*, 23 Ch. D. 171; *Re Bethlehem Hospitals*, 30 Ch. D. 541). The court has under this section absolute discretion as to costs (*Re Hanbury*, 31 W. R. 784; 52 L. J. Ch. 687), and the costs will in general be paid by the corporation taking the land (*Ib.*; *Re Harrop*, 24 Ch. D. 717).

As to the bearing of this section on the procedure under the S. E. Act, 1877, relating to the examination of married women, see *Re Arabin* (52 L. T. 728).

Application of money in hands of trustees under powers of settlement.

33. Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this act (*q*).

(*q*) This section has been held to apply to money bequeathed to trustees

to be laid out in land to be settled (*Re Mackenzie*, 23 Ch. D. 750; *Re Maberly*, *Maberly* v. *Maberly*, 33 Ch. D. 455; *Re Mundy*, 1891, 1 Ch. 399); to money ordered to be applied under sect. 34 of the S. E. Act, 1877 (*Re Tennant*, 40 Ch. D. 594); and to money in court in an administration action, liable under the settlement to be laid out in land (*Clarke* v. *Thornton*, 35 Ch. D. 312; see *contra*, *Burke* v. *Gore*, 13 L. R. Ir. 367).

When the tenant for life is an infant the trustees may, under sect. 60 (*post*, p. 711), exercise the option given by this section to the tenant for life (*Re Newcastle*, 24 Ch. D. 140).

45 & 46 Vict. c. 38, s. 33.

34. Where capital money arising under this act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the court, as the case may be, and in the case of the court on the application of any party interested in that money, may, notwithstanding anything in this act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be (*r*).

Application of money paid for lease or reversion.

(*r*) This section is substantially identical with sect. 74 of the Lands Clauses Act, and decisions under that act have been treated as authorities on this section (*Cottrell* v. *Cottrell*, 28 Ch. D. 628). On a sale of leaseholds, the tenant for life was only allowed during the leasehold term an income equal to the rent previously received by him (*Ib.*; see *Re Griffith*, 49 L. T. 161). So in the case of a sale of ground rents (*Re Bowyer*, 1892, W. N. 48; and see *Askew* v. *Woodhead*, 14 Ch. D. 27). This section does not apply to chattels which are sold under sect. 37 (*Re Marlborough*, *Marlborough* v. *Marjoribanks*, 30 Ch. D. 133).

For form of summons, see R. S. L. Act, Form 18 (*post*, p. 732).

35.—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the court, may cut and sell that timber, or any part thereof.

Cutting and sale of timber, and part of proceeds to be set aside.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this act, and the other fourth part shall go as rents and profits (*s*).

(*s*) Proceeds of sale of timber were applied as directed by this section (*Re Newcastle*, 1883, W. N. 99). Where, however, a tenant for life had obtained the consent of the trustees to a sale of the settled land with the timber, but not any consent to cutting the timber, he was not entitled to any part of the purchase-money of the timber (*Re Llewellin*, *Llewellin* v. *Williams*, 37 Ch. D. 317).

For form of summons, see R. S. L. Act, Forms 6, 7 (*post*, p. 729).

36. The court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or

Proceedings for protection or recovery of

45 & 46 Vict. c. 38, s. 36.

land settled or claimed as settled.

other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement (*t*).

(*t*) Under this section the costs of proceedings prosecuted before the House of Lords to establish a claim to an earldom were paid out of the settled property (*Re Aylesford*, 32 Ch. D. 162); also, under the general jurisdiction of the court, the costs of parliamentary opposition previous to 1883 (*Re Ormrod*, 1892, 2 Ch. 318).

The above section is somewhat wider than sect. 17 of the S. E. Act, 1877, which is now repealed (S. L. Act, 1882, s. 64, *post*, p. 715). As to the repealed section, see *Re Willan* (45 L. T. 745); *Re De la Warr* (16 Ch. D. 589).

Heirlooms.

37.—(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

(2.) The money arising by the sale shall be capital money arising under this act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this act directed with respect to other capital money arising under this act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the court (*u*).

(*u*) In selling under this section a tenant for life is a trustee, and must have regard to the interests of all entitled (*Re Radnor*, 45 Ch. Div. 402). The interest, however, of anyone liable to be cut off by a tenant in tail is entitled to little weight (*Ib.* 424); all the circumstances must be considered (*Ib.* 416; *Re Beaumont*, 58 L. T. 916). The court would not sanction a sale proposed wantonly or maliciously (*Re Radnor*, 45 Ch. D. 413); nor a sale without any colour of necessity (*Re Marlborough*, *Marlborough* v. *Marjoribanks*, 32 Ch. Div. 4). Incumbrances created by the tenant for life on his interest should not, as a rule, be taken into account (*Re Radnor*, 45 Ch. D. 410; *Re Beaumont*, 58 L. T. 918). Chattels settled to devolve with a title were ordered to be sold where they were useless and a cause of expense (*Re Rivett-Carnac*, 30 Ch. D. 136; see *Re Houghton*, *ib.* 102).

Where heirlooms were directed to be kept in a certain house, an order for sale of the house was refused, without some direction as to the disposal of these heirlooms. These were subsequently ordered to be sold (*Re Brown*, 27 Ch. D. 179). An order has been made for sale of some chattels, and removal of the remainder to another mansion (*Browne* v. *Collins*, 62 L. T. 566). On a sale of heirlooms a tenant for life may be given leave to bid (*Re Brown*, *sup.*) Trustees with a power of sale over land are trustees for the purposes of this act, including the sale of heirlooms (*Constable* v. *Constable*, 32 Ch. D. 233). Moneys arising from the sale of heirlooms may be applied in discharge of incumbrances on the settled land (*Re Marl-*

borough, sup.), or in payment for improvements (*Re Houghton*, 30 Ch. D. 102). They were placed to a separate account (*Browne* v. *Collins, sup.*) 45 & 46 Vict. c. 38, s. 37.

For form of summons, see R. S. L. Act, Forms 6 and 7 (*post*, p. 729).

X.—Trustees.

Appointment of trustees by court.

38.—(1.) If at any time there are no trustees of a settlement within the definition in this act, or where in any other case it is expedient, for purposes of this act, that new trustees of a settlement be appointed, the court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for the purposes of this act (*v*).

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this act become and be the trustees or trustee of the settlement (*w*).

(*v*) The provisions with reference to the appointment of new trustees contained in the Conv. Act, 1881 (sects. 31 *et seq.*, *ante*, p. 601), apply to trustees for the purposes of the S. L. Acts (S. L. Act, 1890, s. 17, *post*, p. 724; see before that act, *Re Wilcock*, 34 Ch. D. 508; *Re Kane*, 21 L. R. Ir. 112).

As to who are "trustees of a settlement within the definition in this act," see sect. 2 (8), (*ante*, p. 675, and S. L. Act, 1890, s. 16, *post*, p. 724). The trustees are intended to be a check on the tenant for life; and accordingly the solicitor of the tenant for life will not be appointed (*Re Kemp*, 24 Ch. Div. 485; *Wheelwright* v. *Walker*, 23 Ch. D. 763); nor the tenant for life himself, nor a person who may become a tenant for life (*Re Harrop*, 24 Ch. D. 719). The court refused to appoint two persons related to each other (*Re Knowles*, 27 Ch. D. 707; see, however, *Re Wells*, 48 L. T. 859; 31 W. R. 764). The existing trustees of the instrument creating the settlement were appointed (*Re Morgan*, 24 Ch. D. 114; see *Re Harrop*, *id.* 717; *Re Kemp*, *id.* 487).

It would seem that on an appointment of trustees under this section the court has no jurisdiction to place restrictions on the exercise of their powers (*Re Dudley*, 35 Ch. D. 343; see note to sect. 60, *post*, p. 711). Trustees have been appointed under the following circumstances:—Where they were required for the purpose of receiving notices under sect. 45 (*Wheelwright* v. *Walker*, 23 Ch. D. 763; *Re Taylor*, 49 L. T. 420; see *Re Bentley*, *Wade* v. *Wilson*, 33 W. R. 610); or for receiving out under sect. 21 (ix.), money paid into court under the Lands Clauses Act (*Re Wright*, 24 Ch. D. 662); or when the tenant for life was an infant, see sect. 60 (*Re Morgan*, 24 Ch. D. 114; *Re Price*, *Leighton* v. *Price*, 27 Ch. D. 552). As to the appointment of trustees abroad, see *Re Lloyd*, *Edwards* v. *Lloyd* (54 L. T. 643). The court has refused to appoint trustees to enable an investment to be made under sect. 33, which was not authorized by the will and might interfere with its objects (*Burke* v. *Gore*, 13 L. R. Ir. 367).

(*w*) Trustees appointed under this section can, under sect. 40, give a good discharge for money paid to them (*Cookes* v. *Cookes*, 34 Ch. D. 502).

On an original appointment of trustees under this section no duty is chargeable (*Re Potter*, 1889, W. N. 69; see *Re Kennaway*, *id.* p. 70).

45 & 46 Vict. c. 38, s. 38.

For form of summons, see R. S. L. Act, Form 19 (*post*, p. 732). An order appointing new trustees was drawn up *nunc pro tunc* where a trustee died before the drawing up (*Re Jones, Bullio* v. *Jones*, 1891, W. N. 114).

Number of trustees to act.

39.—(1.) Notwithstanding anything in this act, capital money arising under this act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

(2.) Subject thereto, the provisions of this act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being (*x*).

(*x*) A power in a settlement to "the trustees or trustee" to receive and give receipts was held to authorize a sole surviving trustee to receive capital money (*Re Garnett Orme and Hargreave*, 25 Ch. D. 595).

Trustees' receipts.

40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this act, or that no more than is wanted is raised (*y*).

(*y*) Under this section, trustees appointed under sect. 38 can give a good discharge (*Cookes* v. *Cookes*, 34 Ch. D. 498; *Hatten* v. *Russell*, 38 Ch. D. 342). Compare the provision as to trustees' receipts, Conv. Act, 1881, s. 36 (*ante*, p. 604).

Protection of each trustee individually.

41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default (*z*).

(*z*) As to the indemnity of trustees generally, see note to 23 & 24 Vict. c. 35, s. 31, *ante*, p. 555.

Protection of trustees generally.

42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this act, or of an exchange, partition, or lease, are not liable for adopting any contract made

by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease (*a*). 45 & 46 Vict. c. 38, s. 42.

(*a*) The trustees have no such duty to control the tenant for life in the case of a sale, as would make them liable if it was an improper one. But they may properly commence proceedings in the case of a sale they think improvident (*Hatten* v. *Russell*, 38 Ch. D. 344); and ought to do so in the case of a fraudulent sale (*Wheelwright* v. *Walker*, 23 Ch. D. 762). They were intended to impose a check upon the powers conferred on the tenant for life (*Re Kemp*, 24 Ch. Div. 487; *Re Hotchkin*, 35 Ch. D. 44). On a summons by the tenant for life desiring to exercise some power, they should not as a rule support the application, but hold an even hand (*Re Hotchkin*, 35 Ch. Div. 43; *Re Broadwater*, 53 L. T. 745). In one case when they appeared by the same counsel as the tenant for life on an appeal which was dismissed, they were not given their costs out of the estate (*Re Broadwater*, *sup.*) A trustee, who is respondent to an appeal by a tenant for life, may be heard in support of the appeal (*Re Ailesbury*, 1892, 1 Ch. 526).

43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them (*b*). Trustees' reimbursement.

(*b*) See 23 & 24 Vict. c. 35, s. 31, *ante*, p. 555.

44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this act, or respecting any matter relating thereto, the court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the court thinks fit (*c*). Reference of differences to court.

(*c*) See the cases quoted under sect. 42, *sup.*, and as to costs the note to sect. 46, *post*, p. 703.

For form of summons, see R. S. L. Act, Form 20, *post*, p. 733.

45.—(1.) A tenant for life when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of Notice to trustees.

45 & 46 Vict. c. 38, s. 45.

business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section (*d*).

(*d*) No notice need be given in respect of a lease not exceeding twenty-one years (S. L. Act, 1890, s. 7, *post*, p. 721). As to the nature of the notice and as to waiver of it, see S. L. Act, 1884, s. 5 (*post*, p. 717), which section, however, does not in terms apply to a mortgage or charge. As to notice in cases to which the section does not apply, see *Re Ray* (25 Ch. D. 464).

A notice under this section is good if given before completion (*Marlborough* v. *Sartoris*, 32 Ch. D. 621). No notice need be given where persons have been appointed under sect. 60, to carry out a sale (*Re Dudley*, 35 Ch. D. 338). The committee of a lunatic cannot give a notice without leave of the court (*Re Ray*, 25 Ch. D. 464).

As between the tenant for life and a purchaser from him, the notice is a matter with which the purchaser is not concerned (*Marlborough* v. *Sartoris*, 32 Ch. D. 623); *quære*, however, whether a purchaser can safely complete who has actual knowledge that no notice has been given (*Hatten* v. *Russell*, 38 Ch. D. 344). Where a tenant by the curtesy granted a building lease, as absolute owner, there being no trustees for the purpose of the S. L. Act, the lessee got a good selling title, being protected by sub-sect. 3 of this section (*Mogridge* v. *Clapp*, 66 L. T. 558).

As between the tenant for life and a remainderman, the tenant for life has been restrained from selling until proper notices had been given (*Wheelwright* v. *Walker*, 23 Ch. D. 752; *Re Bentley, Wade* v. *Wilson*, 33 W. R. 610).

XI.—Court; Land Commissioners; Procedure.

Regulations respecting payments into court, applications, &c.

46.—(1.) All matters within the jurisdiction of the court under this act, shall, subject to the acts regulating the court, be assigned to the Chancery Division of the court.

(2.) Payment of money into court effectually exonerates therefrom the person making the payment.

(3.) Every application to the court shall be by petition, or by summons at chambers.

(4.) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life (*e*).

(5.) On any application notice shall be served on such persons, if any, as the court thinks fit.

(6.) The court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement (*f*).

(7.) General rules for purposes of this act shall be deemed

rules of court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made accordingly. 45 & 46 Vict. c. 38, s. 46.

(8.) The powers of the court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and rules for regulating proceedings in that court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine (*g*). 39 & 40 Vict. c. 59. 44 & 45 Vict. c. 68.

(9.) General rules, and rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this act, to take effect on or after the commencement of this act (*h*).

(10.) The powers of the court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this act mentioned, not exceeding in value five hundred pounds, be exercised by any county court within the district whereof is situate any part of the land which is to be dealt with in the court, or from which the capital money to be dealt with in the court arises under this act, or in connexion with which the personal chattels to be dealt with in the court are settled (*i*).

(*e*) As to service, see R. S. L. Act, Nos. 4, 5, and 6 (*post*, p. 725).

(*f*) Sub-sect. 6 gives the court discretion as to costs of parties to applications under the act; and sect. 47 (*post*) mentions the sources from which such costs may be paid. There are also special provisions as to costs in sects. 32, *ante*, p. 696 (See *Re Hanbury*, 31 W. R. 784), 36, *ante*, p. 697, and 44, *ante*, p. 701. In all cases not provided for by the act or rules, the existing practice of the court as to costs applies to proceedings under the act (R. S. L. Act, No. 15, *post*, p. 726). Questions under the act have been decided in specific performance actions, where the rules as to costs in those actions have been followed (*Hatten* v. *Russell*, 38 Ch. D. 334; *Marlbrough* v. *Sartoris*, 32 Ch. D. 616). In one case an action was brought by a tenant for life against trustees and others to determine questions as to his title to sell under this act, in which he was given party and party costs (*Sebright* v. *Thornton*, 1885, W. N. 176; where see as to costs of mortgagees). As to costs of actions commenced by originating summons, in which questions under the act were determined, see *Re Atkinson*, *Atkinson* v. *Bruce* (30 Ch. D. 613); *Re Strangways*, *Hickley* v. *Strangways* (34 Ch. D. 433); *Re Llewellin*, *Llewellin* v. *Williams* (37 Ch. D. 328); *Re Powell*, *Allaway* v. *Oakley* (1884, W. N. 67). Sub-sect. (6). Costs.

The costs of a summons taken out in an administration action to decide questions under this act may be made costs in that action (*Constable* v. *Constable*, 54 L. T. 610; see *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 540), or may be paid out of the estate (*Taylor* v. *Poncia*, 25 Ch. D. 651).

In the case of ordinary applications under the act, only the costs of a summons are to be allowed unless a petition be directed by the judge (S. L. Act Rules, No. 2, *post*, p. 725). The costs of petitions were allowed in *Re Houghton* (30 Ch. D. 102); *Re Bethlehem Hospitals* (30 Ch. D. 541, where see judgment).

As regards summonses, the costs of all parties of a summons by tenant for life, either wholly or partially successful, were paid out of the settled

45 & 46 Vict. c. 38, s. 46.

estate (*Re Morgan*, 24 Ch. D. 117; *Re Paget*, 30 Ch. D. 165; see *Re Ailesbury*, 1892, 1 Ch. 548). For form of usual order in such case, see S. L. Act Rules, Form 3, *post*, p. 728. The tenant for life, however, may have to pay the costs of the mortgagees of his life estate (*Re Smith*, 1891, 3 Ch. 76; *Sebright* v. *Thornton*, 1885, W. N. 176; compare *Cardigan* v. *Curzon-Howe*, 41 Ch. Div. 375). The costs of an unsuccessful summons by tenant for life may be paid out of the estate (*Re Knatchbull*, 27 Ch. D. 349; see *Re James*, 51 L. T. 596; *Re Sebright*, 33 Ch. D. 442). But the tenant for life may, if not successful, have to pay all the costs, if there is no fund available for the purpose (*Re Beaumont*, 58 L. T. 916). The costs of an unsuccessful summons by persons claiming to be tenant for life were paid out of the estate (*Re Horne*, 39 Ch. D. 84; see *Re Atkinson*, *Atkinson* v. *Bruce*, 30 Ch. D. 613).

Where on a summons taken out by the trustees it was decided that a tenant for life could not sell under the act, the tenant for life had to pay his own costs (*Re Collinge*, 36 Ch. D. 519). Where two trustees appeared by different counsel on opposite sides, both, having acted reasonably, were given costs out of the estate (*Re Ailesbury*, 1892, 1 Ch. 548). Trustees, however, who appeared by the same counsel as the tenant for life, on an application by him, had to pay their own costs (*Re Broadwater*, 53 L. T. 745).

Under S. L. Act Rules, No. 14, *post*, p. 726, a person paying capital money into court may deduct costs of paying in (See Form 10). A purchaser taking out a summons in an action for leave to pay the purchase-money into court was allowed to deduct his costs (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 540).

Costs of appeal.

All the costs of an appeal were given out of the estate when it was a case proper to be decided by the Appeal Court (*Re Jones*, 26 Ch. Div. 744; see *Re Ailesbury*, 1892, 1 Ch. 548). A person claiming to be tenant for life had to pay all the costs of an unsuccessful appeal (*Re Strangways*, *Hickley* v. *Strangways*, 34 Ch. Div. 433). A tenant for life paid his own costs of an unsuccessful appeal, and a remainderman paid his own costs, the trustees being given costs out of the estate (*Re Sebright*, 33 Ch. D. 445). Where the trustees and remainderman appealed against an order sanctioning a sale under sect. 37, the appeal was dismissed with costs (*Re Radnor*, 45 Ch. Div. 423).

Scale.

Costs were allowed on the higher scale in *Re Chaytor* (25 Ch. D. 651).

Charges and expenses.

Under the words "charges and expenses," the expenses of an abortive attempt to sell have been ordered to be paid out of the settled property *Re Smith* (1891, 3 Ch. 65).

(*g*) The powers of the High Court may, as regards land and estates in the County Palatine of Durham, be exercised by the Palatine Court (52 & 53 Vict. c. 47, s. 10).

(*h*) General rules as to applications in the High Court made under this section are given, p. 725, *post*.

(*i*) As to applications in the county court, see County Court Rules, 1889, Ord. 38.

Payment of costs out of settled property.

47. Where the court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the court, be raised and paid out of capital money arising under this act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a

mortgage of the settled land or any part thereof, to be made by such person as the court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the court thinks fit (*j*). 45 & 46 Vict. c. 38, s. 47.

(*j*) See general note as to costs under sect. 46 (*ante*, p. 703), *Re Smith* (1891, 3 Ch. 165), and see form of summons in *Re Aylesford* (32 Ch. D. 163).

Constitution of Land Commissioners; their powers, &c.

48.—(6.) The Land Commissioners shall, by virtue of this act, have, for the purposes of any act, public, local, personal, or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Land Commissioners under any act making provision as last aforesaid; and the provisions of any act relating to fees or to security for costs to be taken in respect of the business transacted under the acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any act, public, local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them (*k*). 27 & 28 Vict. c. 114.

(*k*) Sub-sects. 1—5 inclusive, constituting the Land Commissioners for England, have been repealed by 52 & 53 Vict. c. 30, s. 13. By the same act the powers and duties of the Land Commissioners for England under this act have been transferred to the Board of Agriculture, see sects. 2 and 11 of the last mentioned act.

Filing of certificates, &c. of commissioners.

49.—(1.) Every certificate and report approved and made by the Land Commissioners under this act shall be filed in their office.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

XII.—Restrictions, Savings, and General Provisions.

Powers not assignable; contract not to exercise powers void.

50.—(1.) The powers under this act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life

45 & 46 Vict. c. 38, s. 50.

after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

(2.) A contract by a tenant for life not to exercise any of his powers under this act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this act.

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment (*l*).

(*l*) As to assignments or charges in consideration of marriage, or by way of family arrangement, see S. L. Act, 1890, s. 4 (*post*, p. 721). The bankruptcy of a tenant for life does not prevent the exercise of his powers under this act (*Re Mansel*, 1884, W. N. 209; *Re Ailesbury*, 1892, 1 Ch. 535). The court has refused to sanction the sale of a mansion-house without the consent of the tenant for life's mortgagees (*Re Sebright*, 33 Ch. D. 429), which they are free to give or withhold (*Cardigan* v. *Curzon-Howe*, 40 Ch. D. 341).

The tenant for life's conveyance is subject to charges as mentioned in sect. 20, *ante*, p. 686, where see note.

As to a tenant for life's covenant, see *Re Hale and Smyth* (55 L. T. 151); quoted *ante*, p. 677.

In connection with the latter part of sub-sect. (1), see sect. 2 (7) (*ante*, p. 675); and compare 23 & 24 Vict. c. 145, s. 31 (*ante*, p. 565), and the note as to the extinguishment of powers appendant (*ante*, p. 296).

Prohibition or limitation against exercise of powers, void.

51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or

interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same (*m*). 45 & 46 Vict. c. 38, s. 51.

(*m*) This section was not intended to enlarge a particular estate not properly an estate for life (*Re Hazle*, 29 Ch. Div. 84). To make it apply there must be found in the settlement a limitation, which but for the attempted prohibition would constitute a tenant for life within this act (*Re Atkinson*, *Atkinson* v. *Bruce*, 31 Ch. Div. 581).

A condition of forfeiture for non-residence does not prevent a lease of a mansion-house (*Re Thompson*, 21 L. R. Ir. 109), or a sale (*Re Paget*, 30 Ch. D. 162; see *Re Brown*, 27 Ch. D. 179), and does not attach to the proceeds of sale (*Re Paget*, *sup.*) But such a condition is not rendered void under this section unless it interferes with the exercise of the powers of the tenant for life (*Re Haynes*, *Kemp* v. *Haynes*, 37 Ch. D. 307).

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this act shall not occasion a forfeiture. Provision against forfeiture.

53. A tenant for life shall, in exercising any power under this act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties (*n*). Tenant for life trustee for all parties interested.

(*n*) The object of this section is to protect the material interests of the parties entitled, and to prevent the tenant for life from doing anything in the exercise of his powers which will damage those interests (*Re Ailesbury*, 1892, 1 Ch. 540). He should consider not merely pecuniary interests but also sentimental feelings (*Ib.* 536, 541). Further, he is bound to exercise his discretion as if he were an independent trustee for himself and all the other members of the family (*Re Radnor*, 45 Ch. Div. 417). He should consider whether he is unduly prejudicing any party; but in the absence of reason for supposing the discretion to be unfairly exercised, that discretion ought to prevail (*Re Stamford*, 43 Ch. D. 95; *Re Radnor*, 45 Ch. D. 417; *Re Ailesbury*, 1892, 1 Ch. 531). He may exercise his powers for his own benefit (*Re Sebright*, 33 Ch. D. 436; *Wheelwright* v. *Walker*, 23 Ch. D. 759); but not for his own benefit solely, or for the benefit of a stranger (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 539; *Re Chawner*, 1892, 2 Ch. 195). The fact that he gets a benefit is not sufficient to prevent him from exercising the requisite discretion (*Re Stamford*, 56 L. T. 484).

The duty imposed by this section on the tenant for life does not affect a purchaser's title (*Re Ailesbury*, 1892, 1 Ch. 536); but the tenant for life will be answerable for the improper or improvident exercise of his powers (*Ib.*; *Re Marlborough*, *Marlborough* v. *Marjoribanks*, 32 Ch. D. 514; see *Hatten* v. *Russell*, 38 Ch. D. 345; *Wheelwright* v. *Walker*, 23 Ch. D. 762; *Norton* v. *Johnstone*, 30 Ch. D. 651). The tenant for life, however, has under this section rather the responsibilities than the rights of a trustee (*Re Llewellin*, *Llewellin* v. *Williams*, 37 Ch. D. 325; see *Cardigan* v. *Curzon-Howe*, 41 Ch. Div. 379), and accordingly is not entitled to all costs and expenses (*Sebright* v. *Thornton*, 1885, W. N. 176; *Cardigan* v. *Curzon-Howe*, 41 Ch. Div. 375; see *Re Beck*, 24 Ch. D. 608; *Re Llewellin*, *sup.*) See further as to the costs of the tenant for life, the note to sect. 21, subsect. (x.) (*ante*, p. 689), and the note to sect. 46 (*ante*, p. 703).

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled General protection of purchasers, &c.

45 & 46 Vict. c. 38, s. 54.

under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this act.

Exercise of powers; limitation of provisions, &c.

55.—(1.) Powers and authorities conferred by this act on a tenant for life or trustees or the court or the Land Commissioners are exerciseable from time to time.

(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

(3.) Where any provision in this act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this act (*o*).

(*o*) See *Re Llewellin*, *Llewellin* v. *Williams* (37 Ch. D. 327); *Re Smith* (1891, 3. Ch. 65).

Saving for other powers.

56.—(1.) Nothing in this act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this act are cumulative (*p*).

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this act, the provisions of this act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this act (*q*).

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

(*p*) The restriction in a private act on a trustee's power of sale did not limit the tenant for life's power under this act (*Re Chaytor*, 25 Ch. D. 651). As to the joint operation of powers in the settlement and the powers in the act, see *Re Newcastle* (24 Ch. D. 129). Where an order has already been made under the S. E. Act, 1877, the powers of this act are not cumulative (*Re Poole*, 50 L. T. 585; 32 W. R. 956; see *Re Barrs-Haden*, 49 L. T. 661; 32 W. R. 194).

(*q*) A case of conflict within sub-sect. 2 arose in *Clarke* v. *Thornton* (35 Ch. D. 315), where the statutory power of a tenant for life to have capital money expended in improvements was held to override a power given by the settlement to apply income for that purpose (See *Re Stamford*, 56 L. T. 484). The consent of the tenant for life is not necessary to the exercise by trustees of an absolute trust for sale (*Taylor* v. *Poncia*, 25 Ch. D. 646); but was held necessary to the exercise by trustees of a power of sale (*Re Clitheroe*, 31 Ch. Div. 135). An order for sale overrides the necessity for any such consent (*Taylor* v. *Poncia*, *sup.*) Where the tenant for life is an infant, the consent required by sub-sect. 2 may be given by the trustees under sect. 60 (*Re Newcastle*, 24 Ch. D. 140). The consent of one of several persons constituting the tenant for life is sufficient (S. L. Act, 1884, s. 6, *post*, p. 717, which see also as to consents in a case within sect. 63 of this act).

45 & 46 Vict. c. 38, s. 56.

57.—(1.) Nothing in this act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this act.

Additional or larger powers by settlement.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this act, unless a contrary intention is expressed in the settlement.

XIII.—Limited Owners generally.

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession (*r*), have the powers of a tenant for life under this act, as if each of them were a tenant for life as defined in this act (namely):

Enumeration of other limited owners, to have powers of tenant for life.

(i.) A tenant in tail, including a tenant in tail who is by act of parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services (*s*):

(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event (*t*):

(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this act shall bind the Crown (*u*):

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent (*v*):

(v.) A tenant for the life of another, not holding merely under a lease at a rent:

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of

45 & 46 Vict. c. 38, s. 58.

the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose (*w*):

(vii.) A tenant in tail after possibility of issue extinct:

(viii.) A tenant by the curtesy (*x*):

(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event (*y*).

(2.) In every such case, the provisions of this act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3.) In any such case any reference in this act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

(*r*) In sub-sect. (1) the words "in possession" are used by way of distinction from in remainder and reversion (*Re Jones*, 26 Ch. Div. 744; *Re Morgan*, 24 Ch. D. 116). So an infant may be "in possession" by his guardian (*Re Morgan*, *sup.*) But where there was a trust of the whole income for a term for management and accumulation, the subsequent life estate was held to be *in futuro*, and not within this section (*Re Strangways*, *Hickley* v. *Strangways*, 34 Ch. Div. 423).

(*s*) As to clause (i.), see *Re Bolton* (52 L. T. 728).

(*t*) A case was held within clause (ii.) where there was a trust to pay the income to a person for the maintenance of an infant till twenty-one, then to the infant absolutely, but if he died under twenty-one over (*Re Morgan*, 24 Ch. D. 114; see *Re James*, 51 L. T. 596; 32 W. R. 898).

(*u*) As to the words "base fee," in clause (iii.), see 3 & 4 Will. IV. c. 74, s. 1 (*ante*, p. 241).

(*v*) These words do not include a person entitled to receive, if he shall so long live, the rents payable under a lease for years (*Re Hazle*, 29 Ch. Div. 79).

(*w*) A person to whom a property is devised so long as he shall reside, and in default over, is within clause (vi.) (*Re Paget*, 30 Ch. D. 161). The words "trust for accumulation" applied where there was an antecedent term supporting such a trust (*Re Clitheroe*, 31 Ch. Div. 141); but did not include a disposition of the entire rent, the interest of the tenant for life being postponed (*Re Strangways*, *Hickley* v. *Strangways*, 34 Ch. Div. 431). A trust to pay rents during a person's life to him, his wife, and children, or one or more of them, is not with this clause (*Re Atkinson*, *Atkinson* v. *Bruce*, 31 Ch. Div. 577; see *Re Parry*, 1884, W. N. 43).

(*x*) The estate by the curtesy (clause viii.) is deemed to arise under a settlement made by the wife (S. L. Act, 1884, s. 8, *post*, p. 718). For the case of a lease under this act by a tenant by the curtesy, see *Mogridge* v. *Clapp* (66 L. T. 558). As to an estate by the curtesy generally, see the note, *ante*, p. 349.

(*y*) In clause (ix.) "entitled" means entitled according to the limitations of the settlement, without regard to incumbrances (*Re Jones*, 26 Ch. Div. 738). The clause includes a direction to pay surplus rents, after keeping down interest on mortgages (*Cardigan* v. *Curzon-Howe*, 30 Ch. D.

525), or expenses under extensive powers of management (*Clarke* v. *Thornton*, 35 Ch. D. 307; see *Re Jones*, 26 Ch. Div. 738; *Re Cookes*, 1885, W. N. 177; *Re Bentley*, *Wade* v. *Wilson*, 33 W. R. 610). A trust, however, to apply the whole or a part of the income for the maintenance of an infant, the surplus to be accumulated not necessarily for his benefit, does not entitle the infant to the income within this clause (*Re Horne*, 39 Ch. Div. 84). Where trustees have a discretion to pay income to a husband, wife and children, or one or more of them, there is no "direction for payment" to the husband, or the husband and wife, within this clause (*Re Atkinson*, *Atkinson* v. *Bruce*, 31 Ch. Div. 577). **45 & 46 Vict. c. 38, s. 58.**

XIV.—Infants; Married Women; Lunatics.

59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this act the land is settled land, and the infant shall be deemed tenant for life thereof (*z*). **Infant absolutely entitled to be as tenant for life.**

(*z*) Under this section an infant was deemed tenant for life when his title had vested, absolutely (*Re Price*, *Leighton* v. *Price*, 27 Ch. D. 552), or subject to divesting on death under twenty-one (*Re James*, 51 L. T. 596; 32 W. R. 898).

An infant entitled contingently on attaining twenty-one is not "entitled in possession," though there is a trust to apply income for maintenance (*Re Horne*, 39 Ch. D. 84). An interest in land belonging to a partnership which had descended to an infant on the death of one partner was within this section (*Re Wells*, 48 L. T. 859; 31 W. R. 764; see *Re Greenville*, 11 L. R. Ir. 138).

60. Where a tenant for life, or a person having the powers of a tenant for life under this act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this act, the powers of a tenant for life under this act may be exercised on his behalf by the trustees of the settlement (*a*), and if there are none, then by such person and in such manner as the court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders (*b*). **Tenant for life, infant.**

(*a*) The trustees of the settlement may give, on behalf of the infant, the consent required by sect. 56 (*Re Newcastle*, 24 Ch. D. 140). It has been suggested that the first part of this section gives the trustees of the settlement unrestricted power to exercise the powers of the tenant for life (*Re Dudley*, 35 Ch. D. 343; see *Re Newcastle*, 24 Ch. D. 140). Where, however, it was necessary to obtain the sanction of the court under sect. 10 (*ante*, p. 682), the court imposed conditions by reason of the infant being nearly of age (*Cecil* v. *Langdon*, 54 L. T. 418; and see *Re Powell*, *Allaway* v. *Oakley*, 1884, W. N. 67). Where the trustees have already powers of leasing under an order under the S. E. Act, 1877, that order must be suspended before they can exercise the powers given by this act (*Re Poole*, 32 W. R. 956; 50 L. T. 585).

(*b*) Where an infant is entitled to property and there are no trustees of the settlement, two courses appear to be open:—(1) To obtain the appointment of trustees under sect. 38; and (2) to obtain the appointment of persons to exercise the powers of a tenant for life on behalf of the infant. If the first course be adopted the trustees will be within the words "the trustees of the settlement" in the above section (*Re Dudley*, 35 Ch. D. 342); and

45 & 46 Vict. c. 38, s. 60.

the court has no jurisdiction to restrict the exercise of their powers (*Ib.* 343). The right order would seem to be to appoint trustees generally (See *Re Morgan*, 24 Ch. D. 117). Special directions, however, were given in *Re Price, Leighton* v. *Price* (27 Ch. D. 552) that the trustees might sell out of court; and in *Re Wells* (48 L. T. 859; 31 W. R. 764) that powers under the particular sections might be exercised. See *Re James* (51 L. T. 596; 32 W. R. 898).

If the second course be adopted the court can restrict the exercise of the powers (*Re Dudley*, 35 Ch. D. 342). The court has refused to appoint under this section a co-owner to exercise the infant's powers for the purpose of a sale (*Re Greenville*, 11 L. R. Ir. 138). Where a person has been ordered to sell under this section no notice to trustees is necessary, and therefore none need be appointed to receive a notice (*Re Dudley*, 35 Ch. D. 338); but the purchase-money must in such a case be paid into court (*Ib.*)

For form of summons, see R. S. L. Act, Form 22 (*post*, p. 733).

Married woman, how to be affected.

61.—(1.) The foregoing provisions of this act do not apply in the case of a married woman.

(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life under the foregoing provisions of this act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a feme sole, then she, without her husband, shall have the powers of a tenant for life under this act.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this act.

(4.) The provisions of this act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this act (*c*).

(*c*) A married woman may become entitled as *feme sole* under the following statutes:—20 & 21 Vict, c. 85, ss. 21, 25; 21 & 22 Vict. c. 108, ss. 6, 8; 41 & 42 Vict. c. 19, s. 4; and the M. W. P. Act, 1882 (*ante*, pp. 325 *et seq.*); see *Re Bentley*, *Wade* v. *Wilson* (33 W. R. 610).

Tenant for life, lunatic.

62. Where a tenant for life, or a person having the powers of a tenant for life under this act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this act;

and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate (*d*). 45 & 46 Vict. c. 38, s. 62.

(*d*) A general authority may be given to the committee to take proceedings under this act to sell (*Re Gaitskell*, 40 Ch. Div. 416). Trustees should be appointed, if there are none, to receive notice under sect. 45 (*Re Taylor*, 49 L. T. 420; 52 L. J. Ch. 728). Notices cannot be given by the committee without the leave of the court (*Re Ray*, 25 Ch. D. 464). As to the jurisdiction in lunacy, see now 53 Vict. c. 5, ss. 108, 120; and as to applications in lunacy, see sect. 338.

XV.—Settlement by way of Trusts for Sale.

Provision for case of trust to sell and reinvest in land.

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, act of parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this act are for purposes of this act trustees of the settlement.

(2.) In every such case the provisions of this act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

(i.) Any reference in this act to the predecessors or successors in title of the tenant for life, or to the remaindermen,

45 & 46 Vict. c. 38, s. 63.

or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

(ii.) Capital money arising under this act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

(iii.) Capital money arising under this act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(iv.) Land of whatever tenure acquired under this act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging (*e*.)

(*e*) See S. L. Act, 1884, sect. 6 (1) and sect. 7 (*post*, p. 717). Unless leave be given under the last-mentioned section, trustees for sale can determine how land should be placed on market (*Re Harding*, 1891, 1 Ch. 64). Sect. 11 (*ante*, p. 682), applies to cases within this section (*Re Ridge*, *Hellard* v. *Moody*, 31 Ch. Div. 504). The only instrument to be considered the settlement under this section is the instrument which contains the trust for sale (*Re Earle and Webster*, 24 Ch. D. 144). If the only person entitled under that instrument is entitled absolutely, this section has no application (*Ib.*) If the trust for sale is postponed it is not within this section (*Re Horne*, 39 Ch. Div. 84). Where there is a

discretionary power of maintenance, the surplus to be accumulated, no one is beneficially entitled to the income within this section (*Ib.*; see *Re Powell, Allaway* v. *Oakley*, 1884, W. N. 67). 45 & 46 Vict. c. 38, s. 63.

No consent of the tenant for life (See sect. 56) is necessary to a sale by trustees in cases within this section (S. L. Act, 1884, s. 6 (1), *post*, p. 717; *Taylor* v. *Poncia*, 25 Ch. D. 646).

XVI.—Repeals.

64.—(1.) The enactments described in the schedule to this act are hereby repealed. Repeal of enactments in schedule.

(2.) The repeal by this act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this act.

XVII.—Ireland.

65.—(1.) In the application of this act to Ireland the foregoing provisions shall be modified as in this section provided. Modifications respecting Ireland.

(2.) The court shall be her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that court shall, subject to the acts regulating that court, be assigned to the Chancery Division of that court; but general rules under this act for Ireland may direct that those matters or any of them be assigned to the land judges of that division.

(4.) Any deed inrolled under this act shall be inrolled in the record and writ office of that division.

(5.) General rules for purposes of this act for Ireland shall be deemed rules of court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this act, to take effect on or after the commencement of this act. 40 & 41 Vict. c. 57.

(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this act, have and exercise the power and authority exerciseable by the court under this act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

(7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exerciseable by those courts under this act. 40 & 41 Vict. c. 56.

(8.) Rules and orders for purposes of this act, as far as it

45 & 46 Vict. c. 38, s. 65.

relates to the Civil Bill Courts, may be made at any time after the passing of this act, to take effect on or after the commencement of this act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

Sect. 64.

THE SCHEDULE.

Repeals.

23 & 24 Vict. c. 145.	An act to give to trustees, mortgagees, and others, certain powers now commonly inserted in settlements, mortgages, and wills	in part; namely,— Parts I. and IV. (being so much of the act as is not repealed by the Conveyancing and Law of Property Act, 1881).
27 & 28 Vict. c. 114.	The Improvement of Land Act, 1864	in part; namely,— Sections seventeen and eighteen: Section twenty-one, from "either by a party" to "benefice) or" (inclusive); and from "or if the land owner" to "minor or minors" (inclusive); and "or circumstance" (twice): Except as regards Scotland.
40 & 41 Vict. c. 18.	The Settled Estates Act, 1877	in part; namely,— Section seventeen.

SETTLED LAND ACT, 1884.

47 & 48 Victoriæ, cap. 18.

An Act to amend the Settled Land Act, 1882.

[3rd July, 1884.]

47 & 48 Vict. c. 18, s. 1.

Be it enacted as follows:

Short title.

1. This act may be cited as the Settled Land Act, 1884.

Interpretation.

2. The expression "the Act of 1882" used in this act means the Settled Land Act, 1882.

Construction of act.

3. The Act of 1882 and this act are to be read and construed together as one act, and expressions used in this act are to have the same meanings as those attached by the Act of 1882 to similar expressions used therein.

47 & 48 Vict. c. 18, s. 4.

Fine on a lease to be capital money.

4. A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that act.

Notice under 45 & 46 Vict. c. 38, s. 45, may, as to a sale, exchange, partition, or lease, be general.

5.—(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.

(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this act.

(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this act, is not made sufficient by virtue of this act.

As to consents of tenants for life.

6.—(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

(2.) In the case of every other settlement, not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that act, then, notwithstanding anything contained in subsection (2.) of section fifty-six of that act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exerciseable for any purpose provided for in that act.

(3.) This section applies to dealings before, as well as after, the passing of this act (*a*).

(*a*) See *Re Harding* (1891, 1 Ch. 60).

Powers given by sect. 63 to be exercised only with leave of the court.

7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect:—

(i.) Those powers are not to be exercised without the leave of the court.

(ii.) The court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given (*b*).

(iii.) The court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

47 & 48 Vict. c. 18, s. 7.

(iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.

(v.) An order under this section may be registered and re-registered, as a lis pendens, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882" (*c*).

(vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a lis pendens.

(vii.) An application to the court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882.

(viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

(ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section sixty-three of the Act of 1882, and shall have, and may exercise those powers accordingly.

(x.) This section is not to affect any dealing which has taken place before the passing of this act, under any trust or power to which this section applies.

(*b*) Leave to sell was given to the tenant for life in *Re Harding*, 1891, 1 Ch. 60.

(*c*) As to registering a *lis pendens*, see *ante*, p. 464.

Curtesy to be deemed to arise under settlement.

8. For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife (*d*).

(*d*) See S. L. Act, 1882, sect. 58 (1) (viii.), *ante*, p. 710.

SETTLED LAND ACTS (AMENDMENT) ACT, 1887.

50 & 51 VICTORIÆ, CAP. 30.

An Act to amend the Settled Land Act (1882).

[23rd August, 1887.]

WHEREAS by the twenty-first section of the Settled Land Act, 1882 (in this act referred to as the Act of 1882), it is provided that capital money arising under that act may be applied in payment for any improvement by that act authorized: 50 & 51 Vict. c. 30, s. 1. 45 & 46 Vict. c. 38.

Be it therefore enacted as follows:

Amendment of sect. 21 of the Settled Land Act, 1882.

1. Where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this act, and a rent charge, whether temporary or perpetual, has been or may be created in pursuance of any act of parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882 (*a*).

(*a*) In the case of temporary rent charges created under the Improvement of Land Act, 1864, it was decided under the S. L. Act, 1882 (before the passing of the above act), that such rent charges could not be paid out of capital moneys (*Re Knatchbull*, 29 Ch. Div. 588).

Under the above act capital moneys may now be applied, either (1) in payment from time to time of the instalments of such rent charges (*Re Sudeley*, 37 Ch. D. 123), including, it would seem, interest as well as principal (See *Re Egmont*, 45 Ch. Div. 395, disapproving on this point, *Re Sudeley*, *sup.*; *Re Newton*, 61 L. T. 787); or (2) in redeeming the rent charges by one payment (*Re Egmont*, *sup.*), in which case the payment may include not only the balance of principal, but a bonus to compensate the lender for loss of interest (*Ib.*)

The powers of this act were applied where the trustees of a settlement had themselves purchased the rent charges under sect. 60 of the Act of 1864 (*Re Howard*, 1892, 2 Ch. 233), and where the improved portions of the settled estates had been sold (*Ib.*)

This act does not enable the tenant for life to be recouped out of capital moneys the instalments of the rent charges actually paid by him, whether before the act came into operation (*Re Howard*, *sup.*); or since (*Re Dalison*, 1892, W. N. 140; see *Re Howard*, *sup.*)

Where the works paid for by means of the rent charge were not within the description of improvements authorized by the S. L. Act, 1882, the application of capital moneys was not allowed (*Re Newton*, 61 L. T. 787).

Sect. 28 of Settled Land Act, 1882, to apply to improvements within preceding section.

2. Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of section twenty-eight of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.

SETTLED LAND ACT, 1889.

52 & 53 VICTORIÆ, CAP. 36.

An Act to amend the Settled Land Act, 1882.

[12th August, 1889.]

52 & 53 Vict. c. 36, s. 1.

BE it enacted as follows:—

Construction and short title.

1. This act shall be construed as one with the Settled Land Acts, 1882 to 1887, and may be cited together with those acts as the Settled Land Acts, 1882 to 1889, and separately as the Settled Land Act, 1889.

Option of purchase in building lease.

45 & 46 Vict. c. 38.

2. Any building lease, and any agreement for granting building leases, under the Settled Land Act, 1882, may contain an option, to be exercised at any time within an agreed number of years not exceeding ten, for the lessee to purchase the land leased at a price fixed at the time of the making of the lease or agreement for the lease, such price to be the best which, having regard to the rent reserved, can reasonably be obtained, and to be either a fixed sum of money, or such a sum of money as shall be equal to a stated number of years' purchase of the highest rent reserved by the lease or agreement.

Price to be capital money.

3. Such price when received shall for all purposes be capital money arising under the Settled Land Act, 1882.

SETTLED LAND ACT, 1890.

53 & 54 VICTORIÆ, CAP. 69.

An Act to amend the Settled Land Acts, 1882 *to* 1889.

[18th August, 1890.]

53 & 54 Vict. c. 69, s. 1.

BE it enacted as follows:

Preliminary.

Short title.

1. This act may be cited as the Settled Land Act, 1890.

Acts to be construed together.

2. The Settled Land Acts, 1882 to 1889, and this act are to be read and construed together as one act, and may be cited as the Settled Land Acts, 1882 to 1890.

Interpretation.

3. Expressions used in this act are to have the same meanings as those attached by the Settled Land Acts, 1882 to 1889, to similar expressions used therein.

Definitions.

53 & 54 Vict. c. 69, s. 4.

Instrument in consideration of marriage, &c. to be part of the settlement.

4.—(1.) Every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of section fifty of the Act of 1882.

45 & 46 Vict. c. 38.

(2.) This section is to apply and have effect with respect to every disposition before as well as after the passing of this act, unless inconsistent with the nature or terms of the disposition (*a*).

(*a*) See S. L. Act, 1882, sect. 1 (1), *ante*, p. 674; sect. 50, *ante*, p. 705.

Exchanges.

Creation of easements on exchange or partition.

5. On an exchange or partition any easement, right, or privilege of any kind may be reserved or may be granted over or in relation to the settled land or any part thereof, or other land or an easement, right, or privilege of any kind may be given or taken in exchange or on partition for land or for any other easement, right, or privilege of any kind.

Completion of Contracts.

Power to complete predecessor's contract.

6. A tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which if made by such predecessor would have been valid as against his successors in title (*b*).

(*b*) This section does not apply to leases (*Kemeys-Tynte* v. *Kemeys-Tynte*, 1892, 2 Ch. 213), see sect. 12 (i.) of S. L. Act, 1882, *ante*, p. 683.

Leases.

Provision as to leases for twenty-one years.

7. A lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made by a tenant for life—

(i.) Without any notice of an intention to make the same having been given under section forty-five of the Act of 1882; and

45 & 46 Vict. c. 38.

(ii.) Notwithstanding that there are no trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890; and

(iii.) By any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent in cases where the term does not extend beyond three years from the date of the writing.

53 & 54 Vict. c. 69, s. 8.

Provision as to mining leases.

8. In a mining lease—

(i.) The rent may be made to vary according to the price of the minerals or substances gotten, or any of them:

(ii.) Such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration), or may be an average of any such prices or values taken during a specified period (*c*).

(*c*) See S. L. Act, 1882, sect. 9, *ante*, p. 681.

Power to reserve a rent-charge on a grant in fee simple.

9. Where, on a grant for building purposes by a tenant for life, the land is expressed to be conveyed in fee simple with or subject to a reservation thereout of a perpetual rent or rentcharge, the reservation shall operate to create a rentcharge in fee simple issuing out of the land conveyed, and having incidental thereto all powers and remedies for recovery thereof conferred by section forty-four of the Conveyancing and Law of Property Act, 1881 (*d*), and the rentcharge so created shall go and remain to the uses on the trusts and subject to the powers and provisions which, immediately before the conveyance, were subsisting with respect to the land out of which it is reserved.

44 & 45 Vict. c. 41.

(*d*) *Ante*, p. 609.

Mansion and Park.

Restriction on sale of mansion.

10.—(1.) From and after the passing of this act section fifteen of the Act of 1882, relating to the sale or leasing of the principal mansion house, shall be and the same is hereby repealed.

(2.) Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the court.

(3.) Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section (*e*).

(*e*) When the tenant for life was insolvent and had heavily mortgaged his life interest, the court sanctioned a sale, even though the next remainderman was in a position to keep up the estate if he came into it (*Re Ailesbury*, 1892, 1 Ch. 506). In giving its consent under this section the court has had regard to public interests, and the interests of tenants on the estate (*Ib.*) The discretion of the court, it would seem, is not so limited as that of the tenant for life (*Ib.*, see pp. 528, 536).

The following cases were decided under S. L. Act, 1882, s. 15, which was similar to sub-sect. 2. Notwithstanding a clause of forfeiture for

non-residence, a mansion house may be sold (*Re Paget*, 30 Ch. D. 161) or let (*Re Thompson*, 21 L. R. Ir. 109). So a mansion house may be sold though directed to be kept as a residence, and expressly excluded from the power of sale (*Re Brown*, 27 Ch. D. 179). The court has refused to order a sale until all facts bearing on the question were known, and also whether the mortgagees of the life interest consented (*Re Sebright*, 33 Ch. Div. 429). For forms of summons, see R. S. L. Act, Forms 4, 5, 6, and 7 (*post*, p. 728).

53 & 54 Vict. c. 69, s. 10.

The Raising of Money.

11.—(1.) Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee-simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

(2.) Incumbrance in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable.

Power to raise money by mortgage.

Dealings as between Tenant for Life and the Estate.

12. Where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction.

Provision enabling dealings with tenant for life.

13. Improvements authorised by the Act of 1882 shall include the following; namely:

Application of capital money.

(i.) Bridges;

(ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let;

(iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof;

(iv.) The rebuilding of the principal mansion house on the settled land: Provided that the sum to be applied under

53 & 54 Vict. c. 69, s. 13.

this sub-section shall not exceed one-half of the annual rental of the settled land(*f*).

(*f*) See S. L. Act, 1882, sect. 25, *ante*, p. 691.

Capital money in court may be paid out to trustees.

14. All or any part of any capital money paid into court may, if the court thinks fit, be at any time paid out to the trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890 (*g*).

(*g*) See S. L. Act, 1882, sect. 22, *ante*, p. 689.

Court may order payment for improvements executed.

15. The court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorized by the Settled Land Acts, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the court (*h*).

(*h*) See S. L. Act, 1882, sect. 26, *ante*, p. 692. As to paying for improvements executed before 1883 out of capital moneys, see *Re Ormrod* (1892, 2 Ch. 318).

Trustees.

Trustees for the purposes of the act.

16. Where there are for the time being no trustees of the settlement within the meaning and for the purposes of the Act of 1882, then the following persons shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely,

(i.) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale, or, if there be no such persons, then

(ii.) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not (*i*).

(*i*) See, before this act, *Wheelwright* v. *Walker* (23 Ch. D. 752). For further definition of "trustees," see S. L. Act, 1882, sect. 2 (8), *ante*, p. 675.

Application of provisions of 44 & 45 Vict. c. 41, as to appointment of trustees.

17.—(1.) All the powers and provisions contained in the Conveyancing and Law of Property Act, 1881, with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the court or by the settlement, or under provisions contained in the settlement.

(2.) This section applies and is to have effect with respect to

an appointment or a discharge and retirement of trustees taking place before as well as after the passing of this act. 53 & 54 Vict. c. 69, s. 17.

(3.) This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this act otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881 (*k*).

(*k*) See Conv. Act, 1881, sects. 31 *et seq.*, *ante*, p. 601; S. L. Act, 1882, sect, 38, *ante*, p. 699.

18. The provisions of section eleven of the Housing of the Working Classes Act, 1885, and of any enactment which may be substituted therefor, shall have effect as if the expression "working classes" included all classes of persons who earn their livelihood by wages or salaries: Provided that this section shall apply only to buildings of a rateable value not exceeding one hundred pounds per annum. Extension of meaning of "working classes" in 48 & 49 Vict. c. 72.

19. The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any judge thereof. Power to vacate registration of writ.

RULES UNDER THE SETTLED LAND ACT, 1882.

1. The expression "the act" used in these rules means the Settled Land Act, 1882. Interpretation.

Words defined by the act when used in these rules have the same meanings as in the act.

The expression "the tenant for life" includes the tenant for life as defined by the act, and any person having the powers of a tenant for life under the act.

2. All applications to the court under the act may be made by summons in chambers; and if in any case a petition shall be presented without the direction of the judge, no further costs shall be allowed than would be allowed upon a summons. Application to be by summons.

3. The forms in the appendix to these rules are to be followed as far as possible, with such modification as the circumstances require. All summonses, petitions, affidavits, and other proceedings under the act are to be entitled according to Form I. in the Appendix. Forms.

4. The persons to be served with notice of applications to the court shall, in the first instance, be as follows:— Service.

In the case of applications by the tenant for life under sections 15 and 34, the trustees.

In the case of applications under section 38, the trustees (if any), and the tenant for life if not the applicant.

In the case of applications under section 44, the tenant for life, or the trustees, as the case may be.

No other person shall in the first instance be served. Except as hereinbefore provided where an application under the act is made by any person other than the tenant for life, the tenant for life alone shall be served in the first instance.

5. Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.

6. The judge may require notice of any application under the act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time as the case may require. Where a petition is presented, the petitioner may, after the petition has

Rules.

been filed, apply by summons in chambers (Appendix, Form 23) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the judge directs. The judge may in any particular case, upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these rules, or under any direction of the judge, any application is to be served (*a*).

(*a*) The court dispensed with service on the children of the tenant for life who were sufficiently represented by the trustees (*Re Brown*, 27 Ch. D. 186).

Title.

7. It shall be sufficient upon any application under the act to verify by affidavit the title of the tenant for life and trustees or other persons interested in the application unless the judge in any particular case requires further evidence. Such affidavit may be in the form or to the effect of Form No. 8 in the Appendix.

Sales.

8. Any sale authorised or directed by the court under the act, shall be carried into effect out of court, unless the judge shall otherwise order, and generally in such manner as the judge may direct.

Leases, &c., under sect. 10.

9. Where the court authorises generally the tenant for life to make from time to time leases or grants for building or mining purposes under section 10 of the act, the order shall not direct any particular lease or grant to be settled or approved by the judge unless the judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the court authorises any such lease or grant in any particular case, or where the court authorises a lease under section 15 of the act, the order may either approve a lease or grant already prepared or may direct that the lease or grant shall contain conditions specified in the order or such conditions as may be approved by the judge at chambers without directing the lease or grant to be settled by the judge.

Payment into court.

10. Any person directed by the tenant for life to pay into court any capital money arising under the act may apply by summons at chambers for leave to pay the money into court. (Appendix, Forms 9, 10, 11.)

11. The summons shall be supported by an affidavit setting forth—

1. The name and address of the person desiring to make the payment.
2. The place where he is to be served with notice of any proceeding relating to the money.
3. The amount of money to be paid into court and the account to the credit of which it is to be placed.
4. The name and address of the tenant for life under the settlement by whose direction the money is to be paid into court,
5. The short particulars of the transaction in respect of which the money is payable.

12. The order made upon the summons for payment into court, may contain directions for investment of the money on any securities authorised by section 21, sub-section 1 of the act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent, to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises, is not completed at the date of payment into court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the court may be invested.

13. Money paid into court under the act shall be paid to an account, to be entitled in the matter of the settlement, with a short description of the mode in which the money arises if it is necessary or desirable to identify it, and in the matter of the act. (Appendix, Forms 9, 10, and 11.)

14. Any person paying into court any capital money arising under the act shall be entitled first to deduct the costs of paying the money into court.

Practice generally.

15. In all cases not provided for by the act or these rules, the existing practice of the court as to costs and otherwise, so far as the same may be applicable, shall apply to proceedings under the act.

Rules.

Fees.

16. The fees and allowances to solicitors of the court in respect of proceedings under the act shall be those provided by the Rules of the Supreme Court as to costs for the time being in force, so far as they are applicable to such proceedings.

17. The fees to be taken by the officers of the court in respect to proceedings under the act shall be those provided by the Rules of the Supreme Court as to court fees for the time being in force, so far as they are applicable to such proceedings.

18. These rules shall come into operation from and after the 31st December, 1882.

19. These rules may be cited as the Settled Land Act Rules, 1882.

(Signed) SELBORNE, C. NATH. LINDLEY, L.J.
COLERIDGE, L.C.J. H. MANISTY, J.
G. JESSEL, M.R. E. FRY, J.

APPENDIX.

FORM I.—TITLE OF PROCEEDINGS.

In the High Court of Justice, Chancery Division,
Vice-Chancellor Bacon,
or
Mr. Justice Chitty,
[*or other judge before whom the application is to be heard.*]

In the matter of the estate [*or*, of the timber upon the estate], situate at in the county of , [*or*, of the chattels], settled by a settlement made by an indenture dated the day of , and made between [*or*, by the will of dated *or*, *as the case may be*].

And in the matter of the Settled Land Act, 1882.

FORM II.—FORMAL PART OF SUMMONS.

Title as in Form I.

Let all parties concerned attend at my chambers at the Royal Courts of Justice on day, the day of 18 , at o'clock in the forenoon, on the hearing of an application—

(*a.*) On the part of *A. B.*, the tenant for life [*or*, tenant in tail, *or as the case may be, describing the nature of the applicant's estate*] under the above-mentioned settlement.

Or, (*b.*) On the part of *A. B.*, the tenant for life [*or as the case may be*] under the above-mentioned settlement an infant, by *X. Y.*, his testamentary guardian [*or*, guardian appointed by order dated the , *or* next friend].

Or, (*c.*) On the part of *C. D.* and *E. F.*, the trustees of the above-mentioned settlement for the purposes of the above-mentioned act.

Or, (*d.*) On the part of *G. H.*, the tenant for life in remainder [*or*, tenant in tail in remainder, *or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of *A. B.* [*or as the case may be*].

Or, (*e.*) On the part of *I. J.*, the purchaser of the lands [*or*, the timber upon the lands, *or* chattels, *or as the case may be*] settled by the above-mentioned settlement.

Forms.

Or, (*f.*) On the part of *I. J.*, the lessee under a mining lease dated the 18 , granted under the powers of the above-mentioned act of the mines and minerals under the lands settled by the above-mentioned settlement.

Or, (*g.*) On the part of *I. J.*, the mortgagee under a mortgage intended to be created under section 18 of the above-mentioned act of the lands settled by the above-mentioned settlement.

Or, (*h.*) On the part of *K. L.*, interested under the contract hereinafter mentioned.

Dated the day of 18 .

This summons was taken out by of , solicitor for the applicant.

To

(*Add the names of the persons* (*if any*) *on whom the summons is to be served.*)

Form III.—Summons under Section 10 for General Leasing Powers.

Title and formal parts as in Forms I. and II. *a* or *b*.

1. That the applicant [*or in the case of an infant* that the said *X. Y.* during the infancy of the said *A. B.*], and each of his successors in title [*or in the case of an infant*, each of the successors in title of the said *A. B.*], being a tenant for life or having the powers of a tenant for life under the above-mentioned act, may pursuant to section 10 of the said act be authorized from time to time to make building [*or* mining] leases of the lands comprised in the said settlement for the term of years [*or* in perpetuity] on the conditions specified in the said act [*or* on other conditions than those specified in sections 7 to 9 of the said act].

2. That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property subject to the said settlement, and that for that purpose all necessary directions may be given.

Note.—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

Form IV.—Summons under Sections 10 or 15 for Authority to grant a particular Lease where the Tenant for Life has entered into a Contract.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the conditional contract, dated the 18 , and made between the applicant [*or* the said *X. Y.*] of the one part and of the other part, for a [building *or* mining] lease to the said of the hereditaments therein mentioned for the term, and upon the conditions therein stated, may, pursuant to section 10 [*or* 15] of the above-mentioned act be approved, and that the said *A. B.* [*or X. Y.*] may be authorized to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III.* 2.)

FORM V.—SUMMONS UNDER SECTIONS 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHEN NO CONTRACT HAS BEEN ENTERED INTO.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the [building *or* mining] lease intended to be granted to of the lands [*or* of the mansion house, &c.] settled by the said settlement may, pursuant to section 10 [*or* 15] of the above-mentioned act be approved, and that the applicant [*or* the said *X. Y.*] may be authorized to execute the same.

2. (*Add application for costs as in Form III.* 2.)

FORM VI.—SUMMONS UNDER SECTIONS 15, 35, OR 37 FOR A SALE OUT OF COURT OF THE PRINCIPAL MANSION HOUSE, AND DEMESNES, OR OF TIMBER OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant [*or in the case of an infant* the said *X. Y.*] may be authorized to sell the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels] settled by the above-mentioned settlement in such manner and subject to such particulars, conditions, and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that *C. D.* and *E. F.*, the trustees of the said settlement, may be at liberty to pay the costs when taxed out of the proceeds of the said sale [*or, in the case of timber*, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said act], *or, if this Form is not applicable, as in Form III.* 2.

FORM VII.—SUMMONS UNDER SECTIONS 15, 35, OR 37 FOR SALE BY THE COURT OF THE PRINCIPAL MANSION HOUSE, AND DEMESNES, OR OF TIMBER OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels], settled by the above-mentioned settlement, may be sold under the direction of the court.

2. (*Application for costs as in Form III.* 2.)

FORM VIII.—AFFIDAVIT VERIFYING TITLE.

Title as in Form I.

I, , of , make oath and say as follows:

1. By the above-mentioned settlement the above-mentioned lands [*or* certain chattels, *shortly describing them*] stand limited to uses [*or* upon trusts] under which *A. B.* is [*or* I am] beneficially entitled in possession as tenant for life [*or* tenant in tail, *or* tenant in fee simple, with an executory gift over, *or as the case may be*].

Forms.

2. (*If it is the fact.*) The said *A. B.* is an infant of the age of years or thereabouts.

3. *C. D.*, of , and *E. F.*, of , are trustees under the said settlement, with a power of sale of the said lands [*or* with power of consent to or approval of the exercise of a power of sale of the said lands contained in the said settlement, *or* are the persons by the said settlement declared to be trustees thereof for purposes of the above-mentioned act].

FORM IX.—SUMMONS UNDER SECTION 22 BY PURCHASER FOR PAYMENT INTO COURT OF PURCHASE-MONEY OF SETTLED LAND, TIMBER, OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. *e*.

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement, dated the and made between [*or* will, &c.] proceeds of sale of the A. estate [*or as the case may be*], and in the matter of the Settled Land Act, 1882," the sum of £ on account of the purchase-money of the said A. estate [*or as the case may be*] settled by the said settlement [*or* will, &c.]

2. That such directions may be given for the investment of the said sums when paid into court, and the accumulation or payment of the dividends of the securities, representing the same, as the court may think proper.

FORM X.—SUMMONS UNDER SECTION 22 FOR PAYMENT INTO COURT BY LESSEE UNDER A MINING LEASE (*see* Section 11).

Title as in Form I.

Formal parts as in Form II. *f*.

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement, dated the and made between [*or* the will, &c.] mineral rents under lease, dated the and in the matter of the Settled Land Act, 1882," the sum of £ being three-fourths [*or* one-fourth] of the rents payable by him under the said lease for the half-year ending the less £ the costs of payment into court.

2. That the applicant may be at liberty on or before the day of and the day of in every year during the term created by the said lease to pay into court to the credit aforesaid, so much of the rents payable by him under the said lease as is by section 11 of the above-mentioned act directed to be set aside as capital money arising under the said act after deducting therefrom the costs of payment in, the amount paid in to be verified by affidavit.

3. That the said sum of £ and all other sums to be paid into court to the credit aforesaid may be invested in the purchase of (*name the investment*) to the like credit, and that the dividends on the said when purchased may be paid to *A. B.*, the tenant for life under the above-mentioned settlement, during his life or until further order.

FORM XI.—SUMMONS UNDER SECTION 22 FOR PAYMENT INTO COURT BY MORTGAGEE (*see* Section 18).

Title as in Form I.

Formal parts as in Form II. *g*.

1. That the applicant may be at liberty to pay into court to the credit of "Money advanced on mortgage of lands settled by the settlement dated the and made between [*or* the will, &c.] and in the matter of the Settled Land Act, 1882," the sum of £ being the amount agreed to be advanced by him on mortgage of the lands comprised in the above-mentioned settlement less the costs of payment in.

2. (*Add directions for investment as in Form VIII.* 2) (*a*).

(*a*) This reference is inaccurate; see, however, Form IX. 2, and Form X. 3.

FORM XII.—SUMMONS UNDER SECTION 26 (1).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the scheme left at my chambers this day for the execution of improvements on the lands settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III.* 2.)

FORM XIII.—SUMMONS UNDER SECTION 26, SUB-SECTION (2) (ii) FOR APPOINTMENT OF AN ENGINEER OR SURVEYOR.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *M. N.* of engineer [*or* surveyor] may be approved as engineer [*or* surveyor] for the purposes of section 26, sub-section (2) (ii) of the above-mentioned act.

2. (*Add application for costs as in Form III.* 2.)

FORM XIV.—NOMINATION OF AN ENGINEER OR SURVEYOR BY THE TRUSTEES.

Title as in Form I.

We *C. D.* of and *E. F.* of the trustees of the above-mentioned settlement for the purposes of the above-mentioned act, hereby nominate of engineer [*or* surveyor], for the purposes of section 26, sub-section (2) (ii) of the said act.

(Signed) *C. D.*
E. F.

FORM XV.—SUMMONS UNDER SECTION 26, SUB-SECTION (2) (iii).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *C. D.* and *E. F.* the trustees of the above-mentioned settlement, for the purposes of the above-mentioned act may be directed to apply the sum of £ out of the capital money arising under the said

Forms.

act in their hands subject to the said settlement in payment for [*describe the work or operation*] being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said *C. D.* and *E. F.* under the said act.

2. (*Add application for costs as in Form III.* 2.)

FORM XVI.—SUMMONS UNDER SECTION 26, SUB-SECTION 3.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the sum of £ may be ordered to be raised out of the in court to the credit of and that the same when raised may be paid to upon his undertaking to apply the same in payment for [*describe the works or operation*] being part of an improvement executed upon the land settled by the above-mentioned settlement pursuant to the scheme approved by order dated the .

2. (*Add application for costs as in Form III.* 2.)

FORM XVII.—SUMMONS UNDER SECTION 31.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant may be at liberty to enforce [*or* carry into effect *or* vary *or* rescind *as the case may be*] the contract entered into between the applicant of the one part, and of the other part.

2. Or that such directions may be given relating to the said contract as the judge may think fit.

3. (*Add application for costs as in Form III.* 2.)

FORM XVIII.—SUMMONS UNDER SECTION 34 FOR APPLICATION OF MONEY PAID FOR A LEASE OR REVERSION.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *d*.

1. That the sum of £ being the proceeds of sale of a lease for years [*or* life *or* a reversion *or other interest describing it*] settled by the above-mentioned settlement, may, pursuant to section 34 of the above-mentioned act, be directed to be applied for the benefit of the parties interested under the said settlement in such manner as the court may think fit.

2. (*Add application for costs as in Form III.* 2.)

FORM XIX.—SUMMONS UNDER SECTION 38 FOR THE APPOINTMENT OF NEW TRUSTEES.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, *c*, or *d*.

1. That *G. H.* and *I. J.* may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned act.

2. (*Add application for costs as in Form III.* 2.)

FORM XX.—SUMMONS UNDER SECTION 44.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *c*.

1. That it may be declared that (*set out the declaration required*).
2. (*Add application for costs as in Form III.* 2, *or as the circumstances require.*)

FORM XXI.—SUMMONS UNDER SECTION 56 FOR ADVICE AND DIRECTION.

Title as in Form I.

Formal parts as in Form II. *a* to *h*.

For the opinion, advice, and direction of the judge on the following questions:—

1. Whether
2. Whether
3. Whether

(*or if the questions involve complicated facts.*)

for the opinion, advice, and direction of the judge on the facts and questions submitted by the statement left in my chambers this day.

(*Add application for costs as in Form III.* 2.)

FORM XXII.—SUMMONS UNDER SECTION 60 FOR APPOINTMENT OF PERSONS TO EXERCISE POWERS ON BEHALF OF INFANT.

Title as in Form I.

Formal parts as in Form II. *b*.

1. That the powers conferred upon a tenant for life by sections 6 to 13, both inclusive, and sections 16 to 20, both inclusive, of the above-mentioned act (*or such other powers as it is desired to exercise*) may be exercised by the said on behalf of the said during his minority.
2. (*Add application for costs as in Form III.* 2.)

FORM XXIII.—SUMMONS FOR DIRECTIONS AS TO SERVICE OF A PETITION.

Title as in Form I.

Formal parts as in Form II.

That directions may be given as to the persons to be served with the petition presented in the above matter on the day of , 18 .

Forms.

TITLES OF SUMMONSES.

The following regulations as to the title of summonses have been adopted by the Practice Masters. See Annual Practice, Table of Titles, &c.:—

7. If under the Settled Land Act, 1882, a summons must be entitled in accordance with the Rules of the Supreme Court (December, 1882) under that act, and in the form given in the appendix to such rules as varied by the form, Appendix L., No. 25, R. S. C. 1883.

1886, J. No. .
or 1886, R. No. .

Examples.

In the matter of the Blackacre Estate [*or*, of the timber on the estate], situate at , in the county of [*or* of the chattels] settled by the settlement, dated the day of , made on the marriage of John Jones and Mary his wife [*or*, by the will of George Roberts, dated].

And in the matter of the Settled Land Act, 1882.

1886, S. No. .

Infant.

In the matter of the Blackacre Estate [*or*, of the timber of the estate] situate at , in the county of , settled land within the meaning of the Settled Land Act, 1882, s. 59, by reason of John Smith, the person seised of or entitled to such land being an infant.

In the matter of the Settled Land Act, 1882.

1886, R. No. .

Tenant by curtesy.

In the matter of the Blackacre Estate, at , in the county of , settled by a settlement within the meaning of the Settled Land Act, 1884, s. 8, by Mary Roberts, deceased, the late wife of John Roberts.

In the matter of the Settled Land Act, 1884.

The address and description of the applicant and of the next friend (if any) and of the respondents should in all cases be stated in the summons, and if the applicants apply as, or the respondents are summoned as trustees, or in a representative capacity, the fact should appear.

If the applicants or respondents are females, it should be shown on the summons whether they are spinsters, married women, or widows.

CONFIRMATION OF SALES.

25 & 26 Victoriæ, cap. 108.

An Act to confirm certain Sales, Exchanges, Partitions, and Enfranchisements by Trustees and others.

[7th August, 1862.]

25 & 26 Vict. c. 108, s. 1.

Whereas trustees and others, in the intended exercise of trusts or powers authorizing them to dispose of land by sale, exchange, partition, or enfranchisement, have disposed of land subject to such trusts or powers, with an exception or reservation of minerals, and either with or without rights and powers for or incidental to the working, getting, and carrying away of such minerals, or otherwise relating thereto, or have so disposed of minerals with or without such rights and powers separately from the residue of the land, such mode of disposition not being expressly authorized nor forbidden by the instrument creating the trust or power: and whereas it is expedient to confirm such dispositions as aforesaid: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same as follows:

Powers of sale, &c. not to be invalid on the ground of want of express mention of exception or reservation of minerals, &c.

1. No sale, exchange, partition or enfranchisement at any time heretofore of land by any trustee or other person, expressed or intended to be made in exercise of any trust or power authorizing the sale, exchange, partition, or enfranchisement of land, and not forbidding the reservation of minerals, and which sale, exchange, partition, or enfranchisement shall have been made with an exception or reservation of minerals, and with or without rights or powers for or incidental to the working, getting, and carrying away of such minerals, or otherwise relating thereto, shall be invalid on the ground only that the trust or power did not expressly authorize such exception or reservation, but such sale, exchange, partition, or enfranchisement shall be deemed to have taken effect in the same manner as if the exception or reservation had been authorized by the trust or power; and no sale, exchange, or partition heretofore made as aforesaid of any minerals separately from the residue of the land subject

25 & 26 Vict. c. 108, s. 1.

to the trust or power intended to have been exercised, and either with or without such rights or powers as aforesaid, shall be invalid on the ground only that the trust or power did not expressly authorize such sale, exchange, or partition, but such sale, exchange, or partition shall be deemed to have taken effect in the same manner as if such minerals, rights, and powers (if any) had been expressly authorized to be so dealt with separately from the residue of such land; but this enactment shall not be deemed to confirm any sale, exchange, partition, or enfranchisement already declared by a court of competent jurisdiction to be invalid, nor to confirm or effect any sale, exchange, partition, or enfranchisement as to the validity of which any suit or other proceeding is now pending (*a*).

Not to confirm sales, &c. declared invalid or pending.

(*a*) Where a testator devised lands to trustees for a term, and subject thereto to his son for life with remainders in strict settlement; and gave the trustees power to demise all or any part of the lands, and all or any of the mines then opened or thereafter to be opened, and to sell all or any part of the lands, the Master of the Rolls, on the authority of *Cholmeley* v. *Paxton* (3 Bing. 207, *ante*, p. 548), held, that under the power the trustees could not sell the lands with a reservation of the minerals (*Buckley* v. *Howell*, 29 Beav. 546). In consequence of this decision this act was passed.

Trustees may dispose of land or minerals separately, without the residue, &c.

2. And whereas it is expedient that trusts and powers to dispose of land by way of sale, exchange, partition, or enfranchisement should be extended in the manner hereinafter appearing:

Every trustee and other person now or hereafter to become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals, or may (unless forbidden as aforesaid) dispose of by way of sale, exchange, or partition the minerals with or without such rights or powers separately from the residue of the land, and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals, or (as the case may be) the undisposed-of land; but this enactment shall not enable any such disposition as aforesaid without the previous sanction of the Court of Chancery, to be obtained on petition in a summary way of the trustee or other person authorized as aforesaid, which sanction once obtained shall extend to the enabling from time to time of any disposition within this enactment of any part or parts of the land comprised in the order to be made on such petition, without the necessity of any further or other application to the court (*b*).

Sanction of Court of Chancery requisite.

(*b*) The court will sanction a sale of land reserving the minerals, or of the minerals apart from the land without reference to any particular sale (*Re Willway*, 32 L. J. Ch. 226; *Re Wynn*, 28 L. T. 615; 21 W. R. 695).

Mortgagees may petition under the act (*Re Wilkinson*, 13 Eq. 634). Such a petition must be served on the mortgagor (*Re Hirst*, 45 Ch. D. 263); but not on subsequent incumbrancers (*Re Beaumont*, 12 Eq. 86). 25 & 26 Vict. c. 108, s. 2.

Mortgagees are within the act.

Where a petition is presented for the sanction of the court to a sale of the land apart from the minerals, the beneficiaries should be served or be made parties to the application (*Re Brown*, 11 W. R. 19; *Re Palmer*, 13 Eq. 408). But where trustees, with a power of sale exerciseable with the consent of the tenant for life, presented a petition for leave to sell the land and minerals separately, service on the beneficiaries entitled in remainder was unnecessary (*Re Pryse*, 10 Eq. 531; see *Re Wynn*, *sup.*, *Re Wadsworth*, 63 L. T. 217).

Service.

For form of petition under this section, see Dan. Ch. Forms, 956, 4th ed.

3. This act shall not extend to Ireland or Scotland.

Extent of act.

SALES OF REVERSIONS.

31 VICTORIÆ, CAP. 4.

An Act to amend the Law relating to Sales of Reversions.

[7th December, 1867.]

31 Vict. c. 4, s. 1.

WHEREAS it is expedient to amend the law, as administered in Courts of Equity, with respect to sales of reversions:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same as follows:

No purchase, made *bonâ fide*, of reversionary interests to be set aside merely on the ground of undervalue.

1. No purchase, made bonâ fide and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue (*a*).

(*a*) Before this act, even in the absence of fraud, mere inadequacy of price was sufficient to rescind contracts or dealings with reversioners for their reversionary interests (See notes to *Chesterfield* v. *Janssen*, 1 White & Tudor, L. C. Eq.) As to what were reversionary interests within this rule, see *Id.* Where A. was entitled to the income of property, subject to the payment of a life annuity, Lord *Chelmsford* held, that A's interest was not a reversionary interest within the rule (*Webster* v. *Cook*, 2 Ch. 542); but this has been disapproved (*Tyler* v. *Yates*, 11 Eq. 276.) In the case of "expectant heirs" (as to the meaning of which, see *Beynon* v. *Cook*, 10 Ch. 391) mere inadequacy may even since this act be a ground for setting aside a sale of a reversion (*O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814; see *Nevill* v. *Snelling*, 15 Ch. D. 679).

The jurisdiction of the Court of Chancery over unconscionable bargains is not affected by this act; the exception in the act as to unfairness leaves the settled law as to such cases untouched (*Miller* v. *Cook*, 10 Eq. 641; *Tyler* v. *Yates*, 6 Ch. 665). The words of this section leave undervalue still a material element in cases in which it is not the sole equitable ground for relief (*Per* Lord *Selborne*, *Aylesford* v. *Morris*, 8 Ch. 490); and accordingly sales of reversionary interests have been set aside when the vendors were poor, ignorant men with no professional advice, and the sales were at an undervalue (*Re Fry*, *Fry* v. *Lane*, 40 Ch. D. 312).

Interpretation of "purchase."

2. The word "purchase" in this act shall include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired.

Commencement of act.

3. This act shall come into operation on the first day of January, one thousand eight hundred and sixty-eight, and shall not apply to any purchase concerning which any suit shall be then depending.

PARTITION.

31 & 32 Victoriæ, cap. 40.

An Act to amend the Law relating to Partition.

[25th June, 1868.]

Be it enacted as follows:

31 & 32 Vict. c. 40, s. 1.

1. This act may be cited as "The Partition Act, 1868."

Short title.

2. In this act the term "the court" means the Court of Chancery in England, the Court of Chancery in Ireland, the Landed Estates Court in Ireland, and the Court of Chancery of the County Palatine of Lancaster, with their respective jurisdictions (*a*).

As to the term "the court."

(*a*) By Jud. Act, 1873, sect. 34 (3), the partition or sale of real estates has been assigned to the Chancery Division of the High Court in England. Under 52 & 53 Vict. c. 47, s. 10, the Partition Acts apply to the Palatine Court of Durham.

Power to court to order sale instead of division.

3. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made (*b*), then if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions (*c*).

Cases where decree for partition could be made.

(*b*) This and the two following sections only enable the court to decree a sale in a suit *for partition*, where, if this act had not been passed, a decree for partition might have been made. A decree for partition may be made, where the parties interested are either coparceners, or joint tenants or tenants in common in possession, whether in tail (*Brook* v. *Hertford*, 2 P. Wms. 518); for life (*Gaskell* v. *Gaskell*, 6 Sim. 643); for life determinable on marriage (*Hobson* v. *Sherwood*, 4 Beav. 184); or for years (*Heaton* v. *Dearden*, 16 Beav. 147); but not on the application of a reversioner (*Evans* v. *Bagshaw*, 5 Ch. 340). Such a decree may be made of

31 & 32 Vict. c. 40, s. 1.

property which is, freehold; or copyhold (4 & 5 Vict. c. 35, s. 85); or leasehold (*Foster* v. *Foster*, 1 Ch. D. 588); or consists of, manors (*Hanbury* v. *Hussey*, 14 Beav. 153); advowsons (*Johnstone* v. *Baker*, 6 D. M. & G. 439); tithes (*Bassett* v. *Knollys*, 1 Ves. Sen. 494); or rent charges (*Rivis* v. *Watson*, 5 M. & W. 255). See, further, notes to *Agar* v. *Fairfax* (2 L. C. Eq.).

Property held on trust. Where, however, the whole property is vested in trustees on trust for sale it is personalty, and the court has no jurisdiction to decree partition or sale (*Bigge* v. *Peacock*, 22 Ch. Div. 284); nor where there is a trust for sale after certain events (*Swaine* v. *Denby*, 14 Ch. D. 326; see *Cass* v. *Wood*, 30 L. T. 670). But the existence of a power of sale in trustees is no bar to a partition decree (*Boyd* v. *Allen*, 24 Ch. D. 622); unless the trustees are about to exercise the power (*Re Norris*, 1883, W. N. 65). In some cases, at all events where there are active trusts to be performed by the trustees, partition will not be decreed (*Taylor* v. *Grange*, 15 Ch. Div. 165).

Property in mortgage. Where one tenant in common has mortgaged his share to another tenant, he has no right to partition or sale, except on the terms of paying off the mortgage (*Gibbs* v. *Haydon*, 47 L. T. 184); but a tenant in common can maintain an action for partition or sale against his co-tenant, when the co-tenant is mortgagee of the whole property (*Waite* v. *Bingley*, 21 Ch. D. 674). A property which is in mortgage may be made the subject of a partition action without interfering with the mortgage (*Ib.*) Under this act the court may direct the sale of the fee simple of an estate subject to an executory devise over (*Groves* v. *Carbert*, 55 L. T. W. N. 165). The court cannot, under this act, direct a sale in a suit, where a decree for partition, though not acted on, was made before the passing of the act (*Pryor* v. *Pryor*, 10 Ch. 469).

Power of court under this section discretionary. (*c*) Sects. 3, 4, and 5 of the act are, in form at least, independent enactments, though all to be construed together. The 4th and 5th sections are not mere provisoes on the 3rd section (*Pitt* v. *Jones*, 5 App. Cas. 659). Sect. 3 confers on the court an absolute power of sale on the request of anyone interested, provided the court is satisfied that a sale would be more beneficial for the parties interested than a division (*Drinkwater* v. *Ratcliffe*, 20 Eq. 530; *Pitt* v. *Jones*, 5 App. Cas. 661). This power is discretionary (*Pemberton* v. *Barnes*, 6 Ch. 693; *Huddersfield* v. *Jacomb*, 1874, W. N. 80); and with this discretion the Court of Appeal will not ordinarily interfere (*Dyer* v. *Paynter*, 33 W. R. 806).

The *onus* lies on those who wish a sale to show that it would be more beneficial (*Huddersfield* v. *Jacomb*, 1874, W. N. 80). And when a division can reasonably be made, a sale should not be directed under this section unless there are other circumstances giving jurisdiction (*Dyer* v. *Paynter*, *sup.*) So a sale has been refused where the court considered that the proper order was for partition (*Dicks* v. *Batten*, 1870, W. N. 173; *Allen* v. *Allen*, 55 L. T. W. N. 220; *Huddersfield* v. *Jacomb*, 1874, W. N. 80). As to the meaning of "beneficial," see *Drinkwater* v. *Ratcliffe* (20 Eq. 533); *Fleming* v. *Crouch* (1884, W. N. 111). The court may order partition of part and sale of the rest (*Roebuck* v. *Chadebet*, 8 Eq. 127). As to the nature of the orders that will be made, see note to sect. 9, *post*, p. 744.

Requests under this section. A sale may be decreed at the request of a mortgagee of part of the property (*Davenport* v. *King*, 49 L. T. 92; *Re Hawksworth*, 1 L. R. Ir. 179). As to requests by persons under disability, see now 39 & 40 Vict. c. 47, s. 6, *post*, p. 748. For the law before that act, see *Higgs* v. *Duke* (13 Eq. 280) (married women); *Grove* v. *Comyn* (18 Eq. 387) (infants); *Halfhide* v. *Robinson* (9 Ch. 373) (persons of unsound mind).

Sale on application of certain proportion of parties interested.

4. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property

and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions (*d*).

31 & 32 Vict. c. 40, s. 4.

(*d*) This section is an imperative enactment to the effect that, if parties interested to the extent of one moiety or upwards request a sale, the court shall order a sale, unless it sees good reason to the contrary (*Pitt* v. *Jones*, 5 App. 661; *Drinkwater* v. *Ratcliffe*, 20 Eq. 530). A mortgagee is a party interested, and must be reckoned in the proportion of interests under this section (*Davenport* v. *King*, 49 L. T. 92); so is a tenant for life with an absolute power of appointment subject to a contingent life interest (*Parker* v. *Trigg*, 1874, W. N. 27).

Effect of this section.

The onus is thrown on the person who says that the court ought not to order a sale to show some good reason why it should not do so: otherwise the court is bound to order it (*Pemberton* v. *Barnes*, 6 Ch. 693; *Fleming* v. *Crouch*, 1884, W. N. 111). The fact that the owner of one moiety of an estate is yearly tenant of the whole property, and occupies it for the purposes of his business, and also resides thereon, is no "good reason" why a sale should not be ordered (*Wilkinson* v. *Joberns*, 16 Eq. 14; *Roughton* v. *Gibson*, 36 L. T. 93; 46 L. J. Ch. 366); nor is the fact that a sale will reduce the income of an infant (*Rowe* v. *Gray*, 5 Ch. D. 263); nor the fact that the land has fallen in value, and the proceeds will only produce an income equal to half the rent (*Re Whitwell*, 19 L. R. Ir. 45). See as to what will not be "good reason" in the case of a mansion-house and estate (*Pemberton* v. *Barnes*, 6 Ch. 685; *Porter* v. *Lopes*, 7 Ch. D. 358; *Lys* v. *Lys*, 7 Eq. 126). But where partition was as easy as sale, and would cause no loss to the plaintiff, while a sale would cause great loss to the defendant, and the action was vindictive, there was held to be "good reason" (*Saxton* v. *Bartley*, 48 L. J. Ch. 519; 1879, W. N. 94; see *Re Langdale*, I. R. 5 Eq. 572).

Good reason to the contrary.

5. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given, the court may order a valuation of the share of the party requesting a sale in such manner as the court thinks fit, and may give all necessary or proper consequential directions (*e*).

As to purchase of share of party desiring sale.

(*e*) This section is an independent enactment, not to be construed merely as a proviso on sect. 3 (*Pitt* v. *Jones*, 5 App. Cas. 659); under it the court has a discretion to refuse a sale requested by any party, even should no other party interested undertake to buy him out (*Richardson* v. *Feary*, 39 Ch. D. 45). If such an undertaking be offered, the court cannot under this section order a sale (*Pitt* v. *Jones*, 5 App. Cas. 659); but a party requesting a sale cannot be compelled to sell his interest at a valuation (*Ib.*, *Williams* v. *Games*, 10 Ch. 204), and may still press for a sale under sect. 3 (*Pitt* v. *Jones*, 5 App. Cas. 659; *Drinkwater* v. *Ratcliffe*, 20 Eq. 531).

31 & 32 Vict. c. 40, s. 5. Undertakings to purchase may be given by persons under disability (39 & 40 Vict. c. 17, s. 6, *post*, p. 748).

Authority for parties interested to bid.

6. On any sale under this act the court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same, or as to any other matters, as to the court seem reasonable (*f*).

(*f*) The party having the conduct of the sale will not as a rule be allowed to bid. In one special case he was allowed (*Pennington* v. *Dalbiac*, 18 W. R. 684), but this was not followed in a similar case (*Verrall* v. *Cathcart*, 27 W. R. 645; 1879, W. N. 100; see *Wilkinson* v. *Joberns*, 16 Eq. 14; *Gilbert* v. *Smith*, 11 Ch. Div. 82).

Application of Trustee Act. 13 & 14 Vict. c. 60.

7. Sect. 30 of the Trustee Act, 1850 (*g*), shall extend and apply to cases where, in suits for partition, the court directs a sale instead of a division of the property.

(*g*) *Ante*, p. 515, where see note. Sect. 1 of the Trustee Act, 1852, *ante*, p. 532, also applies to sales directed under this act (*Beckett* v. *Sutton*, 19 Ch. D. 646).

Application of proceeds of sale. 19 & 20 Vict. c. 120.

8. Sects. 23 to 25 (both inclusive) of the act of the session of the 19th and 20th years of her Majesty's reign (c. 120), "to facilitate Leases and Sales of Settled Estates," shall extend and apply to money to be received on any sale effected under the authority of this act (*h*).

(*h*) Sections 34 to 36 of the S. E. Act, 1877 (which correspond to sections 23 to 25 of the S. E. Act, 1856), are given at length *ante*, pp. 655 *et seq.*

This section applies to all sales under this act, whether of settled estates or otherwise (*Re Barker*, 17 Ch. Div. 244).

Conversion.

An order for sale properly made in an administration action effects conversion as from its date and before sale (*Hyett* v. *Mekin*, 25 Ch. D. 735). In the case of sales under this act there is a similar conversion as regards the share of a person *sui juris* (*Arnold* v. *Dixon*, 19 Eq. 113; 23 W. R. 314; *Re Pickard*, *Turner* v. *Nicholson*, 53 L. T. 293). But as regards the shares of persons under disability and who have not properly requested or consented to a sale, there is (in the case of sales under this act) an equity for reconversion in the sections of 19 & 20 Vict. c. 120 (See now S. E. Act, 1877, ss. 34, 35, and 36, *ante*, pp. 655 *et seq.*), which are imported into 31 & 32 Vict. c. 40: so held in the case of an infant (*Foster* v. *Foster*, 1 Ch. D. 588; *Howard* v. *Jalland*, 1891, W. N. 210; compare the similar case under sect. 69 of the Lands Clauses Act, 1845, *Kelland* v. *Fulford*, 6 Ch. D. 491); a married woman (*Mildmay* v. *Quicke*, 6 Ch. D. 553; see *Re Lloyd*, 9 P. D. 65); a lunatic (*Re Barker*, 17 Ch. Div. 241; *Grimwood* v. *Bartels*, 25 W. R. 843). There is, however, no such equity for reconversion where the infant or married woman has properly requested a sale under sect. 6 of the Partition Act, 1876, *post*, p. 748 (*Wallace* v. *Greenwood*, 16 Ch. D. 362). The committee of a lunatic will only be authorized to request a sale upon the terms that the proceeds shall be subject to the same uses as the land (*Re Pares*, *Lillingston* v. *Pares*, 12 Ch. Div. 333; see 53 Vict. c. 5, s. 123). Where there is an equity for reconversion in the case of a married woman, she can signify her election to take the fund as personal estate by a separate examination (*Standering* v. *Hall*, 11 Ch. D. 652). And where the fund was under 200*l.* her separate examination has been dispensed with, payment out to her

being made on affidavit of no settlement (*Wallace* v. *Greenwood*, 16 Ch. D. 362; but see *Topham* v. *Burgoyne*, 41 L. T. 670). 31 & 32 Vict. c. 40, s. 8.

Proceeds of land sold under this act, which is in court, and belongs to a person *sui juris*, who is absolutely entitled thereto and does not deal with it, is personal estate, and in the event of his death is payable to his personal representatives. So held in the case of a person *sui juris* who had become entitled as heir-at-law to an infant's share of such proceeds (*Mordaunt* v. *Benwell*, 19 Ch. D. 302); and in the case of a person who had become of unsound mind after the date of an order for payment out to her (*Re Pickard*, *Turner* v. *Nicholson*, 53 L. T. 293).

When land in which persons under disability were interested was sold under this act, the court refused to order payment of the proceeds to trustees (*Higgs* v. *Dorkis*, 13 Eq. 280; see *Aston* v. *Meredith*, 13 Eq. 492).

9. Any person who, if this act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration; but all persons who, if this act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit, and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the court to add to the decree or order (*i*). Parties to partition suits.

(*i*) As to who may maintain an action for partition, see *ante*, p. 739.

In actions under this act, trustees represent their beneficiaries (R. S. C. Ord. 16, r. 8; *Simpson* v. *Denny*, 10 Ch. D. 28; *Goodrich* v. *Marsh*, 1878, W. N. 186; see *Stace* v. *Gage*, 8 Ch. D. 451). An annuitant is not a necessary party (*Poole* v. *Poole*, 1885, W. N. 15). Parties.

In pleading it is sufficient if the statement of claim asks a sale and distribution of proceeds. It need not ask partition (39 & 40 Vict. c. 17, s. 7, *post*, p. 748). It should indicate under which section of this act the sale is claimed (*Evans* v. *Evans*, 48 L. T. 567; 52 L. J. Ch. 304); and if a sale is claimed under sect. 3, on the ground that it is more beneficial, this should be expressly pleaded (*Ib.*) Where the property had been misdescribed the pleading was amended, and a judgment was given referring to the order post-dated (*Winkley* v. *Winkley*, 44 L. T. 572). Pleading.

Before the hearing, a receiver may in a proper case be appointed (*Porter* v. *Lopes*, 7 Ch. D. 358). Receiver.

At the hearing, an immediate order for sale has been made on admission by the defendant of the title as set out in the statement of claim (*Burnell* v. *Burnell*, 11 Ch. D. 213); but where infants are interested the claim should be verified by affidavit (*Willis* v. *Willis*, 61 L. T. 610; see *Crook* v. *Crook*, 1890, W. N. 26). Where all persons interested, and who were in existence, were parties, and the title was proved by affidavit at the hearing, an immediate order for sale was made without preliminary inquiry (*Lees* v. *Coulton*, 20 Eq. 20). And often this is the shortest and least expensive course (*Re Stedman*, *Coombe* v. *Vincent*, 58 L. T. 709). Hearing.

31 & 32 Vict. c. 40, s. 9.

But, *semble*, it can only be adopted where the property is small, and the title simple (*Wood* v. *Gregory*, 43 Ch. D. 82; *Hawkins* v. *Herbert*, 60 L. T. 142; 37 W. R. 300). The usual course is to direct inquiries, and an immediate order for sale may be made conditional on the result (*Powell* v. *Powell*, 10 Ch. 130); the words "further consideration" in this section not being used in their technical sense (*Ib.*; see *Mildmay* v. *Quick*, 20 Eq. 538). The form of order usually made when (under sect. 4) persons interested in a moiety or upwards request a sale is given in Seton, 1004, 4th ed. In Seton, 1005, 4th ed., is given a form for use where a sale is requested under sect. 3; but where it is clear that some of the persons interested are not parties, there should be omitted from this form the prefatory opinion of the court (*Re Hardiman*, *Pragnell* v. *Batten*, 16 Ch. D. 360; *Waite* v. *Bingley*, 21 Ch. D. 674), and also the conditional order for sale, liberty to apply for a sale only being given (*Sykes* v. *Schofield*, 14 Ch. D. 629). Preliminary inquiries may be directed on admissions in the pleadings (R. S. C. Ord. 32, r. 6), without evidence (*Gilbert* v. *Smith*, 2 Ch. Div. 686). Where in such a case the defendants were infants, no affidavit was required, the court holding that the inquiries would be a sufficient protection to the infants (*Ripley* v. *Sawyer*, 31 Ch. D. 494); not following *Senior* v. *Hereford* (4 Ch. D. 494); see *Fitzwalter* v. *Waterhouse* (52 L. J. Ch. 83).

Service. Under this section notice of the decree must be served on all necessary parties who are not before the court at the hearing. Under sect. 3, however, of 39 & 40 V. c. 17 (*post*), such service may be dispensed with.

Final order for sale. No final order for sale will be made unless all persons interested are parties (*Dodd* v. *Gronow*, 17 W. R. 511), or have been served with notice of the judgment (*Peters* v. *Bacon*, 8 Eq. 125; *Peal* v. *Watts*, 11 Eq. 213; *Hurry* v. *Hurry*, 10 Eq. 346; see *Silver* v. *Udall*, 9 Eq. 227), or such service has been dispensed with under sect. 3 of the Partition Act, 1876, *post*, p. 746 (*Re Hardiman*, *Pragnell* v. *Batten*, 16 Ch. D. 360), or unless the absent parties can be presumed to be dead, as where they have not been heard of for a long time (*Jackson* v. *Lomas*, 23 W. R. 744; *Rawlinson* v. *Miller*, 1 Ch. D. 52). A sale before the certificate in answer to inquiries has been approved is invalid, and the purchaser is entitled to be discharged (*Powell* v. *Powell*, 10 Ch. 130; see *Rawlinson* v. *Miller*, 1 Ch. D. 54). Where the action has been begun in a district registry, the inquiries may be held there, but the application for a sale must be made in the High Court (*Sykes* v. *Schofield*, 14 Ch. D. 629).

Sale out of court. R. S. C. Ord. 51, r. 1a, provides that in all cases where a sale or partition is ordered, the court or a judge shall, in addition to existing powers, have power for good reason to authorize the same to be carried out, either by laying proposals before the judge or by proceedings altogether out of court, the proceeds being dealt with as the judge may order; but no proceedings altogether out of court are to be authorized unless the judge is satisfied that all persons interested are before the court or are bound. As to when a sale is "altogether out of court," see *Cumberland Banking Co.* v. *Maryport Co.* (1892, 1 Ch. 92).

Under this rule an order for sale out of court may be made, even where an infant is interested (*Willis* v. *Willis*, 61 L. T. 610); or a person of unsound mind (*Crook* v. *Crook*, 1890, W. N. 26). Before the making of the rule this was otherwise (*Strugnell* v. *Strugnell*, 27 Ch. D. 258). A form of order for sale out of court is given in Seton, p. 1009, 4th ed.; and see *Willis* v. *Willis*, 61 L. T. 610. The reserve price and the auctioneer's remuneration should be fixed by the chief clerk, and the money should be paid into court (*Pitt* v. *White*, 57 L. T. 650; *Willis* v. *Willis*, *sup.*; *Re Stedman*, *Coombe* v. *Vincent*, 58 L. T. 709).

Form of order. For effectuating a sale under this act, the estate tail of a lunatic may be barred upon terms (*Re Pares*, *Lillingston* v. *Pares*, 12 Ch. Div. 333). The court declined to sanction a sale reserving minerals (*Law* v. *Stoney*, 1876, W. N. 141). Various forms of orders under the act are given in Seton, p. 1004 *et seq.*, 4th ed. For order where there have been permanent improve-

ments, see *Parker* v. *Trigg* (1874, W. N. 27); and where there are annuitants interested, see *Poole* v. *Poole* (1885, W. N. 15). 31 & 32 Vict. c. 40, s. 9.

10. In a suit for partition the court may make such order as it thinks just, respecting costs up to the time of the hearing (*j*). Costs in partition suits.

(*j*) The rule as to costs in a partition suit before this act was that no costs were given until the hearing; and that the costs of the partition should be borne by the parties in proportion to the value of their respective interests; but not the costs of any subsequent proceedings (1 Dan. Ch. Pr. 1032, 5th ed.; *Richardson* v. *Feary*, 39 Ch. D. 50).

In cases under this act the general rule is that the entire costs are borne by the estate, that is, by each share in proportion to its value, the shares being ascertained at the date of the chief clerk's certificate (*Belcher* v. *Williams*, 45 Ch. D. 510; see *Cannon* v. *Johnson*, 11 Eq. 90; *Ball* v. *Kemp-Welch*, 14 Ch. D. 512). Where partition only was asked for, this rule has been followed (*Bowes* v. *Marquis of Bute*, 27 W. R. 750); but under special circumstances the old rule may be adopted (*Richardson* v. *Feary*, 39 Ch. D. 50), or the court may exercise its discretion (*Porter* v. *Lopes*, 7 Ch. D. 367; *Re Hawkesworth*, 1 L. R. Ir. 179; *Jennings* v. *Foster*, 1884, W. N. 200; see *Osborn* v. *Osborn*, 6 Eq. 338; *Miller* v. *Marriott*, 7 Eq. 1; *Leach* v. *Westall*, 17 W. R. 313; *Simpson* v. *Ritchie*, 16 Eq. 103). As to costs of adverse litigation in respect of one share, see *Jennings* v. *Foster* (1884, W. N. 200); *Mildmay* v. *Quicke* (46 L. J. Ch. 667); *Belcher* v. *Williams* (45 Ch. D. 510); and as to costs of incumbrancers on one share, see *Wilkinson* v. *Joberns* (16 Eq. 14); *Belcher* v. *Williams* (*sup.*) As to costs of trustees, see *Hervey* v. *Olliver* (57 L. T. 239). The costs must be taxed as between party and party, unless by consent of all parties (*Ball* v. *Kemp-Welch*, 14 Ch. D. 512). The costs of perusing the conveyance by the solicitors of the parties not conducting the sale are costs in the action, under the Solicitors' Remuneration Act, 1881 (General Order, 1882, r. 2 (c); *Humphreys* v. *Jones*, 31 Ch. Div. 30). As to the lien of a solicitor on the shares for his costs, see *Lloyd* v. *Jones* (40 L. T. 514); and as to his costs of appearing where he had obtained a charging order, see *Mildmay* v. *Quicke* (6 Ch. D. 556).

[Sect. 11 of 31 & 32 Vict. c. 40, read in connection with sect. 11 of 21 & 22 Vict. c. 27, gave power to make general orders for carrying this act into effect. But these provisions have been repealed by 44 & 45 Vict. c. 59, s. 3, as to England; where the power to make rules of court is now given by sect. 17 of the Jud. Act, 1875. As to Ireland and the County Palatine of Lancaster, power to make general orders was given by sect. 11 of 31 & 32 Vict. c. 40, and sects. 9 and 10 of 21 & 22 Vict. c. 27.]

12. In England the county courts shall have and exercise the like power and authority as the Court of Chancery in suits for partition (including the power and authority conferred by this act) in any case where the property to which the suit relates does not exceed in value the sum of five hundred pounds, and the same shall be had and exercised in like manner and subject to the like provisions as the power and authority conferred by section one of "The County Courts Act, 1865" (*k*). Jurisdiction of county courts in partition. 28 & 29 Vict. c. 99.

(*k*) See now sect. 67 of 51 & 52 Vict. c. 43. Where in a case commencing in a County Court the proceeds of sale exceeded 500*l*., the matter was transferred to the High Court (*Rawlinson* v. *Miller*, 1 Ch. D. 52).

39 & 40 Victoriæ, cap. 17.

An Act to amend the Partition Act, 1868.

[27th June, 1876.]

39 & 40 Vict. c. 17, s. 1.

Be it enacted as follows:

Short title.

1. This act may be cited as the Partition Act, 1876, and shall be read as one with the Partition Act, 1868.

Application of act.

2. This act shall apply to actions pending at the time of the passing of this act as well as to actions commenced after the passing thereof, and the term "action" includes a suit, and the term "judgment" includes decree or order.

Power to dispense with service of notice of decree or order in special cases.

3. Where in an action for partition it appears to the court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by the Partition Act, 1868, required to be served, or cannot be so served without expense disproportionate to the value of the property to which the action relates, the court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order, dispense with that service on any person or class of persons specified in the order, and, instead thereof, may direct advertisements to be published at such times and in such manner as the court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before the judge in chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the court (including persons under any disability) shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with; and thereupon the powers of the court under the Trustee Act, 1850, shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the court may thereupon, if it shall think fit, direct a sale of the property and give all necessary or proper consequential directions (*a*).

(*a*) There must be either service or advertisement of the judgment; the court cannot dispense with both (*Hacking* v. *Whalley*, 51 L. J. Ch. 944; 1882, W. N. 135; *Phillips* v. *Andrews*, 56 L. T. 108; see, however, *Barton* v. *Barton*, 1877, W. N. 23). For form of order dispensing with service, see *Re Hardiman, Pragnell* v. *Batten* (16 Ch. D. 360).

Proceedings where service is dispensed with.

4. Where an order is made under this act dispensing with service of notice on any person or class of persons, and property

is sold by order of the court, the following provisions shall have effect: 39 & 40 Vict. c. 17, s. 4.

(1.) The proceeds of sale shall be paid into court to abide the further order of the court:

(2.) The court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may from time to time, by further order, extend that time:

(3.) The court shall direct such notices to be given by advertisements or otherwise as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made (*b*):

(4.) If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the court shall distribute the proceeds in accordance with the rights of those persons:

(5.) If at the expiration of the time so fixed or extended the interests of all the persons interested have not been ascertained, and it appears to the court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the court shall distribute the proceeds in such manner as appears to the court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the court, and with such reservations (if any) as to the court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the court to have any primâ facie rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person.

(*b*) Where the order dispensing with service of notice of the judgment did not provide for issuing advertisements, the court, on an application to distribute, directed advertisments to issue, and postponed the distribution for six months (*Phillips* v. *Andrews*, 56 L. T. 108).

5. Where in an action for partition two or more sales are made, if any person who has by virtue of this act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subse- Provision for case of successive sales in same action.

39 & 40 Vict. c. 17, s. 5.

quent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time.

Request by married woman, infant, or person under disability.

6. In an action for partition a request for sale may be made or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorized by order in lunacy), or other person authorized to act on behalf of the person under such disability, but the court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit (*c*).

(*c*) The authority to act on behalf of the person under disability must be to act in the action (*Rimington* v. *Hartley*, 14 Ch. D. 632); and the authority must be given in some special manner (*Wallace* v. *Greenwood*, 16 Ch. D. 365).

In the case of a married woman, or an infant, a request by counsel is not sufficient (*Wallace* v. *Greenwood*, 16 Ch. D. 362; *Howard* v. *Jalland*, 1891, W. N. 210; *contra*, *Crookes* v. *Whitworth*, 10 Ch. D. 289). A written request, signed by the married woman, authorizing and requesting her solicitor to instruct counsel to ask for sale has been held sufficient (*Grange* v. *White*, 18 Ch. D. 612). The request of an infant may be made by his next friend or guardian *ad litem*, but the sale must be shown to be for his benefit (*Rimington* v. *Hartley*, 14 Ch. D. 630; *Miles* v. *Jarvis*, 50 L. T. 48; *contra*, *Platt* v. *Platt*, 28 W. R. 533). An action may be brought, or a request made by the next friend of a person of unsound mind, not so found, but it must be shown that the sale is for his benefit (*Porter* v. *Porter*, 37 Ch. D. 420; *Watt* v. *Leach*, 26 W. R. 475).

Action for partition to include action for sale and distribution of the proceeds.

7. For the purposes of the Partition Act, 1868, and of this act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

INDEX.

ABANDONMENT,
fishery, of several, effect of, 37.
light, of right to, 95.
water, of right to, 76.
way, of private, 65.
of public, 53.

ABATEMENT,
in case of disturbance of common, 43, 44.
light, 95.
water, 76.
way, 66.
public nuisance, individual cannot abate, 83.

ABSENCE,
beyond the seas, of creditor, does not prevent time running, 228, *see* 204, 216.
of defendant, prevents time running, 204, 216, 217, 228.
of person claiming land or rent, does not prevent time running, 196, *see* 141.
what is beyond the seas, 228, *see* 145, 207.
decree may be made in absence of trustee, 528, 529.

ABSTRACT OF TITLE,
advowsons, to, should extend to a century, 167.
Conv. Act, 1881, sec. 3, rules in, as to, 574, 575.
effect of section, 576.
forty years' title may be required, 566, *see* 144.
lots, on sale in, 575.

ACCOUNT,
action of, limitation of, 208.
mesne rents, of, from what period directed in equity, 190.
in the case of charities, 191.
pending, acknowledgment of, 220.

ACCOUNTANTS,
to the crown, 466, 467.
See CROWN.

ACCOUNTS,
how time runs in case of open, 210.
merchants' accounts on same footing as others, 210, 227.
partnership accounts, 210.
payment by settlement of, 225.
of mortgagee, whether acknowledgment, 161, *see* 213.

ACKNOWLEDGMENT,
by testator of his signature to will, 407, 408
of debt under seal, implies covenant to pay, 385.
of deeds not necessary before inrolment under Fines and Recoveries Act, 290, 291.

ACKNOWLEDGMENT OF DEEDS BY MARRIED WOMEN,
certificates, index of, 307.
no longer necessary, *ib.*
colonies, &c., may be taken in, by judge, notary, &c., 301.
commissioners for taking,
appointment of, 300, 301.
fees of, 310.
index of special commissioners, 309.
interested parties, should not be, 307, 308.
lien of, on papers, 301.
lists of perpetual commissioners, 300, 310.
perpetual, 300, 301.
special, 301, 302.
compel, court cannot, 300.
contracts, in case of, 293.
county court judge may take, 299.
court, payment out of money in, not necessary for, 293.
declaration that commissioner not interested necessary, 309.
disclaimer, in case of, 293.
dower, extinguishment of, by, *ib.*
election, not necessary for, *ib.*
entail, on barring, 272.
examination on taking, 300, 308.
inquiry as to provision made for married woman on, 308.
fees for taking, &c., 310, 311.
interested parties not to take, 307, 308.
declaration as to, 309.
Ireland, may be taken by judge, notary, &c., in, 301.
lease may be binding without, 293.
memorandum to be indorsed on deed, 302.
effect of, 306, 307.
form of, 309.
necessary, cases in which it is, 292, 293, 315.
disclaimer, 293, 490.
real estate, in dealing with, 292.
reversionary interest in personalty, in dealing with, 315.
rules as to, 303, 306—308.
Scotland, may be taken by judge, notary, &c., in, 301.
unnecessary, cases in which it is, as to real estate, 293.
election, for, *ib.*
protector, in the character of, 299.
schools, in conveying sites for, 300.
where the concurrence of the husband is dispensed with, 304.
who can take, 299.

ACKNOWLEDGMENTS UNDER THE STATUTES OF LIMITATION,
agent to make and receive, who is, 161, 183, 184.
when acknowledgments may be made by, 176, 182, 183, 218, 226 to, 138, 158, 176, 219, 226.
different sections as to, 139.
in the recovery of land or rent, 138—140.
agent, may be made to, 138, 158.
cannot be made by, 139.
as to mortgages, 158—161, 197.
after twenty years' possession, 160, 168.
in the recovery of money charged on land, legacies, arrears of rent and interest,
by and to whom may be given, 176, 182, 183, 184.
by payment, 176, 182, 183.
in writing, 176, 183—185.
in the recovery of debts by specialty,
in writing, 205.
by payment, 205—207.

ACKNOWLEDGMENTS UNDER THE STATUTES OF LIMITATION—*continued.*
in the recovery of simple contract debts,
in writing, 217.
by whom acknowledgment must be given, 218, 219.
to whom, 219.
effect of an acknowledgment, *ib.*
construction of an acknowledgment, *ib.*
acknowledgment of pending accounts, 220.
amount need not be stated, *ib.*
exempted from stamp duty, *ib.*
what is a sufficient acknowledgment, *ib.*
instances of sufficient acknowledgments, 220—222.
insufficient acknowledgments, 222—224.
by payment, 218, 224.
appropriation of payments in case of several debts, 224.
proof of payment, 225.
modes in which payment can be made, 225, 226.
not essential money should pass, 225.
by whom may be made, 226, 227.
joint contractor, 226, 229, 230.
to whom may be made, 226.

ACQUIESCENCE. *See* LACHES.
breach of trust, in, 157.
creditor, by, in distribution of assets, 156, 227.
disturbance of rights, in, of air, 100.
of light, 98, 99.
of water, 78, *see* 80.
effect in barring rights of action, 156—158, 233.
laches and, difference between, 157.
lessees, by, when binding on reversioner,
in case of light, 12.
private ways, 8, 61, *see* 20.
public ways, 51.
water, 4, 71, *see* 20.
pollution of stream, in, 80.
Statute of Limitations not to interfere with rules of equity as to, 156, *see* 233.

ACT OF PARLIAMENT,
no prescription against, 28, 29.
presumption of, 112.

ACTION,
covenant, of, will lie on word "demise" in a lease, 488.
disturbance, for, of rights of common, 43.
light, 95, 96.
pews, 90, 91.
water, 76—81.
ways, 53, 66.
legacies, to recover, 173.
married woman, by or against, 325, 326, 327, 333.
real, abolition of, 169, 170.
time within which must be brought. *See* LIMITATION OF ACTIONS.

ACTS OF OWNERSHIP,
effect of, 86.

ACTUAL DAMAGE,
must be proved in actions for obstruction of light, 96, 97.
need not be proved in actions for diversion of water, 77.
pollution of water, 79.

ACTUAL TENANT IN TAIL,
meaning of, 241, 243.

ADMINISTRATION,
foreigners dying in England, of estates of, 441.

ADMINISTRATION ACTION,
bankruptcy rules, how far imported into, 383.
effect on running of time, 237.
executor protected by decree in, 551, 552.
interest, computation of, in, 193.
plaintiff not a judgment creditor within 27 & 28 Vict. c. 112, s. 4..479.
real estate, parties to, 379, 380.
registration as *lis pendens* does not interfere with executor, 465.
Statutes of Limitations, setting up, in, 236.

ADMINISTRATOR,
advice of Court, application for, 554, 557.
appointment of new trustees by, 601.
covenants, liability for, 551, 552.
distinction between executor and, 125.
distribution of assets by, after notice, 553.
judgments, protected against unregistered, 472, 473, *see* 481, 482.
limitation of actions by or against, for injuries to property, 201, 202.
in respect of debts, &c., 215, 216, *see* 182, 236.
land or rent, 125.
protector of settlement, not to be, 263.
rents, covenants, and rent-charges, liability for, 551, 552.
retainer by, 383.
rights of, 126.
sale for payment of debts, no power of, 388, 390.

ADULTERY,
forfeiture of dower by, 343, *see* 171.

ADVERSE POSSESSION,
3 & 4 Will. 4, c. 27, before, 115—117.
since, 117, 118.
crown, against the, 110, 112.
curtesy will be prevented by, 351.
incorporeal rights, in case of, 45.
infants, against, 117, 118, 137, 141, *see* 190.
interruption of, what acts sufficient, 136, *see* 127.
not adverse at the passing of 3 & 4 Will. 4, c. 27..140, 141.
possession, what constitutes actual, 120, 121.

ADVERTISEMENT,
creditors, for, by executor or administrator, 553, 554.
acknowledgment of debt, does not amount to, 220.
claim in answer to, does not prevent time running, 238.
Partition Acts, under, instead of service, 747.
Settled Estates Act, under, 654, 655, 667, 674.

ADVICE OF COURT,
application for by trustees, executors, &c., 554, 557.
nature of indemnity when acting on, 555.

ADVOWSON,
donative, nature of, 166.
judgment a charge on, 451.
limitation of time for recovery of, 164—167.
extreme period, 167.
lapse, effect of, 165.
remainderman after estate tail, in case of, 166.
partition of, 740.
pluralities, 166.
presentation, within what time, must be made, 165.
universities, right of presentation, 166.

AGENT,
action of account against, date from which time runs, 210.
interest allowed between principal and, 193.
land, appointed trustee and allowed commission, 520.
who is, to give and receive acknowledgments of debts, 161, 183, 184.
See ACKNOWLEDGMENTS UNDER THE STATUTES OF LIMITATIONS.

AGREEMENT. *See* CONTRACT.
dower, not to bar, enforceable, 348.
lease, for, effect of, 486, 487.
tenant in tail, by, whether binding on issue in tail, 272, *see* 695, 709.

AIR,
acquiescence in pollution, effect of, 100.
chimney, to, right to passage of, cannot be acquired, 7, 99.
common law, claim at, 99.
covenant not to intercept, implied from long user, *ib.*
defined channel, through, may be claimed under lost grant, *ib.*
mill, to, right to passage of, cannot be acquired, 7, *see* 99.
pollute, right to, 6, 99, 100.
pollution of, action for, 99.
purity of, right to, 96, 99.
window, through, right to, may be prescribed for, 99.

ALIEN,
disentailing deed, may execute, 253.
property in England, may acquire, hold, and dispose of, 402.
protector of settlement, not to be appointed, 265.
trustee, may be appointed, 520.

ALIENATION,
condition restraining, of real estate, 299.
life interest determinable on, *ib.*

ALLUVIUM,
right to, 86.

ALTERATION,
ancient lights, of, 94.
descent, of line of, by conveyance, 358, 359.
dominant tenement, of, effect on right of way, 65.
enjoyment of rights of water, 75, 76.
wills, in, 419. *See* WILL.

AMENDMENT,
of fines, 249, 250.
of recoveries, *ib.*

ANCESTOR,
lineal, descent to, 360.
male to be preferred, 361.
mother of more remote male, preferred, *ib.*
seisin of, 355, 362.

ANCIENT DEMESNE,
fines and recoveries of, provisions as to, 246—248.
lands in, cannot be entailed, 242.
tenure of, what is, 247.
when restored, 248.

ANNUITY,
apportionment of, 442, 443, 444.
arrears of, what, are recoverable, 108, 186, 187, 194, 201, 204.
interest on arrears not recoverable, 193.
bond, secured by, limitation of actions in case of, 204.
charging order on, 454, 455.
distress for, 107, 609, 610.
dower, in lieu of, 347, 348.
land, charged on, limitation of actions in case of, 108, 113, 180, 181, 186, 194, 204.
express trust, when secured by, 151, *see* 200, 231.
not charged on, limitation of action in case of, 108, 109, 180, 193, 204.
nature of, 108.

ANNUITY—*continued.*
personal, fee simple conditional in, 242.
registration of, 469, 470.
rentcharge and, difference between, 108.
trust to secure, effect of, 151, 181, 189, *see* 200, 231.

ANTICIPATION (RESTRAINT ON). *See* RESTRAINT ON ANTICIPATION.

APPEALS,
interest in case of, 194.
within what time to be brought, 175.

APPOINTMENT. *See* POWER.
debts, when property subject to power of appointment is assets for, 329, 381, 428.
deed, by, how executed, 547, 548.
deed creating power, relation of, to, 243.
default, estates limited in, vested till appointment made, *ib.*
dower defeated by, *ib.*
fraudulent, 268, 269.
general gift in will, effect of, 406, 426—430.
infant, by, under Infants' Settlement Act, void on death under age, 314.
invalid by reason of corrupt bargain or intention, 268, 269.
leases by, position of lessee, 243.
perpetuities, rule against, when period runs on, 243, 244.
property subject to general power of, assets for payment of debts, 329, 381, 428.
receiver by mortgagee, of, 562, 563, 592, 595.
trustees, of, 517, 540, 600, 699. *See* TRUSTEE.
will, by, in exercise of power, 411.
takes effect from testator's death, 243.
under power to two persons or survivor, 403, 429.

APPORTIONMENT,
Act, 1870..442—445.
apportionment under the Act is in respect of time, 442, 443.
exclusion of, 445.
annuities, of, 442, 443, 444.
area, in respect of, 546, 547.
bonus on shares, of, 443, 444.
common, of, 32, 33, 36.
conditions of re-entry, of, 545, 586.
devisee and testator's estate, between, 443.
dividends, 442, 443, 444, 445.
landlord and tenant, between, 443.
mortgage debt between several estates, of, 395.
parish rates, Act does not apply to, 443.
payable, when apportioned part, 444.
policies, Act does not apply to sums payable on, 445.
profits in trade, Act does not apply to, 443.
recovery of apportioned payments, 444.
rent, of, in respect of area, 546.
in respect of time, 392, 442—445.
on bequest of leaseholds, 392.
rentcharge, of, in respect of area, 547.
in respect of time, 442—445.
salary, of, 443, 444.
testator and devisee or legatee, between, 443.
tenant for life and remainderman, between, *ib.*
tithe, of, 444.
vendor and purchaser, between, 443.

APPROPRIATION,
in case of rights of water, 68.
of payments, as an acknowledgment of debt, 224.

APPROVE,
right of lord of manor to, 40.

APPURTENANCES,
common, will not pass by the word, in enfranchisement deed, 42.
easement extinct in law does not pass by the word, 59.
included in conveyance though not mentioned, 577, 578.
ways, when they pass under, 58, 59.

ARBITRATION,
award, enforcement of, 461.
damages awarded are simple contract debts, 384.
time within which, may be enforced, 202.

ARREARS,
annuity, of, what are recoverable, 108, 186, 187, 194, 201.
no interest allowed on, 193.
dower, of, six years' recoverable, 185.
interest, of, on charges, 188.
judgments, *ib.*
legacies, 189.
mortgages, 185, 187, 189, 199.
unpaid purchase-money, 188.
pauper lunatics' maintenance, of, what can be recovered, 211.
rent, 185, 186, 203.
salary, interest on, 193.
tithe and tithe rentcharge, 186.

ARTIFICIAL WATERCOURSE,
right with regard to, 6, 69, 72, 73.
See WATERCOURSE.

ASSAULT,
within what time action to be brought, 208.

ASSETS,
distribution of, by executor or administrator after notice, 553.
equitable, what are, 377, 387.
foreign personal, law applicable to, 401.
legal, what are, 377.
order in which applied in payment of debts, 380, 381.
real, action to administer, 379, 380.
real estate assets for payment of all debts, 377.

ASSIGNMENT,
chattel interest in land, of, to be by deed, 486.
lease, of, covenant against, 544, 588, 634.
licence for, effect of, 544, 545.
personalty, of, to assignor and another, 549.
Trustee Act, meaning of word in, 497.

ASSUMPSIT,
when time runs in action on, 212.

ASSURANCE,
meaning of word in Inheritance Act, 353.

ATTAINDER,
descent, on, effect of, 363.
statutes as to, *ib.*

ATTENDANT TERMS,
dower, used to bar, 342.
satisfied, cease after 31st December, 1845..493, 494. *See* SATISFIED TERMS.

ATTESTATION OF WILLS. *See* WILL.

ATTORNEY,
execution of deeds by, 611.
married woman may appoint, 606.

ATTORNEY—*continued.*
power of, deposit of, in Central Office, 612, 635, 641.
indemnity to persons acting in good faith under, 550, 612.
irrevocable, when, 630, 631.
payments, &c., under, valid, 551, *see* 612, 630, 631.
revocation of, *ib.*

ATTORNMENT,
tenant, of, what payment of rent amounts to, 135.

AUTRE VIE, ESTATES *PUR*,
curtesy cannot issue out of, 350.
descent of, 352.
disposable by will, 401.
effect where not disposed of by will, 404.
entailed, cannot be, 242.
quasi entail of, *ib.*

AWARD,
action of debt on, limitation of time for, 202.
enforcement of, 461.

BALKS,
whether they belong to owner of adjoining land, 56.

BANKER,
action for money deposited with, barred in six years, 209.
interest between customer and, 193.
lien of, not within Locke King's Act, 393.
relation between customer and, 209.

BANK NOTES,
may be seized under a *fi. fa.*, 449.

BANK OF ENGLAND,
charging order, effect of, on transfer by, 458.
officer of, may be appointed to transfer stock, 509.
vesting order, bound to give effect to, 513, 535, 539.

BANKRUPT,
estate tail of, provisions as to, in Fines and Recoveries Act, 280—288.
powers vested in, 296, 297.
protector of a settlement, may be, 261.
trustee, appointment of new trustee in place of, 518.

BANKRUPTCY,
Act, charging order not execution within sect. 45 of, 457.
appointment of new trustee in case of, 518.
curtesy, in relation to, 350.
disclaimer of trustee in, effect of, 492.
life interest determinable on, 299.
notice, may include interest on judgment, 459.
orders in, enforcement of, 460.
powers vested in bankrupt, effect on, 296, 297.
trustee in, time runs against, *Add.*

BASE FEE,
bankrupt, vested in, 281, 283.
definition of, 241, 243.
enlargement of, 256, 270, 271, 283.
married woman, by, 256, 329.
protector's consent necessary, 268.
merge in the reversion, does not, but is enlarged, 270, 271.

BATHING,
right of, 86.

BED OF RIVER,
ownership of, 84, 85.
when passes by conveyance of land on one bank, 85.

BENEFICE,
execution against, 448, 451.
judgment not a charge on, 453.

BENEFICED CLERK,
enforcing judgment against, 448, 451, *see* 453.

BEYOND THE SEAS,
absence of creditor does not prevent time running, 228, *see* 204, 216.
defendant prevents time running, 204, 216.
in the case of joint debtors, 217, 228.
person claiming land or rent does prevent time running, 196, *see* 141.
what is beyond the seas, 228, *see* 145, 207.

BILL OF EXCHANGE,
acknowledgment of debt by giving, 226.
actions on, within what time must be brought, 213.
execution, may be taken in, 449.
indorsement on, does not stop running of time, 218, 225.

BISHOP,
limitation of right to recover advowson, 165.
presentations by, *ib.*

BOND,
actions on, time within which must be brought, 202 *et seq.*
crown, to, 466—469, 470.
infant, by, in relation to the customs, valid, 474.
interest on, 193.
post-obit, date from which time runs, 204.
in case of judgments on, 178.
presumption of payment of, 208.

BOOTHS,
custom to erect, 25.

BOTE,
house, plough, &c., 36.

BREACH OF TRUST,
acquiescence in, 157, 233, 234.
actions for, time within which must be brought, 231, 232, 234, 235.
deceased trustee, assets of, liable for, 234.
nature of debt created by, 234, 384, 385.

BRICK BURNING,
may be a nuisance, 100.

BROTHER,
descent from, to be traced through parent, 360.

BUILDING LEASE,
settled estates, of, under Settled Estates Act, 644, 645.
under Settled Land Acts, 680, 681, 682, 720, 722, 726.

BURIAL,
prescription for right of burial in particular vault, 91.
See VAULT.

CALLS,
action for, time within which must be brought, 203.
interest on, 193.

CANAL,
company, cannot acquire right to water for other purposes, 7.
steam, right to use, on, 83.
waste water from, right to, as an easement, 9.

CANCELLATION,
of will is not revocation, 418, 420.

CAPITAL MONEY. *See* SETTLED LAND ACTS.

CATTLE,
right to water, an easement, 6.

CATTLE GATES,
nature of, 30.

CESTUI QUE TRUST,
actions by, when barred, 231, 232, 234.
interest between trustee and, 193.
possession by, effect of, 118, 122, 129, 130, 152.
tenant at will to trustee, whether, 126, 129, 130.
trustee, may be appointed, when, 520.

CHANCEL,
rights with regard to, 89, 90.

CHANCERY DIVISION,
advice of, trustees may apply for, 554, 555.
Conveyancing Act, 1881, jurisdiction under, 620.
decrees of, enforcement of, 459—461.
Fines and Recoveries Act, jurisdiction excluded as to disposition under, 272.
forfeiture for breach of covenant, relief granted from, 587—589, 633, 634.
infant, settlements on marriage of, may sanction, 312—314. *See* SETTLEMENT.
protector of settlement, when to be, 266.
consent by, when, 275, 276.
rules of equity excluded in case of protector, 268.
restraint on anticipation, may release, 605.
sale of minerals and surface apart, may sanction, 735—737.
of land of judgment debtor, may order, 479.
Settled Estates Act, may authorize leases and sales under, 644 *et seq.* *See* SETTLED ESTATES ACT.
Settled Land Acts, jurisdiction under, 702. *See* SETTLED LAND ACTS.
Statutes of Limitation, how far bound by, 232, 233.
Trustee Acts, powers under. *See* TRUSTEE ACTS.
Vendor and Purchaser Act, may decide questions of title under, 568—571.

CHARGE,
debts on real estate, what amounts to, 387.
power to raise money to pay debts, where, 386.
power of sale in executor, 388, 389.
protection of purchasers, 390.
interest on, arrears recoverable, 188.
judgment, a charge on land, 451—454. *See* JUDGMENT.
charged on stock, &c., 454—457.
land, on, registration of, 482, 483.
searches for, 483, 484.
time within which action should be brought on, 176, 179—181, 198—200.
legacies on real estate, of, 387.
limitation of actions to recover money charged on land, 176, 179, 180, 198, 199.
express trust, in case of, 151, 181, 189, 200, *see* 231.
simple contract debts not a charge on land under 3 & 4 Will. 4, c. 104, until decree, 379.
specialty debts are not a charge on the land, 370.

CHARGING ORDER,
annuities, on, 454, 455.
Bankruptcy Act, charging order not execution within sect. 45..457.
clause of forfeiture on alienation, effect of order on, 456, 457.
Court, on stock, &c. in, 455.
dividends, on, *ib.*
effect of, 454, 457.
ex parte in the first instance, 458.
fi. fa., charging order to assist, 450.
form of, 456.
infancy, for debt incurred during, 457.
interest of the debtor may be charged, what, 455, 456.
judgments in respect of which order may be made, 455.
lunatic, against a, 456, 457.
mortgagees, effect as against, 457.
operates from date of order *nisi*, 456.
partnership assets, on, 455.
practice as to, 456, 458.
proceedings on, not to be taken for six months, 455, 457.
rescinded, absolute order cannot be, 456.
restraint on anticipation prevents, *ib.*
sale, action must be brought for, 457.
solicitor's lien, effect as against, *ib.*
stock, shares, &c. on, 454—457.
stop orders, 457.
surety entitled to contribution, effect as against a, *ib.*
trust, stock held on, 454, 456, 457.

CHARITIES,
appointment of new trustees of, 527.
express trust for, 153.
limitation of actions on behalf of, *ib.*
Lunacy Act, 1890, vesting orders under, in case of, 540.
rents of, account of, 191.
Trustee Acts apply in case of, 527.

CHATTELS,
incumbered, bequest of, 302.
real, what are, 104.

CHEQUE,
date from which time runs in case of, 213.
may be seized under a *fi. fa.*, 449, 450.

CHIEF RENT,
what is, 106.

CHIMNEY,
air to, right to passage of, 7, 99.
in another house, right to use, 6.

CHOSE IN ACTION,
assigned, to assignor and another, may be, 613.
by husband to wife, *ib.*
reversionary, disposition by married woman, 315.
vesting orders as to. *See* TRUSTEE ACTS.
effect of, 513, 514.
will, not disposable by, 402.

CHURCH,
glebe and, no unity of possession of, 12.
light for, claim to, *ib.*
married woman to, gift by, not within Married Women's Property Act, 1882..326.
way through, prescription for, 22.

CHURCH PROPERTY,
within what time may be recovered, 163.

CHURCHWARDEN,
custom as to election of, 25.

CHURCH WAY,
claimed by custom, not prescription, 23, 61.
highway or for parishioners only, may be, 49.
remedy for interference with, 54, 67.

CHURCH-YARD,
way over, 22, 49.

CLAY,
custom to take, 39
what right to dig, may be claimed, 22.

CLOTHES,
claim to hang on a line, an easement, 6.

COAL,
licence to dig, effect of, 48.
way to carry, claim of, 62.

CODICIL,
confirmation of will by, 410, 418, 424, *Add.*
of codicils by, 418, 419.
incorporating unattested papers, 410.
revivor by, 420, 421.
revocation of, 415, 418.
by, 415, 416.
will re-executed by, 434, 435.

COLONIES,
acknowledgments of deeds by married women in, 301.
adoption of Wills Act in, 435.
Statutes of Limitation in, 174.
vesting orders as to land in,
jurisdiction under Lunacy Act, 1890..538.
Trustee Act, 530, 531.

COMMISSIONERS,
acknowledgments of married women, for taking, 300—302. *See* ACKNOWLEDGMENT OF DEEDS BY MARRIED WOMEN.
Inclosure, powers vested in Board of Agriculture, 41.
Sewers, of, rights of, 80.

COMMON. *See* CUSTOM—WASTE.
action to ascertain rights of, 44.
appendant, nature of, 31, 32.
extinguished, how, 32, 42.
apportionment of, 32, 33, 36.
approve, right of lord to, 40.
appurtenant, extinguishment of, 33, 42.
gross, may be converted to one in, 35.
limited, must be, 33.
nature of, 32.
stranger, may include cattle of, 33.
beasts, commonable, what are, 31, 32.
bote, house, plough, &c., 36.
commoner, interest and right of, 41.
conveyance of right of, *ib.*
copyholders, claim by, for, 23, 31, 37.
corporation, claim by, 22.
custom, claim by, 23, 37.
demise by parol of, how far good, 47.
different kinds of, 30.
disturbance, remedies for, 43—45.
dwellers in a manor, claim by, 23, 37.
enfranchisement, effect of, 42.

COMMON—*continued.*
establish rights of, action to, 44.
estovers, of, 36.
evidence of right of, 3, 4.
extinguishment of, 32—34, 42.
fold course, what is, 32.
freeholders of manor, claim by, 23, 31.
grant will be presumed, 31, 32.
gross, in, nature of, 35.
tithes of, *ib.*
inclosure, effect of, 34.
acquiescence in, effect of, 43.
Acts, 40, 41.
inhabitants, claim by, 37.
interruptions to right of, 15.
levant and couchant, meaning of, 32.
licence to use must be by deed, 47.
lord, restriction of rights of, 31.
metropolitan commons, protection of, 41.
nature of, 23, 30.
of interest of commoner, 41.
new house, for, 25.
non-user, effect of, 29.
occupiers, claim by, 23, 31.
pannage, right of, 31.
pasturage, sole, claim for, 30.
pasture, of, 31—35.
piscary, of, 37.
pleading prescriptive right to, 33.
in action of trespass against persons claiming common, 43.
prescription, claimed by, 1—3, 23, 30. *See* PRESCRIPTION—PRESCRIPTION ACT.
presumption that waste belongs to the lord, 39. *See* WASTE.
encroachments on waste belong to lord, 39, 40.
proof of right to, 3, 4.
rabbits, commoners cannot interfere with, 41.
release of, 42.
tithes of, 33, 35.
turbary, of, 35, 36.
unity of possession, effect of, 29, 42.
vicinage, because of, nature of, 33, 34.
extinguishment of, 34.
proof of, *ib.*
waste of manor, in, how claimed, 23.
words by which common will pass, 41.
year, for whole, exclusive cannot be prescribed for, 31.

COMPANY,
calls, action for, 203.
interest on, 193.
charging order on shares in, 454—458.
interest in winding-up, 193.
liability of member of, a specialty, 203, 385.
married woman, shares belonging to, 319, 323, 330—332.
statutory powers, by, exercise of, 81, 82.
vesting order as to shares in, effect of, 509, 513, 535, 539. *See* TRUSTEE ACTS.
waterworks, 82.
winding-up of, effect on running of time, 215.

COMPOUND,
power of executors and trustees to, 604, 605.

COMPROMISE,
power of executors and trustees to, 604, 605.

CONCEALMENT OF DEEDS,
fraudulent, by vendor, how punishable, 549.

CONCEALMENT OF RIGHT,
effect of, under Statute of Limitations, 214, 233, *Add.*

CONCURRENT RIGHTS,
provisions in 3 & 4 Will. 4, c. 27, as to, 145, 146.

CONDITION,
assigning of lease, against, 544, 545.
re-entry, of, apportionment of, 545, 586.
notice of, 124.
old distinction between leases for lives and years, *ib.*
restraining alienation of realty, 299.

CONFIRMATION OF SALES,
disposition under a power of surface and minerals apart, 735—737.

CONSOLIDATION OF MORTGAGES,
restriction on, 590.

CONSTRUCTION OF WILLS. *See* DEVISE—WILL.
annuities, whether for life or perpetual, 430.
children who leave issue, gifts to, not to lapse, 433, 434.
copyholds included in general devise of land, 426.
date from which will speaks, 422—425.
excepting clauses, with reference to, 425.
lunatic, in case of will of a, *ib.*
married woman, in case of will of a, 405, 406.
objects of gifts, with reference to, 425.
powers, with reference to the execution of, 429.
devise, without words of limitation, passes the fee, 430.
executor or trustee, in the case of, passes the fee, 432.
of "rents and profits," or "income" passes the fee, 430.
"die without issue," meaning of, 431, 432.
domicil, change of, not to affect, 439.
estate tail, no lapse, when issue living, 433.
fee, passes where no words of limitation, 430, 432.
foreign language, in, what documents looked at, 438.
heir, devise to, effect of, 357, 360.
husband and wife and third person, gift to, 326, *Add.*
land, general devise of, includes copyhold and leasehold, 426.
lapse, when no, 433, 434.
powers of appointment,
appointee predeceasing testator, 428.
children who leave issue, appointments to, not to lapse, 434.
direction for payment of debts exercises general power, 428.
executed by wills of a prior date, 429.
general, exercised by general gift, 426—430.
general pecuniary legacies will exercise general power, 428.
general residuary gift will exercise general power, *ib.*
married woman, exercise of power by general gift, 406, 428.
special powers not exercised by general gift unless intention appears, 427.
survivor, given to, whether exercisable by will during joint lives, 403, 429.
power of revocation and new appointment, exercised by will, 429.
real estate, devise of, whether includes leaseholds, 426.
"rents and profits," devise of, passes the fee, 430.
residuary devise includes lapsed and void devises, 425.
specific, is, 424.
trustees, devise to, effect of, 432.

CONSTRUCTIVE NOTICE,
to purchasers, restriction of, 629.

CONSTRUCTIVE TRUSTS,
whether time runs in case of, 231, 235, *see* 150, 235.
within the Trustee Acts, 498, 499.

CONSULS,
may administer estates of foreigners, 441.

CONTINGENT INTERESTS,
alienation of, 257, 258, 489, 490.
estate tail, in, 253.
married woman may dispose of, 292, 489.
will, may be disposed of by, 401.

CONTINGENT REMAINDER,
destruction of, 490, 491.
equitable, 491.
protected from premature failure of preceding estate, 490, 491.
statute abolishing, repealed, 485.

CONTINGENT RIGHT,
meaning of, in Trustee Acts, 497, 499.
release of, under Trustee Acts, 501, 504, 505, 507, 515.
Lunacy Act, 1890..538.

CONTINGENT USES,
to take effect without any seisin to uses, 556, 557.

CONTINUAL CLAIM,
not to preserve right of entry, 136.

CONTRACT. *See* AGREEMENT.
actions on, within what time must be brought, 208, 212.
foreign, limitation of actions on, 211.
infants, by, 219, 312, 313.
married women, of, antenuptial, liability for, 322—324, 333—335.
deemed to be in respect of separate property, 325.
future separate property bound by, *ib.*
husband, with, 328.
joint, *ib.*
meaning of "contract" in M. W. P. Act, 1882..338.
non-separate property, as to, 293, 296.
separate property, as to, 297, 325, 327, 328.
trust property, as to, 293.
nuisance and, distinction between, 81.
tenant for life under S. L. Acts, by, 695. *See* SETTLED LAND ACTS.
his power to complete predecessor's contracts, 683, 721.
tenant in tail, by, effect of, 272, 275, *see* 695, 709.
testator, by, to sell land devised, effect of, 422.

CONTRIBUTION,
judgment, to, between several estates, 454.
legatees, between, to payment of debts, 381, 424.
mortgage, to, between several estates, 395.
rentcharge, to, 546, 547.
rent service, to, by co-feoffees or coparceners, 546.
repairs by tenant in common, 138.

CONVENTIONS,
as to domicile, 440.

CONVERSION,
order for sale of land effects, 742, 743.
equity for reconversion of interest of person under disability, 742.

CONVEYANCE,
devised lands, of, effect of, 421, 422.
grantor and another, to, 613.
husband to wife, and *vice versâ*, *ib.*
includes all estate, &c. of grantor, 616.
land, of, what included in, 577, *see* 616.
manor, of a, what included in, 577, 578.
mortgagee, by, on sale under statutory power, 563, 593.
tenant for life under the S. L. Act, by, 685. *See* SETTLED LAND ACTS.

CONVEYANCING ACTS,
adopting Act, indemnity to persons, 618, 619.
applications to the Court under the Act, 620.
conditions of sale, statutory, 574—576.
of re-entry, apportionment of, 586, *see* 545.
constructive notice, restriction on, 629.
conveyance, includes all estate, &c., 616.
covenants for title, implied by sect. 7..578—583, 617.
heirs and executors, binding on, 615.
in leases to run with reversion, 585, 586.
two or more jointly, with, effect of, 615.
devolution of trust and mortgage estates, 600.
documents, production and safe custody of, 583—585.
easements, grant of, by way of use, 616.
execution of conveyance by vendor, 583.
forfeiture of leases, relief against, 587—589, 633, 634.
general words in conveyances, 577, 578.
"grant," word not necessary in conveyance, 613.
incumbrances, discharge of, on sale, 576, 577.
infant's land to be deemed settled within S. E. Act, 1877..606, *see* 711.
interpretation clauses, 572, 573, 627.
Ireland, application of Acts to, 621.
joint account, advance on, effect of, 616.
lease, contract to grant, not part of title, 629, 630, *see* 696.
limitation in fee or in tail, words of, 613.
long terms, enlargement of, 617, 632.
married women, attorney, power to appoint, 606.
mortgage, statutory, 598, 599, 623—625.
reconveyance, 600, 625.
transfer, 599, 624.
mortgagee, powers of, 590, 592—596. *See* MORTGAGEE.
mortgagor, rights of, 589, 590, 632. *See* MORTGAGOR.
new trustees, appointment of, 600—602.
powers of, when appointed by Court, 603.
separate sets of, 630, 634.
vesting trust property in, 603.
notices under the Acts, 619.
orders of Court under statutory jurisdiction conclusive, 620.
powers, release and disclaimer of, 613, 630.
of attorney, 611, 612, 630, 631.
practice under the Act, 620.
receipt in or on deed, evidence of payment, 614.
authority for payment to solicitor, *ib.*
receiver of mortgaged estates, appointment and powers of, 592, 595, 596.
rentcharges, recovery and redemption of, 609—611.
restraint on anticipation, release of, by Court, 605, 606.
reversion on lease, title to, cannot be called for, 574, 586.
sale in action for redemption or foreclosure, 596—598.
searches for judgments, &c., 627—629.
forms of requisition, certificates, and fees, 636—642.
rules as to, 635.
short forms of deeds, 615, 625, 626.
supplemental deeds, 614.
trustees, compound, power to, 604.
powers of management and maintenance of infants, 607—609.
receipts of, 604, 605.
sell by auction, &c., 604.
survivor may exercise powers, 605.

COPARCENER,
descent in case of, 356.
disability of one, effect of, 142.
possession of one, not possession of others, 136, 137.

COPYHOLDS. *See* COMMON.
attainder, effect of, 363.
common, claimed by custom not prescription, 23, 31. *See* COMMON.

COPYHOLDS—*continued.*
contingent remainders in, 491.
curtesy, not subject to, except by custom, 350.
customs in case of, 39. *See* CUSTOM.
debts, liable for payment of, 377, 385.
descent of, 356.
"dwellers" or "occupiers," claim of common by, 23, 31.
enfranchised, on sale of, title to enfranchise cannot be called for, 574.
entailed, must be a custom for, 277.
bankrupt, where tenant in tail is, 282, 286.
dispositions of, 277—280.
equitable estates in, 279.
inrolment of disposition, 280.
mortgage of, 260.
old modes of barring, 277.
presumption of bar from possession in fee, *ib.*
entry on court rolls, evidence, 278, 279.
estoppel, surrender does not operate by, 259.
execution, formerly not liable to be taken in, 385, 386.
now liable, 386, 446, 447.
fees, payable on devise of, 403, 404.
fines, action for debt for, limitation of, 202.
payable on devise of copyholds, 403, 404.
forfeiture of, time within which lord must enter for, 123.
freebench. *See* FREEBENCH.
general devise of land includes, 426.
heriots, 104, 105, *see* 132, 168.
leases of, licences to tenants to grant, under S. E. Act, 646.
under S. L. Acts, 684.
married women, disposition by, of, 292, 303.
marshalling of, 385, 386.
partition of, 486, 740.
seizure *quousque*, 122—124, 402.
sequestration of, 386.
Settled Land Acts, disposition under. *See* SETTLED LAND ACTS.
surrender of, does not operate by estoppel, 259.
tenant for life, disposition by. *See* SETTLED LAND ACTS.
title to, evidence of, 278.
vesting order of, effect of, 514.
waste of manor, custom to grant, as copyhold, 39.
will, disposable by, 401—404.
entered on court rolls, to be, 404.
general devise in, includes copyholds, 426.
surrender to use of, not necessary, 401, 402.

CORNWALL,
customs as to mines in, 26
Duke of, limitation of actions by, 111.

CORPORATION,
different kinds of, 103, 104.
execution against, 448, 451.
judgment against, whether charge on land, 453.
limitation of actions by, 102, 103, 104.
prescription against, 2, 5, 104.
by, 22, 24, 35.
trustee, as to appointing corporation to be, 520, 602.

COSTS,
action for, when barred, 214, 215.
Fines and Recoveries Act, under, 309—311.
interest on, when payable, 459.
married women, in actions by or against, 325, 327.
Partition Acts, in action under, 745.
Settled Land Acts, under, 703, 704. *See* SETTLED LAND ACTS.
Trustee Acts, under, 501, 529, 530.

COUNTY COURTS,
acknowledgment of married woman may be taken by judge of, 299.
judgment, removal of, 464.
Married Women's Property Act, 1882, jurisdiction under, 335.
Partition Acts, jurisdiction under, 745.
Settled Land Acts, jurisdiction under, 703, 704.
Statutes of Limitation, rules as to, in, 175, 176.
Trustee Acts, jurisdiction under, 496.

COURT. *See* CHANCERY DIVISION.

COURTS, RIGHT TO HOLD,
non-user, effect of, 29.

COVENANT,
benefit of, may be taken by a stranger to the deed, 488, 489.
breach of, relief against effect of, 587.
when time begins to run in case of, 204.
"demise," covenant implied by the word, 488.
devisee liable to action on, 367.
executor bound by, 615.
liability for, 551.
"grant," not implied by word, 487, 488.
heirs, bound by, 615.
liable to action on, 367.
implied by sect. 7 of Conveyancing Act, 1881..578—582, 617.
interest on money due under, 193.
licence to commit breach of, effect of, 544, 545.
limitation of actions on, 202 *et seq.*
performance of, evidence of, receipt for last payment of rent, 574, 575.
reversion, benefit to run with, 585, 586, *see* 544.
runs with reversion, *ib.*
settle after-acquired property, to, the execution of a disentailing deed could not be compelled under, 275.
infant, by, 312.
two or more jointly, with, effect of, 615.
waiver of, effect of, 556.

COVERTURE,
disability under Prescription Act, 19.
Statutes of Limitation, 141, 176, 196, 204, 216.
effect of Married Women's Property Act, 1882, on disability of, 326.

CRANWORTH'S ACT (23 & 24 VICT. c. 145), 558—565.

CREDITORS. *See* DEBTS; PAYMENT OF DEBTS OUT OF REAL ESTATE.
dower has priority over, 346.
judgment, may obtain sale of land, 479.
liability of executor to, 236.
marshalling between creditors, 380.
and legatees, 381.
preference by executor, 383.
right to follow assets, 370, 379, 552.
witness to will of debtor, may be, 414.

CROWN,
accountants to the, who are, 466, 467.
lien of crown, when it attaches, 467.
quietus, registration of, 468.
Acts of Parliament, when bound by, 109, 110.
debtor to, discharge of estate of, 468, 469.
debts, priority of, 382.
registration of, 465—468.
satisfaction on, entry of, 468, 474.
searches for, 467, 468, 627.
extent, what lands may be taken under, 467.
fishery, grant of, by, 38.
grant from, presumption of, 112.

CROWN—*continued.*
incorporeal hereditaments, may reserve rent out of, 107.
limitation of actions by, 109—112.
Locke King's Act, has benefit of, 393.
lopwood, grant of, to inhabitants, by, 37.
presentation to livings by, when incumbent made bishop, 165.
prescription as against, 30.
Prescription Act, how far within, 1, 12.
presumption of grant from, 112.
privileges over land conferred by parol by, 49.
quietus, registration of, 468.
reversion in, Fines and Recoveries Act, not barrable under, 254, 255.
lease by lunatic tenant in tail where, 255.
Settled Estates Act, exercise of powers under, effect on, 664.
Settled Land Acts, exercise of powers under, effect on, 709.
suits by, 111.
surety of, has same priority as, 382.
Trustee Acts extend to private property of, 499.

CURTESY,
adverse possession, effect of, 351.
bankruptcy, rights of assignees in, 350.
copyholds, in, *ib.*
declaration against, effect of, 351.
definition of, 349.
election of wife, effect of, 350.
equitable estates, out of, *ib.*
executory devise over on death of wife, effect of, *ib.*
leases by tenant by the, 660, 664, 710.
Married Women's Property Act, 1882, does not interfere with, 326, 349.
money which is to be considered as land, of, 349.
protector, tenant by the, may be, 261, 351.
pur autre vie, not out of estate, 350.
recoveries, effect on, 255.
requisites for, 349.
sales by tenant by the, 710.
separate property, disposition of, will defeat, 350.
Wills Act, sect. 33, effect on, 349.
Settled Estates Acts, application to, 660, 661.
Settled Lands Acts, application to, 710, 718.

CUSTOM. *See* COMMON.
booths, to erect, 25.
certain, must be, 24.
churchwardens, as to election of, 25.
clay, to take, 39.
coals, to lay, on another's land, 24.
continuous, must be, 24, 25.
curtesy claimed by, 350.
dance, for inhabitants to, 25.
descent by, effect of Inheritance Act on, 356.
enjoyment must be as of right, 24.
evidence of, fifty years at least usual, 25.
flints, for tenant to take away, *ib.*
gravel, to take, 39.
gripe for drainage, to make, bad, 25.
highway, as to repair of, *ib.*
horses, to exercise, beyond parish, bad, *ib.*
immemorial, must be, 24, 25.
interrupted of, 24.
loam, to take, 39.
London, of, as to light, 13.
conveyances by married women, 295.
mines and quarries, as to, 25, 26.
nature of, 23, 24.
nets, to dry, *ib.*
prescription and, difference between, 23.
profit à prendre, to take, bad, 3, 23, 36, 37.

CUSTOM—*continued.*
public cannot claim by, 25, 38.
quarries, for lord to work, 25.
races, to hold, 25.
rates, as to, *ib.*
reasonable, must be, 24, 25.
recreation, for, cannot be claimed by public, 25.
sand, to take, 39.
statute, effect of inconsistent, 28.
tin-bounders, customs claimed by, 26.
unreasonable, instances of, 24, 25.
usage, cannot be enlarged beyond, 25.
water, for inhabitants to take, *ib.*
watercourse, as to, 74.
way, may be claimed by, 6, 23, 57, 61.

CUSTOMARY FREEHOLDS,
liable to execution for judgment debts, 44..
not within 3 & 4 Will. 4, c. 74, s. 53..280.
within 3 & 4 Will. 4, c. 27..101.
Wills Act, 401.

DAMAGES,
admiralty, in, interest on, 192.
interest given by way of, 191.
light, for disturbance of, 98.
married women, recovered by or against, 325, 326.
undertaking in, may be given by married woman, 327.
necessary on granting interlocutory injunction, 97, *see* 98.
water, for disturbance of rights as to, 78, 79.
way, for disturbance of, 53, 54.

DAY TO SHOW CAUSE,
infant's right to, 372, 373.

DEATH,
power of attorney, effect on, 551, 612, 630, 631.
presumption of, after seven years, 142.
legatee, in case of, 143.
security to refund, payment over on, *ib.*
time of death, no presumption of, 142.
two persons in same wreck, case of, 143.
without issue, *ib.*
will to speak from, 422—425.

DEBTS,
acknowledgment under seal implies covenant to pay, 385.
barred by statute, executor may pay, 236, 383.
charge of, on real estate, 387.
crown, to. *See* CROWN.
devise in trust to pay, effect on running of time, 235.
effect of trust of personalty for payment of, 235, *see* 231.
equitable, charging order cannot be made on, 456.
but may be attached, *ib.*
interest on, 191—194.
judgment. *See* JUDGMENT.
mortgage debts, payment out of land, 391 *et seq.*
See LORDS KING'S ACT.
mortgage for payment of, 386, 389, 390.
order of payment of, 382, 383.
lex loci situs, governed by, 382.
payment out of real estate, 365 *et seq.* *See* PAYMENT OF DEBTS OUT OF REAL ESTATE.
preference by executor, 383.
purchaser, whether liable to see to application of purchase-money in payment of, 390, 391.

DEBTS—*continued.*
sale for payment of,
devisee of beneficial interest, by, 388, 390.
devisee in trust, by, 386, 388, 389.
executor, by, 388, 389, 390.
heir, by, 388.
legal estate on sale by executor of will before 1859..388.
simple contract, what are, 384, *see* 209. *See* SIMPLE CONTRACT DEBTS.
limitation of actions for, 208. *See* LIMITATION OF ACTIONS.
specialty, what are, 203, 385. *See* SPECIALTY.
limitation of actions for, 202. *See* LIMITATION OF ACTIONS.

DECREE,
of Court of Equity,
for payment of money, to have force of judgment, 460.
judgment within Statutes of Limitation, is a, 178.
provisions of Trustee Act, 1850, applied to, 515.

DEDICATION,
of land for streets, &c.,
under Settled Estates Act, 650, 651.
under Settled Land Acts, 684.
of ways to public, 50—52.

DEED,
certain acts to be by, 486, 487.
estoppel by, 258, 259. *See* ESTOPPEL.
fraudulent concealment of, by vendor, punishable, 549.
indenture, deed purporting to be, to take effect as, 489.
stranger to, may take interest or benefit under, 488, 489.

DEEDS OF ARRANGEMENT,
registration of, 482.

DEFINED CHANNEL,
in case of air, 7, 99.
in case of streams above ground, 68, 69.
under ground, 7, 70, 71.

DELAY. *See* ACQUIESCENCE.

DELIVERY IN EXECUTION,
necessary before judgment can affect land, 477.
registration of, 481, *see* 470—472, 478.
what is, 477.

DEMISE,
word implies covenant, 488.

DEMURRER OF PAROL,
abolished, 372.

DESCENDIBLE FREEHOLDS,
descent of, 352, 363.

DESCENT,
alteration of line of, 358, 359.
ancestor, lineal, to, 360, 361.
attainder, effect of, 360, 363.
brother to brother or sister, from, 360.
coparceners, from, 356.
copyholds, of, *ib.*
customs, effect of Inheritance Act on, *ib.*
equitable estates, of, *ib.*
evidence of extinction of line of descent, what sufficient, 362.
executory devise, of estate by, 356.
failure of heirs of purchaser, 355.
grantor, limitation to, effect of, 357, 358.
heirs of, limitation to, effect of, *ib.*
half-blood, to, 362.

DESCENT—*continued.*
heir of testator, devise to, effect of, 357, 358.
of another person, devise or limitation to, effect of, 359.
Inheritance Act, 352—364.
commencement of, 364.
interpretation clause, 352.
objects of Act, 353.
limitation to grantor or his heirs, 357, 358.
heirs of a person, effect of, 359.
male line of ancestors preferred, 361.
mother of male paternal ancestor preferred, *ib.*
old law, 353, 354, 357, 358, 360, 362, 363.
person last entitled, when traced from, 355.
possessio fratris, rule of, 362.
posthumous heir, rights of, 356.
purchaser, meaning of word, 352.
traced from last, 355.
presumption as to who was, *ib.*
remainder, of estate in, 356.
reversion, of estate in, *ib.*
root of descent, 355, 356.
Shelley's Case, rule in, 358.
seisina facit stipitem, rule of, abolished, 355, 356, 362.
sister to brother or sister, from, 360.
trust property, of, 567, 600.

DESCENT CAST,
not to bar right of entry, 172.

DETINUE,
when time runs in actions of, 208, 212.

DEVASTAVIT,
claim for, barred in six years, 211, *see* 236.

DEVISE. *See* CONSTRUCTION OF WILLS.
children, to, effect of, 433, 434.
contract to sell by testator, effect on devise, 422.
debts, in trust to pay, effect on running of time, 235.
estates tail, of, not to lapse, 433.
executor, to, passes the fee, 432.
fee passes without words of limitation, 430, 432.
general, includes copyholds and leaseholds, 426.
operates as execution of power, 426—430.
heir, effect of devise to, 357, 360.
mortgage estate, of, effect of subsequent acquisition of equity of redemption, 422.
real estate charged with debts, of, who is to raise money for payment, 386—391.
if devised in trust for whole estate, devisee in trust to sell, 386.
if devised beneficially in fee or in tail for whole estate, devisee to sell, 390.
in other cases executor to sell, 389, 390, *see* 388.
residuary, includes lapsed and void devises, 425.
specialty creditors, void against, 366.
subsequent conveyance, effect of, 421, 422.
trustee, to, passes the fee, 432.
without words of limitation passes the fee, 430.

DEVISEE,
debts, sale for payment of, by, 386, 388, 389, 390.
disclaimer by, 294.
liable to debts, 367, 368, *see* 379.
mortgaged land, of, liable to mortgage debt, 391 *et seq.* *See* LOCKE KING'S ACT.
retainer by, 384.
trust, in, sale for payment of debts by, 386, 388, 389.

DEVOLUTION,
of trust and mortgage estates, 600.

DIE WITHOUT ISSUE,
operation of words in devise or bequest, 431, 432.

DIGNITY,
entail of, 242.
not within Statutes of Limitation, 114.

DISABILITIES,
saving in favour of persons under,
in the case of claims under the Prescription Act, 19.
in the recovery of land or rent, 141—145, 196, 197.
as to mortgages, 141, 161, 196.
successive disabilities in the same person, 141.
in different persons, 145.
in the recovery of money charged on land or legacies, 176, 182, 190, 228.
no saving as to arrears of rent or interest, 190.
in the recovery of debts by specialty, 204, 205.
in the recovery of debts by simple contract, 216.
representatives of persons dying under disability, 217.
where time once begins to run, disability does not stop it, 141, 196, *see* 215.

DISCHARGE OF WATER,
prescriptive right to discharge water on adjoining land, 71, 72.

DISCLAIMER,
clear, must be, 294.
conduct, by, *ib.*
deed, should be by, *ib.*
devisee, by, 293, 294.
disentailing deed, by party to, effect of, 253.
effect of, 294.
freehold, of estate of, 293, 294.
heir, by, of devised land, effect of, 358.
husband, by, may give effect to wife's disposition, 294.
land charged with debts, of, 388.
married woman, by, 293, 490.
parol, of devised copyholds, 294.
of personalty, *ib.*
tenant, by, of landlord's title, 135.
trustees, by one of several, 294.
trustee in bankruptcy, by, effect of, 492.

DISCONTINUANCE,
what is, 172.
not to bar right of entry, *ib.*

DISENTAILING DEED,
alien, by, 253.
contract to execute, specific performance of, 272, 275.
disclaimer by party to, effect of, 253
form of, 254, 272, 273.
infant, ordered to execute, 275, 374.
under Infants Settlement Act, void on death under age, 314.
inrolment of, 273, 280, 290, 291.
acknowledgment not required before, 290.
bankrupt tenant in tail, in case of, 282, 288.
copyholds, in case of, 280, 291.
entailed money, in case of, 289, 290.
fees for, 311.
may be after death of tenant in tail, 273.
judgment debtor ordered to execute, 453.
lunatics, in case of, 253.

DISENTAILING DEED—*continued.*
married woman, by, should be acknowledged before inrolment, 273.
operation of, 253.
payment of money out of Court, required on, 289, 657.
powers, destruction of, by, 253.
rectification of, 275.
relation back of inrolled deeds, 291.
tenant for life, by, effect of, 253.
recital that tenant in tail is, effect of, *ib.*
vesting order operating as, 503.

DISSEISIN,
what amounts to, 115.

DISTRESS,
annuity given by will, for, 107, 609, 610.
common, for surcharge of, 43.
executor's right of, 107.
rent, for, 106, 107.
six years' arrears recoverable by, 185, 186.
tolls, for, 27.
waiver of forfeiture, is, 125.

DISTRIBUTION OF ASSETS,
by executor or administrator after notice, 553.

DITCHES,
possession of, what constitutes, 120.
rights of ownership as to, 56.
set out on inclosure, 75.

DIVERSION OF WATER,
action for, 77.
custom, by, 26, 74.
flood water, of, 70.
licence for, 48.
prescription, by, 71.
right to make, 7, 69, 70.
See WATER—WATERCOURSE.

DIVIDENDS,
apportionment of, in respect of time, 442, 443, 444, 445.
charging order on, 455.

DIVORCE,
dower forfeited on, 343.
sequestration in case of, effect on wife's property, 327.

DOCKETS,
to be closed, 461.

DOMICILE. *See* WILL.

DOMINANT TENEMENT,
meaning of, 5.

DOOMSDAY BOOK,
evidence as to tenure by ancient demesne, 247.

DOWER,
acknowledged deed, effect of conveyance by, 293, 343.
adultery, forfeiture on, 343.
agreement not to bar, 348.
alienation of husband will defeat, 346.
appointment will defeat, 243.
arrears recoverable of, 185.
assignment of, limitation of action for, 114.
attendant terms used to bar, 342.

DOWER—*continued.*
bar of, alienation of land by husband, by, 341, 346.
attendant terms, by means of, 342.
bequest of personal estate, by, 348.
declaration, by, 347.
deed acknowledged, by, 343.
devise of real estate, by, 347.
Dower Act, under, *ib.*
jointure, by, 341, 342.
uses to bar, by, 342.
bargain and sale in relation to, 345.
contract of sale, land subject to, 344.
of husband, effect of, 346.
creditors, dower has priority over, 346, 378.
declaration, bar by, 347.
devise of real estate will bar, *ib.*
divorce, forfeiture on, 343.
Dower Act, objects of, 340.
operation of, 349.
election, when widow put to, 346, 347, 348.
jointure and dower, between, 341.
next of kin of widow, by, 347.
equitable estates, out of, 344.
executory devise over on death of husband does not defeat, 345.
freebench, 343. *See* FREEBENCH.
gavelkind lands, out of, 343.
joint tenant, widow of, not entitled to, 345.
jointure, bar by, 341, 342.
leases by dowéress, 660, 661.
legacies in lieu of, priority of, 348,
interest on, *ib.*
limitation of, time for recovery of, 343, 345, *see* 114.
mortgaged land, out of, 344.
old law of, 340—342, 344, 345, 346, 347.
ostium, dower *ad*, abolished, 349.
partitioned estates, out of, 345.
plaint for, abolished, 170.
property subject to, 340, 341.
protector, dowéress not to be, 263.
purchase for valuable consideration a defence against claim for, 171.
railway company, where land taken by, 341.
recovery of, 170, 343.
remainders, out of, 344.
reversions, out of, *ib.*
seisin of husband not necessary, 345.
Statute of Uses in relation to, 341, 345.
uses to bar, 342.
will, conditions in, dower is subject to, 347.
declaration in, will bar, *ib.*
writ of right of, abolished, 170.

DRAINS,
dedication of part of settled estate for, 650, *see* 684.
inclosure, set out on, 74, 75.
land, right to drain, 68, 69.
repair of, 80.
sewage, right to discharge through, 72.
extent of right, 62, 74.

DURHAM, CHANCERY COURT OF,
judgments in, enforcement of, 460, 464.
registration of, 462, 463.
Conveyancing Act, 1881, jurisdiction under, 620.
Partition Acts, jurisdiction under, 739.
Settled Estates Act, jurisdiction under, 660.
Settled Land Acts, jurisdiction under, 704.
Trustee Acts, jurisdiction under, 510.

EARNINGS,
of married woman to be separate property, 317, 328, 329.

EASEMENT. *See* AIR—LIGHT—PEW—WATERCOURSE—WAY—PRESCRIPTION.
abandonment of, 29.
alteration of dominant tenements, effect of, *ib.*
of enjoyment, 76.
claiming, modes of, 5, 7, 45 *et seq.*
contract in respect of, 6.
conveyance of land includes, 577.
conveyed or created only by deed, 46.
deed necessary for creation and conveyance, 46.
definition of, 5.
dominant tenement, must be claimed in respect of, *ib.*
drainage, 62.
evidence of user of, 10, 14, 17, 46.
extinguishment of, 29.
grant of, 46, 47.
effect of express, on claim by prescription, 29, 45.
lost, doctrine of, 45, 46, *see* 99.
Settled Land Acts, under, 677, 685, 721.
use, by way of, 47, 616.
implied grant of, 59.
instances of, 6, 7.
leases of, under Settled Estates Act, 644.
under Settled Land Acts, 680.
licence for, enforceable, when, 48.
deed, should be by, 47.
merger of, 5.
multitude of persons cannot prescribe for, 6.
nature of, 5.
payment in respect of, 6.
pleading, in claim to, 16, 45.
prescription, claim to, by, 5, 6, 45 *et seq.*
Prescription Act, what are within, 7.
effect of, on claims to, *ib.*
See PRESCRIPTION ACT.
profit *à prendre* and, difference between, 2, 5.
property, imposed on, not on owner, 5.
rent cannot issue out of, 5, 107.
reversioner, action by, 95.
statute, effect of a, on, 29.
support from land or buildings, 6, 7.
tenancy for life or years, enjoyment during, 8, 12, 19—21, 45, 51.
tenant, acquisition by, over land of landlord, 3, 8, 9, 12, 61.
grant by one, to another, 8, 61.
unity of possession, effect of, 5, 9, 29, 46.

EAVES,
right to discharge water from, 71, 72.

ECCLESIASTICAL CORPORATION,
not within the old Statutes of Limitation, 163.
provision as to, in 2 & 3 Will. 4, c. 71..2, 5.
3 & 4 Will. 4. c. 27..163.

ECCLESIASTICAL COURTS,
recovery of legacies in, to be subject to 3 & 4 Will. 4, c. 27 .. 173.
jurisdiction of, transferred to the Court of Probate, 173.
jurisdiction in case of pews, 90.

EJECTMENT,
nature of action, 171.

ELECTION,
dower, between jointure and, 341.
married woman, by, 293, 742.
Trustee Acts, jurisdiction under, in cases of, 515
widow, when put to, 346, 347.
next of kin of, by, 347.

ELEGIT, WRIT OF,
creditor in possession under, must account, 454.
form of, 448.
inquisition under, *ib.*
property which may and may not be taken under an, 447, 448.
tenant by *elegit*, redemption by, 454.

ENCROACHMENT,
tenant, by, presumed to belong to tenant, 39, 40, 118.
waste of manor, on, presumed to belong to lord, 39, 118.
adverse possession of, 116, 117.

ENFRANCHISEMENT,
common, how far extinguishes, 42.
power, under, minerals and surface dealt with apart, 735, 737.
presumption of, from not exacting fines, 105.
tenant for life, by, under Settled Land Acts, 677, 678, 679.

ENJOYMENT,
nature of requisite, to give right under Prescription Act,
to profits *à prendre*, 3, 4.
to easements other than light, 7—10.
to light, 11, 12.
periods of, in case of profits *à prendre*, 2.
easements, 5, 11.

ENJOYMENT AS OF RIGHT,
in case of custom, 24.
claims to easements, 7—10.

ENTAILED LAND. *See* ESTATE TAIL—TENANT IN TAIL.

ENTAILED MONEY,
application of, under Fines and Recoveries Act, 288, 289.
definition of, in Fines and Recoveries Act, 241.
dispositions of, 288—290.
Ireland, belonging to bankrupt, in, 290.
old modes of barring entail in, 289.
payment out of Court of, 289, 290, 657.

ENTRY ON LAND,
landlord, by, on expiration of term, 119.
not to be deemed possession, 136.

ENTRY ON LAND, RIGHT OF,
accrued, when deemed to have first, 119.
in case of administrator, 125.
forfeiture, 120, 123.
future estates, 120, 122, 194.
tenant at will, 126.
tenant from year to year, 130.
wrongful receipt of rent under a lease, 134.
aliened by deed, may be, 489, 490.
continual claim not to preserve, 136.
descent cast and discontinuance will not bar, 172.
devised, may be, 401.
limitation of time for enforcing, 113, 194.
nature of, 345.

EQUITABLE ESTATES,
copyholds, in, disposition of, by married woman, 303.
by tenant in tail, 279.
curtesy out of, 350.
descent of, 355.
dower out of, 344.
execution, liable to be taken in, 446, 447.
fines and recoveries of, 250.
tenant in tail, disposition by, 253, 275, 279.

EQUITABLE EXECUTION,
appointment of receiver as, 477.

EQUITY, COURTS OF,
Statutes of Limitation, how far bound by, 149, 232, 233.
relief when time has run pending an injunction, 238.

EQUITY OF REDEMPTION,
barred by twelve years' possession by mortgagee, 158, 159, 160, 197.
debts, applicable in payment of, under 3 & 4 Will. 4, c. 104..378.
dower out of, 344.

EQUITY TO SETTLEMENT,
examination on taking acknowledgment, effect of on, 308.
released, may be, 315.
retainer, effect on, 316.
reversionary personalty, in, may be released, 315.

ERASURE,
in will, 419.

ESCAPE OF WATER,
liability for, 80, 81.

ESCHEAT,
creditors, does not affect rights of, 378.
felo de se, lands of, not subject to, 363.
felony not to cause, 363.
nature of, 109.
person taking estate by, within 3 & 4 Will. 4, c. 27..102.
trust property not liable to, 527, *see* 506.
trustee, beneficial interest of, liable to, 528.

ESTATE AT WILL, 127.
See TENANCY AT WILL.

ESTATE FROM YEAR TO YEAR, 131.
See TENANCY FROM YEAR TO YEAR.

ESTATE *PUR AUTRE VIE*. *See AUTRE VIE.*

ESTATE TAIL,
attainder, effect of, on, 363.
advowson, in, 166.
bankrupt, of, 280—288.
disposition by trustee, 280, 281.
rents and covenants of, 286, 287.
bar, power under Fines and Recoveries Act to, 252, 253.
power cannot be restricted by settlor, 253.
base fee, meaning of, 241, 243.
enlargement of, 256, 268, 270, 271, 283. *See* BASE FEE.
chattels cannot be entailed, 242.
confirmation of voidable estates, 269, 270, 283.
contingent, disposition of, 252, 253.
contract, disposition resting only in, to have no effect, 272, 274.
to disentail, specific performance of, 272, 275.

ESTATE TAIL—*continued.*
copyholds, in, must be a custom for, 277.
disposition of, 277—280.
mortgage of, 260.
old modes of barring, 277.
presumption of bar, 277. *See* COPYHOLDS.
definition of, 241, 242.
demesne, lands in ancient, cannot be entailed, 242.
devise of, not to lapse, 433.
dignity, in, 242.
disentailing deed, operation of, 253. *See* DISENTAILING DEED.
disposition of, 252—261, 271—276.
declaration of trusts is not, within the Act, 254.
for limited purposes, 259—261. *See* FINES AND RECOVERIES ACT.
entailed, what cannot be, 242.
equitable, disposition of, 253, 275.
in copyholds, 279.
ex provisione viri, disposition of, 254.
execution, may be taken in, 447.
expectant heirs, dispositions by, 256, 257.
fines, formerly barred by, 243, 244. *See* FINES.
half-blood, descent to, 362.
infant ordered to convey, for payment of debts, 374.
leases of entailed land, 259—261, *see* 709.
limitation of, words necessary for, 613.
limitation of actions in case of, 114, 146—148, 197.
lunatic, barring by, 253.
married woman, barring by, 253, 272, 273.
money to be laid out in entailed lands, disposition of, 288—290. *See* ENTAILED MONEY.
mortgages of, 259—261.
origin of, 242.
personalty cannot be entailed, *ib.*
protector of settlement, 261—269. *See* PROTECTOR.
quasi entails, 242.
how barred, 243.
recoveries, formerly barred by, 245. *See* RECOVERIES.
rent, in a, 254.
tenant for life, disentailing deed by, effect of, 253.
recital that tenant in tail is, effect of, *ib.*
terms of years cannot be entailed, 242.
trust for sale, prior, may be executed, 253.
vesting order of, 267, 499, 503.
voidable estates, confirmation of, 269, 270, 283.
warranty, not barrable by, 252.

ESTOPPEL,
cases where there is no, 259.
consideration for a deed, as to, 259, *see* 614.
copyholds, surrender of, does not operate by, *ib.*
deed, by, 258, 259.
by forged, 259.
expectant interests bound by, 257.
fines, operation by, *ib.*
nature of, 258.
pais, in, *ib.*
in mercantile transactions, *ib.*
recital, by, 258, 259.
record, by matter of, 258.
recoveries, operation by, 257.

ESTOVERS,
common of, 30, 36.

EVICTION BY TITLE PARAMOUNT,
apportionment of rent in case of, 546.

EVIDENCE,
common, of right of, 3, 4.
vicinage, because of, 34.
copyhold title, evidence of, 278.
covenants, of performance of, receipt for rent, 574, 575.
easements, of user of, 10, 14, 17, 46.
extinction of line of descent, of, what is sufficient, 362.
heir, of title of person selling as, 355.
husband or wife against each other, by, 333, 339.
infant settlements, on application to sanction, 314.
inrolment of deeds, of, 290, 291.
pews, of rights to, 88, 90.
recitals twenty years old to be, 566, 567.
sale, on, expenses of, 575.
sea shore, of rights as to, 86.
Settled Estates Act, on applications under, 647, 661, 667.
on appointment of guardians under, 666.
trustees, on appointment of new, 521.
way, of grant of private, 61, 62.
of dedication of public, 50, 51.

EXAMINATION OF MARRIED WOMEN,
acknowledging deeds on, 300, 308.
copyholds, on surrendering equitable interest in, 303.
equity to a settlement, effect on, 308.
M. W. P. Act, 1882, effect of, as to, 326, 329.
payment of money out of Court, on, 293, 742.
Settled Estates Act, on applications under, 662, 663.

EXCEPTING CLAUSES IN WILL,
whether sect. 24 of Wills Act applies to, 425.

EXCEPTION,
of right of, way in lease operates as grant by lessee, 57.
fishing, 37.
sporting, 3.

EXCHANGE,
condition in law not to be implied from, 487.
deed, must be by, 486.
power, under, minerals and surface may be dealt with apart, 735, 736.
Settled Land Acts, under, 678, 679, 685.
trustees for sale may, 558, *see* 561, 565.
Trustee Acts, jurisdiction under, where decree for, 515.

EXECUTION,
delivery in, of land, what is, 477.
land not affected by judgment until, *ib.*
equitable, *ib.*
registration of writs of, 481, 482, *see* 470—472, 478.

EXECUTOR,
account of original testator's estate, right to, 237.
administration action, protected by, 551, 552.
administrator and, distinction between, 125.
advice of Court, application for, 554, 557.
allow any debt on any evidence, power to, 604.
attorney, power of, payments by executor in pursuance of, 550, *see* 612.
barred debts, may pay and retain, 236, 383.
compound or compromise, power to, 604, 605.
covenants, bound by, 615.
liability for, 551, 552.
decree in administration action protects, *ib.*
devise to, passes the fee, 432.
distress by, for rent, 107.
distribution of assets by, after notice, 553.
evidence, may allow debt on any, 604.
judgments, protected against unregistered, 472, 473.
liability of, to creditors, 236.

EXECUTOR—*continued*.
limitation of actions by or against, for injuries to property, 201, 202.
in respect of debts, &c., 215, 216, *see* 202, 203, 235, 236.
in respect of legacies. *See* LEGACIES.
Limitations, Statute of,
acknowledgment under, by, 219.
payments under, by, 227, 229, 230.
plead, not bound to, 236.
lis pendens, registration of administration action as, does not interfere with, 465.
new trustee, power to appoint, in certain cases, 600—602.
payments by, effect in preventing running of time, 227, 229, 230.
preference in payment of debts by, 383.
protector of settlement, not to be, 263.
receiver will be appointed against, when, 383, 384.
rent, liability for, 551, 552.
retainer by, 383, 384. *See* RETAINER.
sale for payment of debts by, implied power, 388, 389.
lapse of time, effect on power of sale, 389.
purchasers, protection of, 390.
statutory power of sale, 389, 390.
trustee of legacies, how becomes, 181.
trustee appointed to perform duties of, 499, 519.
Trustee Act extends to, 498, 499.
witness to will, may be, 414.

EXECUTORY INTERESTS,
disposable by will, 401.

EXECUTRIX,
liability of husband of, 339.
married woman, 336, 338, 339.

EXONERATION,
of mortgage estates. *See* LOCKE KING'S ACT.

EXPECTANCES,
alienation of, 257, *see* 489.
contracts in respect of, enforceable, 257.
issue inheritable cannot under 3 & 4 Will. 4, c. 74, bar their, 256, 257.

EXPRESS TRUST,
effect of, on the running of time under Limitation Acts, 150, 200, 234, *see* 231.
in case of land or rent, 150—154, 234, *see* 231.
of money payable out of land, 200, *see* 181, 189, 231, 234, 235.
of money payable out of personalty, 181, 189, 234, 235, 236, *see* 231.
who is express trustee, 151, 234.

EXTENT,
at suit of crown, what may be taken under, 467.

EXTINCTION,
of public ways, 53.
of private ways, 58, 65, 66.
of rights of water, 76.
light, 95.
of title under 3 & 4 Will. 4, c. 27 .. 167—169.

EXTINGUISHMENT,
of powers, 296.
by married women, 296, 315.
of rentcharges, 547.

EXTRA-PAROCHIAL PERSONS,
may prescribe for pew, 89.

FACULTY,
lost grant, doctrine of, applied to, 46.
pew, with regard to, 88.

FALSIFICATION,
of pedigree by vendor a misdemeanor, 549.

FASCIA,
right to erect, as an easement, 6.

FEE,
passes under a devise without words of limitation, 430, 432.
what are sufficient words of limitation of, 613.

FEE-FARM RENT,
arrears recoverable, 186.
consideration for sales under Settled Estates Act, 649.
Settled Land Acts, 682.
distress for, by grantee of the Crown, 108.
generally, 609, 610.
what is, 106.

FEE SIMPLE CONDITIONAL,
definition of, 242.
in personal annuity, *ib.*

FEES,
acknowledgments of married women, on taking, 310.
devise of copyholds, payable on, 403, 404.
Fines and Recoveries Act, under, 309—311.
marriage, claimed by prescription, 26.
powers of attorney, in relation to depositing, in central office, 641.
searches, for judgments, deeds, &c., 641, 642, *see* 483, 484.
Settled Estates Act, in proceedings under, 666, 667.
visitation, claimed by prescription, 26.

FELO DE SE,
lands of, do not escheat, 363.

FELON,
appointment of new trustee in place of, 518.
Court to be protector where protector a, 266, 275.
felony does not cause escheat, 363.

FEME COVERT. *See* MARRIED WOMAN.

FENCE,
prescription to maintain, 26.

FEOFFMENT,
deed, must be by, 486.
infant, by, according to custom, valid, *ib.*
tortiously, not to operate, 487, 488.

FERRIES,
highway, form part of, 87.
rights as to, *ib.*

FIERI FACIAS,
writ of, 449—451.
See WRIT OF FIERI FACIAS.

FINES,
abolition of, 244.
amendment of, 249, 250.
ancient demesne, of lands of, provisions as to, 246, 247.
confirmation of prior acts by, 270.
contingent remainders, on, effect of, 257.
covenants to levy, provisions as to, 245, 246.
custody of records of, 252.
defects in, remedied, 250, 251.
equitable estates, of, *ib.*
estoppel, operation by, 257.
expectancies, on, effect of, *ib.*
nature of, 244.
non-claim of, effect of, 115.
married women's property, disposition of, by, 293.

FINES AND RECOVERIES ACT. *See* DISENTAILING DEED—ESTATE TAIL—TENANT IN TAIL, &c.
bankrupt tenant in tail, provisions as to, 280—288.
base fee, enlargement of, 256, 268, 270, 271, 283.
Berwick-on-Tweed, Act applies to, 306.
confirmation of voidable estates, 269.
copyholds, application of Act to, 277—280, 303.
costs under, 309, 311.
crown, reversion in, not to be barred, 254, 255.
disposition of estate tail under, 252—261, 271—276.
bankrupt tenant in tail, in case of, 280—288.
consent of protector necessary, 267, 268, *see* 274—276. *See* PROTECTOR.
contract is not, 272, 275.
copyholds, in case of, 277—280, *see* 303.
declaration of trust is not, 254.
deeds, inrolment of, 290, 291.
relation back of inrolled, 291.
defects in, cannot be remedied by Court, 274, 275.
equity, rules of, excluded, 274.
limited purposes, for, 259, 260.
modes in which, effected, 271—276.
vesting order may take effect as, 267, 498, 499, 503.
entailed money, 288—290.
fees under, 309—311.
fines, abolished, 244.
amendment of, 249.
covenants to levy, provisions as to, 245, 246.
Ireland, lands in, 240, 290, 306.
married woman, disposition by, 292—303.
acknowledged, must be, 292, 299.
acknowledgments, when necessary, 292, 293. *See* ACKNOWLEDGMENT OF DEEDS BY MARRIED WOMEN.
bankruptcy of husband does not affect, 292.
compel, Court cannot, 300.
copyholds, of, 303.
husband, concurrence of, necessary, 292.
when dispensed with, 303—306.
powers given by Act not to interfere with other powers, 295.
restraint on anticipation affects power given by Act, *ib.*
protector, provisions as to. *See* PROTECTOR.
recoveries, abolished, 244.
amendment of, 249.
covenants to suffer, provisions as to, 245, 246.

FISHERY,
appurtenant, how far a several fishery can be, 37.
bed of river, ownership of, in relation to, 38.
change of course of stream, effect of, 37.
common of, *ib.*
corporation, held by, on trust for members, 24, 38.
crown, grant of, 38.
different kinds of, 37.
foreshore, effect of grant of, on, 38.
reclamation restrained by owner of fishery, *ib.*
free fishery, meaning of, 37.
gross, in, not within Prescription Act, *ib.*
inhabitants, prescription by corporation in trust for, 24.
manor, in waters in a, 38, 39.
non-tidal waters, in, 38.
public has no right in, *ib.*
oysters, for, public, *ib.*
several, *ib.*
prescription for several, *ib.*
profit *à prendre*, is a, 2, 37.
public right of, 38.
quieted in possession of, bill to be, 44.
reserved, several fishery cannot be, 37, *see* 57.
riparian owners, right of, 38.

FISHERY—*continued.*
several, nature of, 37.
abandonment of, *ib.*
proof of, *ib.*
soil of river, &c., ownership of, in relation to, 38.
term of years in, must be by deed, 47.
tidal waters, in, 38.
several fishery in, *ib.*
weir, prescription for fishing, 38, 39, 71.

FIXTURES,
execution, when liable to, 450.

FLOOD WATER,
right to divert, 70.

FLOW OF WATER,
right to, 67, 68.

FORCIBLE ENTRY, 119.

FORECLOSURE,
action, time within which, must be brought, 114, 149, 161, 177.
arrears of interest recoverable in, 187.
infant mortgagor, day to show cause, 373.
sale in action for, 596—598.
time within which, must be brought, 114, 149, 161, 177.
Trustee Act, jurisdiction under, in case of decree for, 516.

FORESHORE,
crown in, right of, 85, 86.
grant of, effect on fishing, 38.
what words will pass, 86.
manor, may be parcel of, *ib.*
public rights in, *ib.*
reclamation of, restrained by owner of fishery, 38.

FORFEITURE,
lease, of, distress is waiver of, 125.
relief against, 587—589, 633, 634.
right to land accrues in case of, when, 120, 123.
Settled Land Acts, exercise of powers under, not to cause, 707, 722.

FORGED DEED,
estoppel by, 259.

FORMEDON,
writ of, abolished, 169.

FOWLING,
is a profit *à prendre*, 2.

FRAUD,
effect on running of time,
in case of land, 154—156, 233.
in case of debts, 210, 233.
power, on, 268, 269.

FRAUDULENT CONCEALMENT,
of deeds, how punishable, 549.

FRAUDULENT CONVEYANCES,
may be set aside after death of debtor, 366.

FREEBENCH,
attaches at death of husband, right to, 343.
bar of, 303, 343.
Dower Act does not apply to, 343.
plaint for, abolished, 170.
Wills Act, defeated by devise under, 402.

FREEHOLD,
meaning of, 104.
may be conveyed by grant, 485.

FREEHOLD LEASES,
within Inheritance Act, 352.
Wills Act, 401.

FUTURE USES,
to take effect without existence of *scintilla juris*, 556, 557.

GARDEN,
right to light for, cannot be acquired, 11.
settled estates may be dedicated for, under Settled Estates Act, 650, 651.
under Settled Land Acts, 684.

GAVELKIND,
custom of, is not unreasonable, 24.
descent in case of, rules of, 352, *see* 356.
dower out of, 343.
Dower Act extends to, *ib.*
infant, alienation by feoffment in case of, 486.
lands may be exchanged for common socage in Middlesex, 41.

GEESE,
cannot be common for, 32.

GENERAL DEVISE,
includes leaseholds and copyholds, 426.
and property over which testator had general power of appointment, 426—430.

GIVE,
word not to imply any covenant in law, 487, 488.

GLEBE LANDS,
right to light over, may be acquired for church, 12.
time fixed for recovering, 163.

GRANT,
ancient, effect on prescription, 29, 45.
covenant in law not to be implied by word "grant," 487, 488.
corporeal hereditaments may be the subject of a, 485.
Crown, presumption of grant from, 112.
non-existing, plea of, 45.
prescription supposes a, 21, 23.
presumption of, of incorporeal hereditaments, 45, 46.
word "grant" not to imply any covenant, 487, 488.
not necessary to convey hereditaments, 613.

GROSS,
rights in, not within Prescription Act, 2.
common in gross, 35.

GUARDIAN,
appointment of, under Settled Estates Act, 666, 671.
petition by, under Infants Settlements Act, 314.
request under Partition Act by, 748.

GUARDIAN *AD LITEM*,
married woman cannot act as, 326.

HALF-BLOOD,
descent in case of, 362.
personal estate, right to share in, *ib.*

HEDGES,
to whom ownership belongs, 56.

HEIR,
covenants bind, 615.
debts of ancestor, liability for, 369, 370, 377, 379.
descent when heirs take by purchase under limitation to heirs of ancestor, 359.
devise to heir, of testator, effect of, 357, 358.
of another person, effect of, 359.
as *persona designata*, 359, 360.
grantor, limitation to heirs of, 357, 358.
judgment against, does not affect creditors of ancestor, 379.
registration of against, 472, 473.
limitation to heirs in assurance, effect of, 358.
mortgage debt, cannot claim payment of, out of personalty, 391—393, 398.
plea of *reins per descent*, 370.
posthumous, right of, to rents, 356.
protector of settlement, not to be, 263.
repairs by, retainer as against creditors for, 370.
retainer by, 370, 371, 384.
Shelley's Case, rule in, 358.

HEIRLOOMS,
sale of, under Settled Land Acts, 698.

HEREDITAMENTS,
meaning of, 103.
corporeal, to lie in grant as well as livery, 485.
incorporeal, must be granted by deed, 46, 47, *see* 485.

HERIOTS,
defined, 104, 105.
prescription for, 22.
when right to, is barred under 3 & 4 Will. 4, c. 27..105.
whether within sect. 34 of 3 & 4 Will. 4, c. 27..168

HIGHWAYS. *See* WAY, PUBLIC RIGHTS OF.
access to, private, 57, 67.
balks, 56.
cattle feeding along, trespass for, 54.
dedication of, 50—52, *see* 650, 684.
ditches, 56.
ejectment for land forming, 54.
extinction of, 53.
ferry forms part of, 87.
nature of, 49, 54.
pipes in soil of, injunction to restrain laying, 54.
repair of, 52, 53.
custom as to, 25.
taking materials from commons for, 39.
soil of, ownership of, 54, 55.
inclosure, in case of, 55.
urban authority, how far vested in, *ib.*
when passes by conveyance, 55, 56.
sporting on, a trespass, 54.
trespass on, *ib.*
waste adjoining, ownership of, 56.
whether part of highway, *ib.*
waters, what are, 82.

HOARDING. *See* LIGHT.
erection of, as an interruption of light, 12, 92, 93.

HOUSE OF LORDS,
appeals to, within what time to be brought, 175.

HUNTING,
licence for, effect of, 47.
profit *à prendre*, whether a, 2.

HUSBAND. *See* MARRIED WOMEN.
ante-nuptial debts, how far liable for, 212, 226, 322, 323, 324, 334, 335.
concurrence of, in barring wife's estate tail, 272.
contingent interests, in disposition of wife's, 489.
dispensed with, when, 303—306, 316.
fraud, in case of, dispensing order set aside, 304.
land, in disposition of wife's, 292.
personalty, in disposition of wife's reversionary, 315, 316.
separate estate, in disposing of wife's, 305.
criminal proceedings against, by wife, 333, *see* 339.
against wife, by, 335, *see* 339.
curtesy, estate by the, 349—351. *See* CURTESY.
death of, effect on property bound by contract of wife, 327.
disclaimer by, gives effect to wife's disposition of land, 294.
evidence by wife against, 333, 339.
executrix, liability when wife is an, 339.
insure wife's life, cannot, 321.
intestacy of wife, rights on, 326.
lease of wife's land, by, 660.
limitation of action against, on ante-nuptial debts of wife, 335.
loans, to wife, by, 326, 329.
by wife to, 329.
by wife to partnership of which husband is member, *ib.*
maintenance of, liability of wife for, 338.
torts of wife, how far liable for, 323, 324, 334, 335.
policy on life of, for benefit of wife, 320, 321, 332, 333.
proceedings by wife against, 333.
summary procedure between husband and wife, 335.

HUSBAND AND WIFE. *See* HUSBAND—MARRIED WOMAN.
to be protector when, 262.

IDIOT,
disability under Prescription Act, 19.
Limitation Acts, 141, 196, 204, 216.

IMPRISONMENT,
not a disability within 21 Jac. 1, c. 16..228.
action for false, running of time in case of, 208, 212.

IMPROVEMENT OF LAND ACT, 1864,
extension of, 695.

IMPROVEMENTS,
under Settled Land Acts, 691—694, 719, 723, 724. *See* SETTLED LAND ACTS.

INCLOSURE,
Acts, 40, 41.
agreement for, between lord of manor and tenants, effect of, 41.
commons, of, 34, 40, 41, 43.
custom for lord to inclose, 39.
ways, creation of, on, 50, 62.
extinction of, on, 53, 66.

INCOME,
devise of, passes the fee, 430.
of infants' property may be applied for their maintenance, 608, 609.

INCORPORATION,
of unattested papers in will, 410, 411.

INCORPOREAL HEREDITAMENTS,
agreement to convey, valid, 47.
rent cannot be reserved out of, 107.
terms in, must be by deed, 46.

INCORPOREAL RIGHTS,
deed necessary for creation and conveyance, 46.
grant of, presumption of, 45.
plea of non-existing, *ib.*
prescription for, under act, 1—21, 46. *See* PRESCRIPTION ACT.
at common law, 21—24, 45, 46.
rent cannot issue out of, 5, *see* 107.

INCUMBRANCER,
possession of prior, effect on arrears of interest recoverable, 186, 189.

INCUMBRANCES,
sale, provision for on a, 576, 577.
Settled Estates Act, 1877, effect on powers under, 663.
Settled Land Acts, effect on powers under, 705, 706, *see* 678, 698.
payment off of, under, 687, 688, 719, 723.
transfer of, on sale, etc., under, 679.
tenant for life, not to affect powers of, 565, *see* 663, 705.

INDEMNITY,
Bank and companies obeying vesting orders, to, 513, 535.
executor or administrator, to, distributing assets after notice, 553.
acting under advice of court, 554, 555.
trustees, to, acting under advice of court, *ib.*
clause of, deemed to be in all trust instruments, 555.
paying money under power of attorney, 550, 551, *see* 612.
Settled Land Acts, in proceedings under, 700, 701.

INDENTURE,
deed purporting to be, to take effect as, 489.
strangers may take immediately under, 488, 489.

INDICTMENT,
in case of disturbance of, public ways, 53.
rights of water, 77.

INDORSEMENT,
on bill or note, no proof of payment so as to exclude statute, 218, 225.

INFANT,
account of rents of, 190.
acknowledgment of debt by, 219.
adoption of acknowledgment by agent during infancy, 184.
adverse possession against, 117, 118, 137, 141.
bailiff for, person in possession considered, 117, 137, 141, 190.
bonds relating to customs by, valid, 474.
charging order for debt incurred during infancy, 457.
confirmation of contracts to settle property by, 312, 313.
of promises and contracts by, 219.
conveyance by, when land sold for payment of debts, 373, 375.
day to show cause, 372, 373, *see* 516.
exceptions in favour of, in Statutes of Limitation—
in case of recovery of land or rent, 141, 196.
simple contract debts, 216.
specialty debts, 204.
in Prescription Act, 19.
land of, deemed to be settled within Settled Estates Acts, 1877..606.
within Settled Land Acts, 1882..711.
maintenance of, 608, 609.
management of property of, by trustees, 606—608.
money of, to be paid into court, in proceedings under Trustee Act, 528.
partition, may be declared a trustee on, 516, *see* 742.
Partition Act, request by, under, 748.
parol not to demur in actions by or against, 372.
protector is an, when, court to be protector, 266, 275.
Settled Estates Act, application of, to, 606, 644. *See* SETTLED ESTATES ACT.
Settled Land Act, application of, to, 711.
settlement on marriage of, 312—314. *See* SETTLEMENT.
trustee, new, appointed in place of, 518.
Trustee Acts, application of, to. *See* TRUSTEE ACTS.
will of, 405.

INFERIOR COURTS,
judgment of, how enforced, 463, 464.
removal of judgments of, *ib.*

INHERITANCE,
Act, commencement of, 364.
law of, 352 *et seq.*
See DESCENT.

INITIALS,
of attesting witness to will, sufficient, 408.

INJUNCTIONS,
when granted,
in case of disturbance of rights of
way, 54.
water, 78—80.
light, 97, 98.
air, 99, 100.
relief when time has run pending, 238.
undertaking in damages required in case of interlocutory, 97, *see* 98.

INJURY,
substantial, must be proved to obtain injunction against disturbance of light, 97.
actual, need not be proved in action for diversion or obstruction of water, 77.
nor in suits to restrain pollution, 79.

INROLMENT,
disentailing deeds, of, 273, 290, 291.
acknowledgment not necessary before, 290, 291.
bankrupt tenant in tail, in case of, 282, 288.
copyholds, in case of, 280.
entailed money, in case of, 289, 290.
fees on, 311.
presumption of inrolment of deed, 112.
protector, of appointment or retirement of, 265.
of consent of, 274.

INSTALMENTS,
judgment payable by, interest on, 459.
money payable by, limitation of action in case of, 109.

INSURANCE,
apportionment of sums payable on policies, no, 445.
breach of covenant to insure, relief against, 587—589.
husband, of life of, for benefit of wife, 320, 321, 332, 333.
mortgagee, by, 562, 592, *see* 595.
receiver of, by, 564, 596.

INTEREST,
acknowledgment of debt by payment of, 159, 162, 176, 182, 199, 205, 206, 217, 224—227.
administration action, computation in, 193, 194.
Admiralty, on damages in, 192.
agent and principal, between, 193.
appeals, in case of, 194, 459.
arrears of, on charges, 188.
judgments, *ib.*
legacies, 189.
mortgages, 185, 187, 189, 200, 203.
mortgage of turnpike tolls, 102.
unpaid purchase-money, 188.
arrears of annuity, on, 193.
banker and customer, between, *ib.*
bonds, on, *ib.*
calls, on, *ib.*
common law, at, 191, 192.
covenant, on money payable under, 193.
demand in writing for, 192.

INTEREST—*continued.*
dower, on legacy in lieu of, 348.
equity, in, 192, 193.
income tax deducted on paying, 193.
judgments, on, 188, 459. *See* JUDGMENTS.
mortgagee's costs, on, 193.
rate, 192.
salary, on arrears of, 193,
securities, on, *ib.*
specially indorsed writ may include, when, 194.
tenant for life and remainderman, between, 193.
trustee and *cestui que trust*, between, *ib.*

INTERLINEATION,
in will, 419.

INTERLOCUTORY APPLICATION,
acquiescence which will justify refusal of injunction on, 99, *see* 78.
mandatory injunction not usually granted on, 78, 98.
receiver appointed on, as equitable execution, 477.

INTERRUPTIONS,
of enjoyment of easements, 14, 15.
rights of way, 50, 61, 65.

INTESTATE,
distribution of assets of, by administrator after notice, 553.
dower of widow of, not barred by 53 & 54 Vict. c. 29, *Add.*
time within which claims to estate of, must be made, 176, 181.

INTRUSION,
information of, to recover crown lands, 111.

INVESTMENT,
of money arising from sales under Settled Estates Act, 656, 657.
under Settled Land Act, 687—691.
married woman, by, in fraud of husband's creditors, 320, 332.

IRRIGATION,
right to use water for, 48, 74.

ISSUE,
construction of "die without issue," 431, 432.
lapse in case of gifts to, 433.
presumption of death without, 143.

ISSUE IN TAIL,
barred by assurance of tenant in tail, 252.
by lapse of time, 114, *see* 146, 197.
contract of tenant in tail does not affect, 272, 275, *see* 695, 709.
expectancies, cannot bar, 256.

JOINT ACCOUNT,
advance on, effect of, 616.

JOINT CONTRACTORS,
acknowledgment by one of, 218, 219.
married woman may be a joint contractor, 328.
payment by one of, 226, 229, 230.

JOINT DEBTORS,
acknowledgment by one of, 218, 219.
payment by one of, 226, 229, 230.
time runs as to those in kingdom, though some beyond seas, 228.

JOINT TENANT,
possession of one not to be deemed the possession of others, 136, 137.
widow of not entitled to dower, 345.

JOINTURE,
covenant to charge, effect of, 342.
dower, bar of, by, 341, 342.
good, what is a, *ib.*
thirds, right to, barred by, 342.

JUDGMENT,
charge on land under sect. 13 of 1 & 2 Vict. c. 110..451—454.
cannot be enforced for a year, 452.
delivery in execution necessary, 452, 477, 478.
enforcement of, 452, 454, 478.
judgments within the section, what are, 451, 453, 459, 460.
lands affected by this charge, what, 453.
Locke King's Act, charge is within, 393, 453.
mortgagees, effect as regards, 452, 453, 454.
nature of charge, 453.
register counties, lands in, *ib.*
registration of writ of execution necessary, 452, 478, 481.
rents, does not vest, in creditor, 453.
charging orders, 454—457. *See* CHARGING ORDERS.
creditor, sale on application of, 479, 480.
crown, 465—468.
decrees within sect. 18 of 1 & 2 Vict. c. 110..469.
dockets abolished, 461.
Durham Court, of, enforcement of, 460.
effect of, in the case of land, 451—454.
enforcement of, 460, 463, 464.
land, against, 477, 478.
within what time can be enforced, 176—178, 198, 199.
equity, decrees and orders in, to have effect of, 459—461.
executors, protection of, against unregistered, 472, 473.
extension of judgments, 464.
foreign, enforcement of, 464.
simple contract debt, is a, 382.
heir, against, does not affect creditors of ancestor, 379.
inferior courts, of, removal of, 463, 464.
interest on, 459.
appeal, runs during, *ib.*
arrears of, recoverable, 188.
bankruptcy notice, may be included in, 459.
costs, payable on, *ib.*
covenant for high rate, when merged in judgment, *ib.*
date from which it runs, *ib.*
satisfaction, runs till, *ib.*
Lancaster Court, of, enforcement of, 460.
land, does not affect, till delivery in execution, 477.
modes of enforcing judgment against, 477, 478.
married woman, against, form and effect of, 327.
money secured by, within what time recoverable, 176—178, 198, 199.
mortgagee, equitable, has priority over, 453, *see* 448.
notice of unregistered judgment, effect of, 452, 461, 462.
orders, enforcement of, 460.
palatine courts, in, 460, 462, 463, 464.
payment of money, for, enforcement of, 460.
into court, enforcement of, 460.
post obit bond, on, time runs from death, 178.
registration of, 461, 462.
heirs and executors, as against, 472, 473.
necessary, no longer, 478, 481.
register county, in case of, 453.
writ of execution, registration of, substituted, 470—472, 478, 481.
release of part of land charged by, effect of, 547.
removal of, of inferior court, 463, 464.
reversed, time within which new action to be brought, 207.
revivor of, 177, 178.
sale on application of judgment creditor, 479, 480.
satisfaction of, entry of, 476.
presumption of, 178.
scire facias, writ of, 177, 178.

JURY,
interest may be allowed by, 191.

LACHES. *See* ACQUIESCENCE.
acquiescence and, difference between, 157.
effect of, 157, 158, 233.
rents, whether account of, will be directed in case of, 190, 191.

LANCASTER,
enforcement of orders of courts of, 460, 463, 464.
jurisdiction of court of, under Conv. Acts, 620.
Partition Acts, 739.
Settled Estates Act, 660.
Settled Land Acts, 703.
Trustee Acts, 510.

LAND,
meaning of, in
3 & 4 Will. 4, c. 27 (Limitations), 101.
c. 74 (Fines and Recoveries), 240.
c. 105 (Dower), 340.
c. 106 (Inheritance) 352.
8 & 9 Vict. c. 112 (Satisfied Terms), 495.
13 & 14 Vict. c. 60 (Trustee Act, 1850), 497, 498.
44 & 45 Vict. c. 41 (Conveyancing Act, 1881), 572.
45 & 46 Vict. c. 38 (Settled Land Act, 1882), 675, 677.
time within which to be recovered, 112, 113, 194.
See LIMITATION OF ACTIONS.

LAND COMMISSIONERS,
Board of Agriculture substituted for, 677, 705.

LANDLORD AND TENANT. *See* DISTRESS, LEASE, RENT.
acquisition of easements, in case of, 8, 9.
as to light, 12, *see* 96.
as to ways, 51.
apportionment between, 443.
disclaimer of landlord's title by tenant, effect of, 135, 136.
encroachments by tenant for benefit of landlord, 39, 40, 118.
forcible entry by landlord, 119.
non-payment of rent does not bar landlord, 114, 123.
relief against breach of covenant by tenant, 587—589, 633.

LAPSE,
of right to present to living, 165.
in case of devise of estates tail, 433.
gifts to testator's issue, *ib.*
subject of lapsed devises included in residuary devise, 425.

LEASE. *See* COVENANT, DISTRESS, LANDLORD AND TENANT, RENT.
agreement for, effect of, 486, 487.
appointment, by, position of lessee, 243.
apportionment of conditions of re-entry, 545, 586.
assign, covenant not to, no relief for breach of, 588, 589.
licence to, effect of, 544, 545.
no fine to be exacted for, 634.
assignment of, to be by deed, 486, 487.
title to reversion cannot be called for on, 566, 574.
breach of covenant, relief against, 587—589, 633.
licence to commit, effect of, 544, 545.
conditioned to be void for breach, is only voidable, 124.
contract for, not to form part of title, 629, 696, *see* 566, 574, 586.
covenants, benefit of, to run with reversion, 585, 586.
deed, when must be by, 486, 487.
"demise," covenants imported by the word, 488.
dowress, by, 660.
executor's liability for rents and covenants, 551.
forfeiture of, by setting up title adverse to landlord, 135.
distress a waiver of, 125.
relief against, 587—589, 633, 634.

LEASE—*continued.*
freehold title, intending lessee or assignee cannot call for, 566.
lives and years, for, old distinction between, 124.
lunatic, of lands of, 254.
mortgagor or mortgagee in possession, by, 590—592.
rent. *See* RENT.
renewal of, under Settled Estates Act, 646.
by tenant for life under Settled Land Act, 683.
by trustees, 560, 561.
landlord's right of action accrues on, 123.
reversion, merged or surrendered, next estate to be reversion, 491, 492.
title to cannot be called for, 566, 574, 586.
Settled Estates Act, under, 644—648, 660. *See* SETTLED ESTATES ACT.
Settled Land Act, under, 680—683, 721. *See* SETTLED LAND ACTS.
surrender of, by operation of law, 258, 487.
sub-demise, on, title to leasehold reversion cannot be called for, 574, 586, 587.
tenant for life by, under Settled Estates Act, 660, 663.
under Settled Land Acts, 680—683, 721.
tenant in tail by, 254, 709.
title, contract to grant lease not part of, 629, 630, 696.
tithes, of, 108.
void, confirmed by tenant for life under Settled Land Act, 683.
limitations of actions for recovery of land in case of, 113.
may be good as an agreement for a lease, 486, 487.
waiver of covenant or condition, effect of, 556.

LEASE AND RELEASE,
grant substituted for, 485.
lease rendered unnecessary for, *ib.*

LEASEHOLDS,
bequest of, apportionment of rent, 392.
subsequent purchase of fee, 422, 423.
equitable assignee, liability of, a simple contract debt, 209.
fieri facias, effect of taking under, 450, 451.
freehold title, intending lessee or assignee cannot call for, 566.
general devise of, land includes, 426.
real estate may include, *ib.*
Locke King's Act, within, 392, 398.
partition of, 740.
renewable, tenant for life may renew, 683, *see* 646.
trustees may renew, 560.
money for the purpose may be raised by mortgage, 561.
title to reversion cannot be called for, 566, 574, 586, *see* 629, 696.
wills of, governed by *lex loci*, 401.

LEAVE. *See* LICENCE.
effect of asking, under Prescription Act, 2, 9, 10, 18.

LEGACIES,
actions to recover, 173.
apportionment of income of specific, 443.
assent to, action at law after, 173.
does not make executor a trustee, 181.
charge of, on real estate, 387, *see* 181, 200.
dower, in lieu of, priority of, 348.
executor becomes trustee of, when, 181.
general power exercised by gift of, 428.
incumbered chattels, of, 392.
interest on, arrears of, recoverable, 189.
limitation of time for recovering, 176, 180—182, 198, 199, 200.
express trust when secured by, 181, 200, *see* 231.
lunacy of executor, in case of, 180, 182, *see* 238.
married women, to, to whom payable, 320.
presumption of payment of, 180.
purchaser, whether liable to see to payment of, 390, 391.
sale for payment of, 386—391.
purchasers, protection of, 390, 391.
shares liable to calls, 392.
witness of the will, to a, void, 413, 414.

LEGATEES,
contribution between, 381, 424.
liability of, to creditors, 236, 552, 553.
marshalling between creditors and, 381.
presumption of death of, 143.

LESSEE,
acquiescence by, effect of. *See* ACQUIESCENCE.
bankruptcy of, condition for forfeiture on, 588, 589, 633.
not to be protector, 263.

LESSOR,
estate of lessee not to be impounded for, 552.

LEVANT AND COUCHANT,
meaning of, 32.

LICENCE. *See* LEAVE.
assign lease, or underlet, effect of, 544, 545.
fine not to be exacted for, 634.
coal, to dig, effect of, 48.
creating rights with regard to water, 97.
deed, must be by, 47
nature of, 47, 49.
Crown, by the, 49.
parol, effect of, 47, *see* 74.
enforceable, when, 48.
personal, of pleasure, extent of, 49.
revocable, how far, 47—49.
revocation, mode of, 48, 49.
water, for rights of, 74.
way, for public, 50, 52.
private, 67.
what will operate as, 49.
writing, not under seal, by, effect of, 47.

LIEN,
banker's, not within Locke King's Act, 393.
money secured by, within what time to be recovered, 176, 198.
of vendor, 178, 179, *see* 188.
of solicitor for costs, 211, 457. *See* SOLICITOR.

LIGHT. *See* PRESCRIPTION; PRESCRIPTION ACT.
abandonment of right to, 95.
abatement of disturbance of, *ib.*
"access," meaning of, in sect. 3 of Prescription Act, 12.
acquiescence, effect of, 98, 99.
acquisition of right to, 11—13, 91—94.
actions for disturbance, who may bring, 95.
against whom may be brought, 96.
when can be brought, *ib.*
adjoining house, implied grant of light on sale of, 93.
agreement under sect. 3 of Prescription Act, 11, 13.
alteration of ancient lights, 94.
evidence of position should be preserved, *ib.*
building, identity of substituted, 12.
must be claimed for a, 11.
occupied, need not be, 12.
pulled down, in respect of, 12, 94, 95.
what is, within act, 12.
building scheme, effect of, on lessees and mortgagees, 93.
common law, may be claimed at, 11, 46, 91, 92.
compensation under Lands Clauses Act, 96.
consent under sect. 3 of Prescription Act, 11, 13.
Crown, against, acquisition of, 12.
damages for obstruction, 98.
deed necessary for creation of right to, 47.
delay, effect of, 98, 99.
devise of land and adjoining house, 93.

LIGHT—*continued.*
enjoyment, need not be as of right, 12.
executor may bring action for obstruction, 96.
extent of right to, 92, 94.
forty-five degrees, rule of, 97.
future use, possible, taken into consideration, 94, 97.
grant of, express, 92.
implied, 93.
injunctions, interlocutory, 97.
mandatory, 98.
substantial damage must be proved, 97.
inspection by judge, refused, *ib.*
interruption, acquiescence in, 13, 15.
during last year, 11.
fluctuating, not sufficient, 12.
hoarding, by, *ib.*
London, custom of, as to, 13.
nature of right to, 94.
obstructions, abatement of, 95.
acquiescence in, effect of, 98, 99.
actions for, 95.
damages for, 98.
injunction against, 97.
lateral, *ib.*
occupied, building need not be, 12.
open ground, to, cannot be acquired by prescription, 11.
permission, verbal, does not prevent acquisition of right to, 13.
prescription for, common law, at, 11, 91, 92.
Prescription Act, under, 11—13.
railway company, grant by, on sale of surplus land, 93.
liable for obstruction, 96.
remedies for disturbance, 95.
rent, effect of payment of, 13.
reservation, no implied, on sale of adjoining land by owner of house, 93.
reversioner, action by, 95.
screen, right of servient owner to erect, 12, 92, 93.
erected by order of court as experiment, 97.
shutters, for windows covered by, 12.
simultaneous sale of land and house, right to light on, 93.
special purpose, for, 92, 94.
surveyor appointed to report, 97.
tenant, acquisition by one, against another of same landlord, 12.
tenant for life or years, acquiescence by, *ib.*
from year to year, action by, 96.
timber yard, for, 11.
undertaking must be given on interlocutory injunction, 97.
need not on mandatory injunction, 98.
unity of occupation, effect of, 12, 95.
verbal agreement, as to, 13.
windows, existence of, not constructive notice of right to, 93.

LIMITATION OF ACTIONS,
in the recovery of land or rent,
absence beyond seas of claimant, 141, 196.
accruer of right, 119 *et seq.*
acknowledgment of title, 138—140.
mortgagee in possession, 158—161, 197.
See ACKNOWLEDGMENTS UNDER THE STATUTES OF LIMITATION.
acquiescence, effect of, 156—158, 233.
actual possession, what is, 120, 121.
administrator, time runs against, from death, 125.
adverse possession, 115—119.
See ADVERSE POSSESSION.
advowsons, 164—167.
See ADVOWSON.
alienation by rightful owner, right accruing on, 119, 122.
by trustee for value, 150, 153.
annuity charged on land, 108, 113, 194, 201.

LIMITATION OF ACTIONS—*continued.*
in the recovery of land or rent—*continued.*
Attorney-General not a "person" within 3 & 4 Will. 4, c. 27..109.
benefices, 164.
cestui que trust in possession, relation of, to trustee, 118, 122, 129, 130.
time does not run against trustee, 152.
charities within the statute, 149, 153.
express trusts for, 153, *see* 231.
church property, 163, 167.
colonies, limitation of action in, 174.
composition, meaning of, in act, 109.
concurrent rights, 145, 146.
condition, right arising on breach of, 120, 123, 124.
construction of Statutes of Limitation, 102.
continual claim, 136.
coparcener, possession of one, not to be possession of others, 136, 137.
disability of one, effect of, 142.
copyholds, seizure *quousque*, 114, 122.
entry for forfeiture, 123, 124.
Cornwall, limitation of rights of Duke of, 111.
corporations within 3 & 4 Will. 4, c. 27..102, 103.
covenant, right arising on breach of, 120, 123.
covenant for payment of rent, collateral, limitation of, 102, *see* 203.
crown, limitation of rights of, 109—112.
death, right accruing on, 119, 122.
descent cast not to bar right of entry, 172.
devisee, when right of, accrues, 122.
disabilities, 141, 144, 196, 197.
See DISABILITIES.
discontinuance not to bar right of entry, 172.
discontinuance of possession of land, right accruing on, 119, 120.
of receipt of rent, 121.
dispossession, right accruing on, 119.
disseisin, 115.
dower, abolition of writ of right of, 170.
arrears recoverable, 185.
remedies for recovering, 170, *see* 343.
ecclesiastical corporations, property of, 163.
eleemosynary corporations, property of, *ib.*
encroachments by tenant for benefit of landlord, 39, 40, 118.
entail, operation of statute in case of, 146—148, 197.
entry, old limitation of rights of, 115.
when right of, accrues under present law, 119 *et seq.*
not to be deemed possession, 136.
Equity, Courts of, how far bound by Statutes of Limitation, 149, 232.
effect of proceedings in, in preventing operation of statute, 149.
pendency of actions, 237.
when equity will prevent statute being used as a bar, 238.
estates tail, operation of statute in cases of, 146—148, 197.
estates subsequent to estates tail in advowsons, 166.
express trusts, operation of statute in cases of, 150—154, 231, 234.
extinction of title by 3 & 4 Will. 4, c. 27..167.
extinguished title cannot be revived, 168, *see* 160.
foreclosure suits, limitation of, 114, 149, 161, 177.
forfeiture, right accruing on, 120, 123, 124.
fraud, limitation in case of concealed, 154—156, 233.
future interests, when right accrues, 119, 122, 145, 146, 194—196.
heriots, limitation in case of, 105.
husband and wife, limitation as to lands of wife, 144.
infants, adverse possession against, 117, 118, 137, 141, 190.
disability of, 141, 196.
interest, effects of payment of, on mortgagee's rights, 159, 162.
issue in tail, when barred, 114, 146—148, 197.

LIMITATION OF ACTIONS—*continued.*
in the recovery of land or rent—*continued.*
joint tenants, possession of one, not possession of others, 136, 137.
laches, effect of, 156—158, 233, *see* 190.
land, limitation of actions to recover, 113, 194.
meaning of, in statute, 101.
landlord and tenant, encroachments by tenant, 118.
nonpayment of rent by tenant does not bar landlord, 113, 114, 123.
lapse of presentation, effect of, 165.
lease, renewal of, right accruing on, 123.
right accruing on breach of condition in, 124.
void, 113.
wrongful receipt of rent under, 134.
lunacy, a disability within statute, 141.
married woman, disability of, 141, 196.
limitation in case of abandonment of land of, 144.
mesne rents and profits, account of, 190.
mines, possession of, 121.
mortgagee's rights, limitation of, 113, 114, 159, 161, 162.
mortgagor, disability of, does not enlarge time, 141, 161, 196.
relation between mortgagee and mortgagor in possession, 128, 129.
limitation of rights of, 158—161, 197, 198.
See ACKNOWLEDGMENTS UNDER STATUTES OF LIMITATION.
old Limitation Acts, 108, 114.
period of limitation,
as to land or rent fixed at twelve years, 113, 194.
extreme period, thirty years, 144, 197.
as to advowsons, 164.
extreme period, 167.
"person," meaning of, in statute, 102, 109.
possession, actual, what is, 120, 121.
entry not to be deemed, 136.
nature of interest of person in possession, 168.
of younger brother or relation, 138.
See POSSESSION.
possessory title, 118, 168, 169.
presentation, limitation of right to recover, 164.
profits of land, meaning of, 121, *see* 169.
purchaser compelled to accept title depending on statute, 169.
quare impedit, abolished, 170, *see* 171.
real actions, abolition of, 169—171.
old limitation of, 114.
receipt of profits, meaning of, 121, 169.
receipt of rent, wrongful, effect of, under 3 & 4 Will. 4, c. 27..134.
receiver, effect of appointment of, 149, 150.
redemption suit, limitation of, 158, 197.
re-entry, right arising under clause for, 124.
remainderman, when barred, 120, 122, 145, 146, 194—196.
remedy only barred by previous statutes, 167.
right as well as remedy barred by 3 & 4 Will. 4, c. 27, *ib.*
renewal of lease, right accruing on, 123.
rent, discontinuance of receipt of, 121.
distress for, within statute, 106, 107.
meaning of, in statute, 102, 114, 135, 194.
non-payment of, does not bar landlord, 113, 114, 123.
receipt of, by agent, effect of, 118.
deemed receipt of profits, 169.
wrongful, effect of, 134, 135.
time runs from last payment of, 121, 122.
reversioner, when right accrues, 119, 122, 145, 146, 194—196.
right deemed to have first accrued, when, 119—123.
in case of tenancies at will, 126, 127.
from year to year, 130, 131.
under lease in writing when wrongful receipt of rent, 134, 135.
seizure *quousque* by lord, when time runs, 114, 122.

LIMITATION OF ACTIONS—*continued.*
in the recovery of land or rent—*continued.*
servant, occupation by, 118.
spiritual corporations, 103.
property of, 163.
spiritual courts, statute extends to, 173.
tenancies, limitation in case of tenancies,
at will, 126, 194.
from year to year, 130, 131.
under lease in writing reserving rent, 134, 135.
tenants in common, and joint tenants, 136, 137.
tenants in tail, limitation in case of, 146—148, 197.
time when right accrues,
on discontinuance of possession or receipt of rent, 121.
on death, 119, 122.
on alienation by rightful owner, *ib.*
in case of future interests, 119, 122, 145, 146, 194—196.
on forfeiture or breach of covenant, 120, 123, 124.
in case of tenancies at will, 126, 127.
from year to year, 130, 131.
under leases in writing, where wrongful receipt of rent, 134, 135.
tithe, 101, 102, 103.
tithe rent-charge, 103.
title, extinguished by statute, 167.
extinguished cannot be revived, 168, *see* 160.
depending on statute, forced on purchaser, 169.
title deed, action to recover, 149.
trespassers, possession by series of independent, 168.
trust, only express, within sect. 25..152, *see* 231, 234.
possession, *cestui que trust* in, 152, *see* 118, 122, 129, 131.
stranger in, 150, 152, 153.
trustee in, 152.
trustee, possession by, *ib.*
who are express trustees within sect. 25..151.
alienation for value by, 150, 153.
turnpike tolls not within act, 102.
warranty not to bar right of entry, 172.
waste, 149.
in the recovery of money charged on land, legacies, arrears of dower, rent, and interest,
account of mesne rents and profits in equity, 190.
acknowledgments, 176, 182—185, 189.
See ACKNOWLEDGMENTS UNDER THE STATUTES OF LIMITATION.
acquiescence, 156—158, 233.
administration suits, claims brought in under decree, 237.
administrator, time runs against, from death, 125.
agent, acknowledgment by, and to, 176, 182—185.
See ACKNOWLEDGMENTS UNDER THE STATUTES OF LIMITATION.
annuity, charged on land, 108, 113, 180, 181, 186, 194, 204.
payable out of personalty only, 180.
arrears recoverable, 186, 187, 194, 201.
secured by express trust, 151, 181, 189, 201.
arrears, recoverable of, annuities, 186, 187, 194, 201.
dower, 185.
rent, 185, 186, 203.
tithe rent-charge and tithes, 186.
interest on charges, 188.
judgments, *ib.*
legacies, 189.
mortgages, 185, 187, 189, 199.
unpaid purchase-money, 188.
bond money due on bond of ancestor, not money payable out of land, 179.
charges, time limited for recovering, 176, 179, 198, 199.
when secured by express trust, 151, 181, 189, 200.
what are within the acts, 179, 180, 199.
charities, account of rents in case of, 191.

LIMITATION OF ACTIONS—*continued.*
in the recovery of money charged on land, &c.—*continued.*
claims to estates of intestates, 176, 181.
decree, claims under, when time ceases to run, 237.
in equity for payment of money, is a judgment within sect. 40.. 178.
disabilities, 182, 190, 228.
dower, arrears of, 185.
equity, time limited for proceeding in, 149, 232.
express trust of land to secure money, what is, 151.
does not prevent the running of time, 200, *see* 231, 234.
fee-farm rent, arrears of, 186.
foreclosure actions, 114, 149, 161, 177.
arrears of interest recoverable in, 187.
fraud, effect of, 154—156, 233.
incumbrancer, possession of prior, 186, 189.
infancy, effect of, in suits for account of rents, 190.
on question of present right to receive, 182.
interest, arrears of, on charges, 188.
judgments, *ib.*
legacies, 189.
mortgages, 185, 187, 189.
unpaid purchase-money, 188.
interest on arrears of annuity, 193.
intestate, estates of, time limited for claims to, 176, 181.
judgments, money secured by, time limited for recovering, 176, 177, 198, 199.
presumption of satisfaction, 177.
arrears of interest on, 188.
laches, 190, *see* 156—158, 233.
legacy, time limited for recovering, 176, 180—182, 198, 199, 200.
rule includes share of residue, 180, 199.
and annuity, 180.
presumption of payment, 180.
secured by express trust, 181, 200.
arrears of interest on, 189.
lien, vendor's, 178, 179, *see* 188.
lunacy, 182.
mistake, 233.
money charged on land within the acts, what is, 179, 199.
mortgage, money secured by, time limited for recovering, 176, 177, 198, 199.
presumption of payment, 177.
arrears of interest on, 185, 187, 189.
surety, limitation in case of, 199.
part payment, effect of, 176, 182, 199.
what is sufficient, 182, 183.
See ACKNOWLEDGMENTS UNDER THE STATUTES OF LIMITATION.
period of limitation,
twelve years for recovery of money charged on land or legacies, 176, 198.
six years for recovery of arrears of dower, rent, or interest, 185.
possession by prior incumbrancer, 186, 189.
post obit bond, judgment on, 178.
present right to receive a legacy, 181, 182, 199.
presumption of payment of legacies, 180.
of mortgages, 177.
of satisfaction of judgment, 178.
purchase-money, interest on, 188.
redemption suits, arrears of interest recoverable in, 187, 188.
rent, account of in equity, 190.
arrears recoverable, 185, 186, 203.
residue, share in, included in "legacy," 180, 199.
reversion. arrears recoverable of annuity charged on, 186.
revivor of judgment, effect of, 177, 178.
simple contract debts charged on land by will, 199, 200, *see* 235.
specialty, arrears recoverable of rent secured by, 208.

LIMITATION OF ACTIONS—*continued.*
in the recovery of money charged on land, &c.—*continued.*
tacking, 188.
tithe rent-charge, 186.
tithes, 186.
trust, effect of express, securing debts, 151, 181, 200, 235.
charges, 181, 200, *see* 231.
legacies, *ib.*
securing arrears of,
annuities, 151, 189, 200, 201.
interest on charges, 189, 200.
legacies, *ib.*
mortgages, *ib.*
vendor's lien, 178, 179, *see* 188.
in the recovery of debts by specialty,
absence of defendant beyond seas, 204.
acknowledgments, 205—207.
See ACKNOWLEDGMENTS UNDER THE STATUTES OF LIMITATION.
acquiescence, 156—158, 233.
administration suits, pleading statute in, 236.
arrears of rents secured by specialty, 203.
beyond seas, 204, 207, 208, 228.
calls on shares in company, 203.
disabilities, 204, 205.
equity, cases in, 203, 232.
executor may pay and retain debts barred, 236, 383.
fraud, effect of, 233.
India, bond executed in, 203.
infants, disability of, 204.
interest, arrears of, recoverable in action on covenant, 203.
judgment reversed, 207.
lunacy, disability of, 204.
married woman, disability of, *ib.*
See DISABILITIES.
mistake, effect of, 233.
outlawry reversed, 207.
payment, acknowledgment by, 205, 206.
See ACKNOWLEDGMENTS UNDER THE STATUTES OF LIMITATION.
period of limitation fixed at twenty years, 202.
presumption of payment of bonds, 208.
rent secured by specialty, arrears recoverable, 203.
specialties, what are within statute, 202, 203, 207, *see* 385.
time begins to run, when, 204.
trust, where specialty secured by, 204, 234, *see* 231.
in the recovery of simple contract debts,
absence of plaintiff or defendant beyond seas, 216, 217, 228.
account, 208.
running of time in case of merchants' accounts, 210, 227.
partnership accounts, *ib.*
acknowledgments, 217—227.
See ACKNOWLEDGMENTS UNDER THE STATUTES OF LIMITATION.
acquiescence, 233, *see* 156—158.
administration suits, pleading statute in, 236.
administrator, running of time in case of, 215, 216.
advertisement, not an acknowledgment, 220.
agent, action of account against, 210.
ante-nuptial debts, 212, 226, 335.
appropriation towards payment, 224.
assumpsit, running of time in case of, 212.
banker and customer, 209.
bankrupt, acknowledgment in balance sheet of, 220.
beyond seas, 216, 228.
bill of exchange, 213, 214.
breach of contract, 212.
trust, 211, 231, 232, 234.
cestui que trust, how far barred by time, 231, 232, 234.
company, effect of winding-up order on running of time, 215.
concealment of right, 214.

LIMITATION OF ACTIONS—*continued.*
in the recovery of simple contract debts—*continued.*
continuous running of time, 215.
contracts, actions on, 212.
costs, 214, 215.
Crown, chose in action vested in, 111.
demand, debt payable on, 213.
detinue, 208, 212.
devastavit, barred in six years, 211, *see* 236.
disabilities, 216.
See DISABILITIES.
equity, doctrines of, as to Statutes of Limitation, in case of debts by simple contract, 232.
executor, running of time in case of, 215, 216.
acknowledgment in writing by, 219.
payment by, 226, 227, 230.
not bound to plead the statute in administration suit, 236.
may pay and retain debts barred, *ib.*
foreign contracts, 211.
fraud, 210.
husband in respect of ante-nuptial debts of wife, 212, 226, 335.
imprisonment not now a disability, 228.
India, 211.
indorsement on bills and notes, effect of, 218, 225.
infants, 216.
acknowledgment by, 219, *see* 184.
confirmation of promises made by, *ib.*
See DISABILITIES.
joint contractors, acknowledgment by, 218.
payment by, 226, 229, 230.
joint debtors, running of time in case of, 228.
judgment reversed, 216.
land, charged on, 199, 200, *see* 235.
lunacy, 216.
married woman, *ib.*
See DISABILITIES.
payment on debt contracted before marriage, 226.
marshalling, right to, does not keep alive debt barred, 330.
merchants' accounts, 210, 227.
mistake, 233.
outlawry reversed, 216.
parol evidence of acknowledgment, 220.
of payment, 225.
partners, payments by, 230, *see* 219.
partnership accounts, 210.
payment, acknowledgment by, 224—227.
See ACKNOWLEDGMENTS UNDER THE STATUTES OF LIMITATION.
payment into court, 224.
period of limitation fixed at six years, 208.
promissory note, 213, 214.
remedy barred, not right, 211.
set-off, 209, 218.
solicitor and client, 209, 210.
stamp duty, acknowledgments exempted from, 220.
time begins to run, when, 211—215.
time not extended by 3 & 4 Will. 4, c. 104..378.
trespass, 208, 211.
trover, *ib.*
trust, when time runs in case of, 234, *see* 231.
trustee, claim for breach of trust enforced against assets of deceased [redacted]
will, trust for payment of debts in, 235.
winding-up order, effect of, on running of time, 215.
miscellaneous limitations,
actions, for account, 208.
assault, menaces, &c., *ib.*
awards on, 202.
fines on copyholds, *ib.*

LIMITATION OF ACTIONS—*continued.*
miscellaneous limitations—*continued.*
actions, for money levied on a *fi. fa.*, 202.
penalty under a bye-law, 209.
a statute, 202, 204.
replevin, 208.
trespass, *ib.*
trover, *ib.*
actions, pendency of, effect on running of time, 237.
constructive trusts, effect on running of time, 235, *see* 231.
injunction, relief where time runs pending, 238.
judgment in administration action, effect of, 237.
local and personal acts, under, 238, 239.
lunacy of debtor, effect on running of time, 238, *see* 180, 182.
mortgage of reversionary personalty, in case of, 187, 199, 234.
order to carry on proceedings, effect of, *ib.*
renewal of writ to save statute, 174.
trustees, limitation of actions against, 231, 232, 234.

LIMITATION, STATUTES OF,
colonies, in, 174.
construction of, 102.
old statutes, 108, 114.
pleading in case of, 154, 174, 175.
practice in case of, 174, 175.
subjects included in 3 & 4 Will. 4, c. 27..102.

LIMITATIONS IN PRACTICE, 175, 176.

LINEAL ANCESTOR,
may be heir, 360.

LIS PENDENS,
after decree there is no, 465.
Land Charges Registration Act does not affect, 482.
registration of, 464, 465.
vacation of, 465.
Settled Land Act, 1884, order under, registered as, 465, 718.
solicitor, negligence in not registering, 465.
special case registered as, *ib.*

LITTER,
claim to cut and carry away, 3, 31, 37.

LOCAL AND PERSONAL ACTS,
limitation of actions under, 238, 239.

LOCKE KING'S ACT, 391—398.
charge by way of mortgage within the act, what is, 393.
chattels, bequest of incumbered, 392.
contrary intention within the act, 393, 394, 396, 397.
contribution between different parts of land in same mortgage, 392, 395.
crown has benefit of act, 393.
deed made before 1855 not within, claims under, 392, 393.
equitable charges of all kinds are within act, 398.
equitable mortgage is within, 393.
judgment, charge created by, within the act, *ib.*
land within the act, what is, 392.
land devised or descended to bear mortgage charged on it, *ib.*
marshalling between legatees and devisees of mortgaged land, 395.
old law, 392.
order in which funds applicable in payment of debt, where act excluded, 395.
personal estate not liable to exonerate heir or devisee, 392.
proviso in Act of 1854, cases on, 393.
republication of will does not bring it within, *ib.*
vendor's lien within the act, 393, 397, 398.
will made before 1855 not within, 392, 393.

LONDON, CUSTOM OF,
light, as to, 13.
married women, alienation by, 295.
separate trading by, 318.
tithes, payments under 37 Hen. 8, c. 12, for, within 3 & 4 Will. 4, c. 27, 109.

LONG TERMS,
enlargement of, 617, 618, 632.

LOPWOOD,
grant of, 30, 37.

LORD OF MANOR. *See* COPYHOLDS; MANOR; WASTE.
appr ve, right to, 40.
forfeiture, within what time, must enter for, 123.
grants by, 39.
judgments against tenant, rights saved in case of, 447.
Settled Estates Act, leases under, saving of rights of, 664.
waste, adverse possession of, under old law, 116, 117.
encr achments on, presumed to be for benefit of, 39, 118.
presumed to belong to, 39.

LUNACY,
appointment of new trustees in cases of, 518, 536, 540.
vesting orders in case of, 500, 538—542.

LUNATIC,
charging order against, 456, 457.
costs of proceeding in lunacy. recoverable from estate, 384.
within what time recoverable, 215.
debtor, time does not run in favour of, 238.
exceptions in favour of,
Limitation Acts, recovery of land or rent, 141, 196.
simple contract debts, 216.
specialty debts, 204.
Prescription Act, 19.
husband a, concurrence in wife's disposition dispensed with, 304.
leases of lands of, 254, *see* 662, 712.
maintenance of, advances for, for how long recoverable, 238, *see* 211, 215.
married woman, interest of bound by order of court, 293.
mortgagee, vesting orders of land, 500, 501, 538.
vesting orders of stock, 502, 539.
See TRUSTEE ACTS.
necessaries for, payment for, 384, *see* 238.
new trustee, appointment of, in place of, 518, 536, 540.
where power vested in, 517, 538, 602.
pauper, arrears of maintenance recoverable, 211, 238.
payments on behalf of, a debt payable out of his assets, 384.
personal representative a, vesting order as to stock, 503, 539.
protector a, case where, 266, 267, 275, 276.
Settled Estates Act, application of, to, 662, 666.
See SETTLED ESTATES ACT.
Settled Land Acts, application of, to, 712.
See SETTLED LAND ACTS.
trustee, vesting orders of land, 500, 501, 538.
vesting orders of stock, 502, 539, 540.
See TRUSTEE ACTS.
will of, 402, 425.

MAINTENANCE,
married woman liable for, of husband and children, 338.
of infants out of income of their property, 608, 609.

MANAGEMENT OF TRUST PROPERTY,
application by trustees for advice as to, 554.
of infants, by trustees, 606—608.

MANDATORY INJUNCTION,
in case of water, 78.
light, 97, 98.

MANOR. *See* LORD OF MANOR; WASTE.
conveyance of, what included in, 577, 578.
partition of, 740.

MANSION HOUSE,
rebuilding of, 656. 723, *Add.*
repairs to, under Settled Land Acts, 692, *see* 723, 656, *Add.*
sale or lease of, under Settled Land Acts, 722.

MANURE,
right to use land for preparing, 6.
right to lead, 57.

MARGINAL NOTES,
of statutes form no part of statute, 320

MARINERS,
wills of, 412, 413.

MARKET,
disturbance of, what is, 27.
enlargement of, 26.
grant of, effect of, on claim by prescription, 26, 29, 45.
new market, a disturbance of old, 27.
place, right to move, 26.
prescriptive right to hold, 26.
presumption of grant of, 26, 112.
prevent sale in houses, right to prevent, 26.
statute, effect of, on old franchise, 26.
tolls, claim to, by prescription, 26.
way to, 61.

MARRIAGE,
revokes will, 414.
infants may make settlements on, 312.
See SETTLEMENT.
court will not inquire into propriety of, 313.

MARRIED WOMAN,
abandonment of lands of, limitation in case of, 144.
acknowledgments of deeds by, 292—306. *See* ACKNOWLEDGMENT OF DEEDS BY MARRIED WOMEN.
acquire property as *feme sole*, may, under M. W. P. Act, 1882..325, 328, 329.
actions by or against, 325, 326, 327, 333.
exceptions in favour of, in Prescription Act, 19.
in Statutes of Limitation, 141, 196, 204, 216.
administratrix, 336, 338, 339.
ante-nuptial debts, liability for, 322, 323, 324, 333—335.
actions on, 212, 226, 335.
date from which time runs in favour of husband, 212, 226, 335.
appointed under general power by, property, assets to pay debts, 329, 381.
attorney, power to appoint, 606.
bankruptcy, how far liable to, 322, 325, 327, 328.
bare trustee, may convey land as *feme sole*, 567.
children, liability for maintenance of, 338.
church, gifts to, not within M. W. P. Act, 1882..326.
company, shares in, belonging to, 319, 323, 330—332, 333, 334.
condition, conveyance of land in performance of, 295.
contingent interests, disposition of, 292, 489.
contract by, ante-nuptial, liability for, 322—324, 333—335.
deemed to be in respect of separate property, 325, 328.
future separate property bound, 325.
husband, with, 328.
husband's death, effect of, as to property bound by, 327, 328.

MARRIED WOMAN—*continued.*
contract by, joint, 328.
must be some separate property at date of contract, 328.
non-separate property, as to, 293, 296.
meaning of, in Married Women's Property Act, 1882..338.
separate property, as to, 297, 325, 327, 328.
trust property, as to, 293, *see* 336.
conversion, in case of sale by the court of lands of, 742.
costs in actions by and against, 325, 327.
criminal proceedings by, 333.
by husband against, 335.
damages recovered by, are separate property, 325, 326, 330.
recovered against, payable only out of separate property, 325.
undertaking in, can be given by, 327.
debts, property subject to power of appointment is assets for, 329, 381.
Debtors Act, 1869, order under, may be made against, for ante-nuptial debts, 322.
not for post-nuptial debts, 326.
deposits in banks, 318, 320, 330—332.
disclaimer by, 293, 490.
discovert, effect of Married Women's Property Act, 1882, to make, 326.
disposition of property by, generally, 295—299.
under Married Women's Property Act, 1882..325.
dower, 340—349. *See* DOWER.
earnings of, separate property, 317, 328, 329.
election by, 293, 315, 742.
entail, may bar, 253, 254, 272, 273.
equity to a settlement, may be released by, 315.
evidence by, against husband, and by husband against, 333, 339.
ex provisione viri, tenant in tail, 254.
examination of, separate. *See* EXAMINATION.
executrix, 336, 338, 339.
liability of husband, 339.
feme sole as regards property, when, 297, 318, 325, 328, 329, 330.
Fines and Recoveries Act, dispositions under, 292, 293.
barring entail under, 253, 272, 273.
concurrence of husband necessary, 292, *see* 303.
copyholds, legal estate, *ib.*
equitable estate, 303.
fraudulent investments of husband's money, by, 320, 332.
gift to husband and wife and third person, construction of, 326.
guardian *ad litem*, cannot act as, *ib.*
husband, abjured realm or transported, power of disposition when, 295.
maintenance of, liability of wife for, 338.
proceedings against, by, 333.
questions between husband and wife decided in summary way, 335.
intestacy of, rights of husband, 326.
judgment against, form and effect of, 327.
lease, statutory powers to, 295, 712.
by husband of wife's land, 660, 661.
surrender of, by, 295.
legacy to, to whom payable, 320.
loans, by husband to, 326, 329, 334.
to husband by, 329.
to partnership of which husband a member, *ib.*
lunatic, interest of, bound by order of court, 293.
next friend, cannot act as, 326.
of married woman must give security for costs, 327.
payment of money into court in action against, effect of, *ib.*
out of court to, 293, 742.
plaintiff, should be so described, 326.
pleading in action against, 328.
policy on life of husband for benefit of, 320, 321, 332, 333.
trustee of, appointment of, 321, 332, 333.
political rights not given by Married Women's Property Act, 1870..322.
power of appointment, cannot be compelled to exercise for benefit of creditors, 328.
exercise of, by, 295, 296, 405.

MARRIED WOMAN—*continued.*
power, general, execution of, makes property liable to debts, 329, 331.
release of, by, 292, 315.
statutory, 295.
property of, when separate within Married Women's Property Act, 1882..328, 329, 330.
questions between husband and wife as to, decided in summary way, 335.
protector of settlement, 262.
consent by, 274.
provision for, on conveyance by acknowledged deed, 308.
release by, 292.
remedies for protecting separate property, 333.
representative of, legal personal, liability of, 338.
retainer by, as executrix of husband, 329.
reversionary personalty, disposition of, 315—317, 329. *See* REVERSIONARY INTERESTS.
rights of entry, disposition of, 292.
separate estate. *See* SEPARATE ESTATE.
sequestration in divorce action, effect of, 327.
Settled Estates Act, application of, in case of, 662, 663.
Settled Land Acts, application of, in case of, 712.
settlements, how far affected by M. W. P. Act, 1882..337.
shares in company belonging to, 319, 323, 330—332, 333, 334.
statutory powers of, 292, 295, 315—339.
stock belonging to, 318, 319, 320, 330—332.
sue, may, and be sued, 325, 326, 327, 333, 336.
summary procedure between husband and wife, 335.
surrender by, 292.
of lease by, 295.
title of woman married before 1883 to bring property within M. W. P. Act, when must accrue, 329, 330.
tort, ante-nuptial, liability for, 323, 333.
post-nuptial, liability for, 326.
trading separately, may be bankrupt, 325, 328.
liability of husband, 318.
trespass on house which is separate property, may sue for, 326.
trustee, 336, 338.
conveyance of land by, 293, 295.
undertaking in damages, can give, 327.
wages of, separate property, 317, 328, 329.
wills of, generally, 405, 406.
effect of M. W. P. Act, 1882, on, 326, 330.
See WILL.

MARRIED WOMEN'S PROPERTY ACTS, 317—339.
See CONTENTS.

MARSHALLING,
creditors, between, 380.
and legatees, 381.
heir and legatees or devisees, between, 358.
legatees and devisees of mortgaged land, between, 395.
limitation of time for recovery of debt not to be extended by, 380.

MEMORY (LEGAL),
meaning of, 21, 22.

MERCHANTS' ACCOUNTS,
running of time in case of, 210, 227.
See LIMITATION OF ACTIONS.

MERGER,
estates tail, in case of, 270, 271.
legal and equitable estates, 271.
reversion on lease, of, effect of, 491, 492.

MIDDLESEX,
registration of will of lands in, 568.

MILL,
air for, claim to, 7.
stream, right to go on land to repair, 6.
water for, right to, 69, 73, 75, 76.

MINERALS,
leases of, under Settled Estates Act, 645.
under Settled Land Acts, 680—682, 685, 722, 726.
possession of, what is, 121.
reservation of, on sale under power, 735, 736.
under Settled Estates Act, 650.
under Settled Land Act, 685.
way, to carry, right of, 62.

MINES,
customs as to working, 25, 26.
custom to let down surface without compensation, bad, 25.
dower out of, 340.
drainage of, 71, 72, 73, 78, 80, 81.
escape of water from, 80.
highways, under, 54.
licences, 48.
possession of, what is, 121.

MINING LEASE,
may be authorized of settled estates under Settled Estates Act, 645.
See SETTLED ESTATES ACT.
under Settled Land Act, 680—682.
See SETTLED LAND ACT.

MISDEMEANOR,
fraudulent concealment of deeds by vendor, to be, 549.

MISTAKE,
relief granted by equity in cases of, within what time, 233.

MONEY,
arising from sales under Settled Estates Act, application of, 655—657.
arising from sale by trustees under statutory powers, application of, 559, 560.
belonging to judgment debtor, may be taken under writ of *fi. fa.*, 449, 450.
charged on land, within what time to be recovered, 176, 198, 200.
See LIMITATION OF ACTIONS.
to be laid out in lands to be entailed, 288, 289.
See ENTAILED MONEY.

MOOR,
right to moor vessel, 83.

MORTGAGE,
consolidation of, restriction of, 590.
copyholds, of, conveyance on sale by mortgagee, 593.
of entailed, 260.
covenant, action on, when barred, 199, 203.
debts. for payment of, 375, 386, 389, 390.
devise of mortgage estate and subsequent acquisition of equity of redemption, 422.
devolution of mortgage estates, 567, 600.
equitable, within Locke King's Act, 393.
estates, devolution of, 600.
foreclosure action, within what time, must be brought, 114, 149, 161, 177.
interest on, arrears of, 185, 187, 189.
petition for payment of, out of fund in court analogous to action to recover land, 114.
Locke King's Act, 391 - 398.
See LOCKE KING'S ACT.
money secured by, time limited for recovering, 176, 177, 198, 199.
personalty, of, limitation of actions in case of, 199.
arrears of interest recoverable in foreclosing, 187, *see* 234.
power to, authorizes mortgage with power of sale, 389.

MORTGAGE—*continued.*
power to, does not authorize a sale, 389.
presumption of payment of, 177.
raise money for exchanges and renewals, to, 561, *see* 685.
redemption action, within what time, must be brought, 158, 197.
reversionary interest in personalty, 234.
limitation in case of mortgage of, 187, 199.
sale not authorized by power to, 389.
sale in action for foreclosure or redemption, 596—598.
short form, statutory, 625.
statutory, effect of, 598, 599.
form of, 623, 624.
reconveyance of, 600, 625.
surety, limitation of actions against, 199, 230.
tacking, provision in Vendor and Purchaser Act, 1874, as to, 568.
simple contract debts against heir, 188, 378.
Statutes of Limitation in relation to, 188.
tenant for life, by, under Settled Land Acts, 685, 723.
tenant in tail, by, 259—261.
transfer, statutory, effect of, 599.
form of, 624.
Trustee Act in relation to.
See TRUSTEE ACTS.
Welsh mortgages, 162, 163.

MORTGAGEE,
acknowledgments by, 160, 161, 197.
adverse possession by, 118.
charging orders, effect of, as against, 457.
costs of, interest on, 193.
equitable, has priority over judgment creditor, 453, *see* 448.
foreclosure action, within what time to be brought, 114, 149, 161, 177.
infant, provisions of Trustee Act as to, 503.
insure, power to, 562, 592, 595.
judgment creditor may take interest of, 453.
lease, power to, 590—592.
legal personal representative of, may reconvey, 567, 600.
lunatic, vesting orders, 500—502, 538, 539.
See TRUSTEE ACTS.
personal remedy of, when barred, 199, 203.
receipts by, 562, 594.
receiver, power to appoint, 562, 563, 592, 595.
powers of, appointed by mortgagee, 563, 564, 595, 596.
right to recover land, when barred, 159, 161, 162, 200.
sale, power of, 562, 563, 592—595.
surface and minerals apart, 736, 737.
statutory powers of, under 23 & 24 Vict. c. 145..561—564.
under 44 & 45 Vict. c. 41..590—598.
stock of, has priority over charging order, 457.
tacking, by, 188, 568.
simple contract debts against heir, 188, 378.
tenant for life, when mortgagor is, running of time, 160, 162.
timber, power to cut and sell, 592.
transfer, may be compelled to, 589, 632.
vesting orders of estate of, on payment off after death, 507, 508.

MORTGAGOR,
action by, for rent or possession, 129.
deeds, right to inspect and copy, 589.
disability of, does not affect the running of time, 141, 161, 196.
fraudulent, punishment of, 549, 557.
lease, power to, 590—592.
limitation of action by, to recover land, 158—161, 197, 198.
possession, in, nature of interest, 128, 129.
require the mortgagee to transfer, may, 589, 632.
right of, to recover land, when barred, 158—161, 197, 198.
surety for, limitation of actions against, 199, 230.

MOUNTAIN,
way over, public, 51.

NATURAL STREAMS,
right as to, 67—70.
See WATER.

NAVIGABLE RIVERS. *See* RIVERS.

NAVIGATION,
right of, 82.
undertakers of, have only easement in land, 6, 85.

NECESSITY,
ways of, 60.

NEGLIGENCE,
actions for, when time begins to run, 211.
liability for, in case of rights of way, 64.

NETS,
custom to dry, 23, 24.
right to land, 6.

NEW TRUSTEES. *See* TRUSTEE.

NEXT FRIEND,
married woman cannot be, 326.
of married woman, must give security for costs, 327.

NOISE. *See* NUISANCE.
right to make, when can be acquired, 7.

NON-EXISTING GRANT,
pleading, 45.

NON-PAYMENT OF RENT,
effect of, 113, 114, 123.

NOTICE,
constructive, to purchaser, restriction of, 629.
executor or administrator, by, before distributing assets, 553.
lessor, by, requiring breach of covenant to be remedied, 587, 588.
Partition Acts, of orders under, 746, 747.
Settled Estates Act, of applications under, 652, 653, 655, 665, 670.
Settled Land Acts, by tenant for life to trustees, 701, 702, 717, 721.

NOTICE TO QUIT,
by agent of one joint tenant sufficient, 133.
necessary to determine tenancy from year to year, *ib.*
not necessary when party holds adversely, *ib.*
what notice sufficient, *ib.*

NUISANCE,
acquiescence in, 100.
contract and, difference between, 81.
damages must be proved, 100.
definition of, 99.
injunction, who can obtain, 100.
public, individual cannot abate, 83.
prescription will not justify, 28, 99.
restrained, when, will be, 100.

OBLITERATION,
in will, not to take effect unless executed as will, 419.

OBSTRUCTION,
of navigation, 83, 84.
of water, remedy by action, 77, 78.
of way, 53, 54, 66.

OPTION OF PURCHASE,
building lease granted under Settled Land Acts, in, 720.
devise of lands subject to, and subsequent exercise of option, 422.

ORDERS,
enforcement of, 460.
statutory juri-diction, under, conclusive, 620, *see* 526.
land, affecting, registration of, 481, 482, 484.
searches for, 483, 484.
vacation of, 481, 725.

OUTLAWRY,
abolished in civil cases, 207.
forfeiture for, 363.
limitation of actions after reversal of, 207.

OYSTERS,
corporation, vested in, right to dredge for, 24, 38.
navigable river, in a, individual cannot remove or damage, 83.
public right to dredge for, 38.
several fishery for, *ib.*

PANNAGE,
prescription for, 31.

PARLIAMENT,
act of, no prescription against, 28, 29.
presumption of, 112.
entails created by, whether barrable under Fines and Recoveries Act, 254, 255
Settled Estates Act, excepted from, 664.
Settled Land Act, how far within, 709.

PAROL,
demurrer of, when abolished, 372.

PAROL EVIDENCE,
of contents of written acknowledgment of debt, 220.
of payment, 225.
wills, in case of, 407, 410, 416, 418, 419, 421. *See* WILL.

PARTIES,
to partition actions, 739, 740, *see* 743.
to suits for administration of real assets, 379, 380.

PARTITION,
condition in law not to be implied by, 487.
copyholds, of, 486.
decree for, when, will be made, 739, 740.
deed, must be by, 486.
minerals and surface dealt with apart on, under power, 745, 736.
tenant in common charged with occupation rent in action for, 137.
tenant for life may join in, under Settled Land Acts, 678, 679, 685.
Trustee Acts apply in case of, 515, 516.
what may be partitioned in action, 740.
who may obtain, 739.

PARTITION ACTS,
advertisements for parties not before the court, 747.
bidding by parties interested, 742.
conversion on sale under the acts, how far there is, 742, 743.
costs in action under, 745.
county courts, jurisdiction of, *ib.*
disability, requests by persons under, 740, 748.
executory devise over, fee simple subject to, may be sold under the acts, 740.
mortgagee may request a sale, 740.
parties to action under, 739, 740, 743.
partition, not necessary to claim, 748.
partition of part and sale of rest, order for, 740.
pleading in actions under, 743, 748.
practice under, 743, 744, 746, 747.
purchase of share of party desiring a sale, 741.

PARTITION ACTS—*continued.*
sale may be directed instead of partition, at request of any party, 739, 740.
at the request of parties interested in one moiety and upwards, 740, 741.
service on persons not before the court, 744, 746, 747.
Settled Estates Act, provisions of, applicable to sales under, 742.
successive sales, on, parties may come into subsequent sales, 747.
trust for sale, prevents decree under the acts, 740.
Trustee Acts apply to, 515, 516, 532, 742.
undertaking to purchase share of party desiring sale, 741, 742, 748.

PART PAYMENT. *See* ACKNOWLEDGMENTS UNDER THE STATUTES OF LIMITATION.

PARTNER,
whether payment by one takes debt out of statute against others, 230, *see* 219.
whether payment by surviving, takes debt out of statute against estate of deceased partner, *ib.*

PARTNERSHIP,
accounts, running of time in case of, 210.
apportionment of payments out of profits, 443.
charging order on assets of, 455.
interest of partner may be taken under a *fi. fa.*, 450.

PASTURE,
common of, 31—35. *See* COMMON.
levant and couchant, meaning of, 32.
Prescription Act, claim under, 3.
sole, claim for, 30.

PAYMENT,
acknowledgment of right by, in the recovery of mortgages, charges, and legacies, 176, 182, 199.
in the recovery of debts by specialty, 205, 206, 229.
simple contract, 224—227, 229.

PAYMENT INTO COURT,
does not stop the running of time, 224.
married woman, in action against, effect of, 327.
order for enforcement of, 460.
Settled Estates Act, of money arising under, 655.
Settled Land Acts, of money arising under, 689.
Trustee Acts, of money of infants, &c., dealt with under, 529.

PAYMENT OUT OF COURT,
entailed money, 289, 290, 657.
married woman, to, 293, 742.
Partition Act, of money in court under, 742.
Settled Estates Act, of money in court under, 656, 657, *see* 696.
Settled Land Acts, of money in court under, 688, 689, 690, 724.

PAYMENT OF DEBTS OUT OF REAL ESTATE.
administration of real estate, parties to action for, 379.
alienation, *bonâ fide*, good against creditors, 370, 379.
unless administration action registered as *lis pendens*, 465.
assets, order of application, 380, 381.
charge of debts on real estate, 386—391.
conveyances by infants, 373, 375.
of lands subject to executory devise over, 376.
persons having limited interests, 374, 375.
copyholds liable for debts, 377.
debts, order of payment of, 382, 383. *See* DEBTS.
within 3 & 4 Will. 4, c. 104, what are, 379.
devisees liable to simple contract debts, 377, 379.
specialty debts, 367, 368, 371.
devises void against specialty creditors, 366.
dower has priority over creditors, 346, 378.
equitable assets, 377, 378.
equity of redemption applicable for, 378.
escheat does not affect rights of creditors, 378, 380.

PAYMENT OF DEBTS OUT OF REAL ESTATE—*continued.*
executor's power of sale for, implied, 388, 389.
statutory, 389, 390.
fraudulent conveyance set aside after death of debtor, 366.
heir, judgments against, effect of, 379.
liable to value of lands aliened by him, 369, 377, 379.
liability of, to debts of ancestor, 369, 370, 377, 379.
plea of *reins per descent*, 370.
repairs by, retainer for, *ib.*
retainer by, 371, 384.
infant compelled to convey to pay debts, 373, 375.
judgment debts, payment of. *See* JUDGMENT.
lands, what are applicable for payment of debts, 378.
legal assets, what are, 377.
limited interests, persons having, may convey fee, 374, 375.
mortgage for payment of debts, 375, 386, 389, 390.
mortgage debts, payment of, 391—398. *See* LOCKE KING'S ACT.
mortgagee may tack simple contract debts against heir, 188, 378.
old law, as to, 365.
order in which assets are applied, 380, 381.
debts are paid, 382, 383. *See* DEBTS.
parol not to demur, 372.
parties to action for administration, 379.
provisions for payment of debts or portions not affected by 1 Will. 4, c. 47..368, 369.
purchase, *bonâ fide*, good against creditors, 370, 379.
purchaser, whether liable to see to payment of debts, 379, 390, 391.
rents of land applicable for payment of debts, 378.
sale for payment of debts, court may order, 380.
devisee in trust, by, 386, 389.
devisee of beneficial interest, by, 388, 390.
executor, by, 388, 389, 390.
simple contract debts, devisee liable for, 377.
freehold and copyhold land applicable for payment of, 377, 378.
specialty creditors, heirs liable for value of lands aliened, 369, 370.
devisees liable to, 367, 368.
devises void against, 366. *See* SPECIALTY DEBTS.
specialty debts no charge on land, 370.
not binding heir, have no priority over simple contract debts under 3 & 4 Will. 4, c. 104..378, *see* 615.
priority over simple contract debts, 378.
traders' estates liable to simple contract debts, 371.
Trustee Act, provisions of, where decree for sale for payment of debts, 615.

PEDIGREE,
falsification by vendor a misdemeanour, 549.

PENALTY,
action for, when barred, 202, 204, 209.

PENDING ACTIONS,
whether debts kept alive by, 237.

PERIOD OF ENJOYMENT,
requisite in case of claims to profits *à prendre*, 2, *see* 13.
to easements, 5, 11, *see* 13, 45.

PERIODICAL PAYMENT,
apportionment of, 242.
within 3 & 4 Will. 4, c. 27, s. 42..186.

PERMISSION,
effect of, in case of claims to easements, 2, 9, 10, 18.

PERPETUITIES, RULE AGAINST,
appointment under power, when period commences, 243, 244.
restraint on anticipation which transgresses, is void, 298.

PERSON LAST ENTITLED,
meaning of, in Inheritance Act, 352, *see* 355.

PERSONAL REPRESENTATIVE,
within Trustee Act, 1850..498, 499. *See* TRUSTEE ACTS.
PERSONALTY,
assignment of, to assignor and another, 549.
express trust of, money secured by, limitation of actions for, 181, 200, 231.
foreign, law applicable to, 401.
half-blood, right to share in, 362.
mortgage of, limitation of action on, 199.
arrears of interest recoverable in foreclosing, 187, *see* 234.
widow's right to share in, when barred, 342, 343.
PEWS,
apportionment of, 91.
appropriation of, 87.
chancels, rights in respect of, 89, 90.
disturbance of, remedy for, 90, 91.
easement is, 6.
evidence of right to, 88, 90.
extra parochial persons, rights acquired by, 89.
prescription for, 88, 89.
Prescription Act, how far within, 88.
priority in a seat may be prescribed for, 91.
rector entitled to chief seat in chancel, 87.
rents, mortgage of, by vicar, 89.
repairing, effect of, 88.
payment for, 89.
remove, churchwardens no right to, 91.
removal of, proceedings against incumbent for, *ib.*
vote in respect of, no right to, 89.
PILE,
right to place, in bed of river, 6, 78.
PIPES,
highway, injunction against laying under, 54.
right to go on land to repair, 80.
PISCARY,
common of, 37.
PLAINTS,
in customary courts abolished, 170.
PLEADING,
commoners, action of trespass against persons claiming to be, 43.
heir, by, in action by ancestor's creditors, 370, 371.
Limitation, Statutes of, under, generally, 174, 175.
when defence need not be raised on pleadings, 169.
married woman, plaintiff should be so described, 326.
separate property should be alleged to have existed, in action against, 328.
Partition Acts, in action under, 743.
prescriptive rights, in case of,
amendments, 18.
common, right of, 33.
common law, right at, should be pleaded as well as under act, 18, 46.
easement, claim for, 16—18, 45, 46.
Prescription Act, under, 4, 16—18.
way, right of, as a defence to an action for trespass, 18, 54.
in action for disturbance of, 18, 66.
PLURALITIES, 166.
POLICY,
on husband's life for benefit of wife, 320, 321, 332, 333.
payments on, not apportionable, 445.
POLLUTION OF AIR, 99, 100.
POLLUTION OF WATER,
action for, 79.
acquiescence, effect of, 80.
custom to pollute, 74.

POLLUTION OF WATER—*continued.*
extent of right to pollute, 74.
implied grant of right to pollute, *ib.*
injunction to restrain, 79, 80.
lost, right to pollute, by suspension, 76.
prescriptive right of, 72.
previous pollution does not justify, 79.
public bodies, by, 79, 80.
stop, right to, 76.
waterworks company, by, 82.

PORT DUTIES,
presumption of grant of, 112.

POSSESSIO FRATRIS,
not to be deemed possession of the heir within the Statute of Limitations, 138.
rule as to, in case of descents, 362.

POSSESSION. *See* ADVERSE POSSESSION.
actual, what constitutes, 120, 121.
bailiff for infant, by, person held, 117, 137, 141, 190.
cestui que trust, by, effect of, 118, 122, 129, 130, 152.
entry on land not to be deemed, 136.
interest of person in, nature of, 168.
mines, of, 121.
mortgagee, by, when bars mortgagor, 158, 160, 197.
mortgagor, by, 128, 129.
solicitor, by, effect of, 160.
stranger, by, against trustee and *cestui que trust*, 152, 153.
succession of independent trespassers, by, 168.
take, right to, 119.
tenant for life under an invalid devise, by, effect of, 118, 119.
trustee, of, is possession of *cestui que trust*, 152.
will where only title is by, 402.
younger brother, or other relation, of, not that of heir, 138.

POSSESSORY TITLE, 117, 168, 169.
disposable by will, 168, 402.
may be forced on a purchaser, 169.

POSSIBILITY,
alienation of, 257, 499.
devisable, 401, 402.
fines and recoveries, effect on, 257.

POST OBIT BOND,
date from which time runs, 204.
judgment on, date from which time runs, 178.

POSTHUMOUS HEIR,
when entitled to rents, 356.

POUNDAGE,
sheriff entitled to what, 448.

POWER. *See* APPOINTMENT.
alienation of donee's interest, effect of, 296.
appointment invalid where corrupt bargain or intention, 268, 269.
liability of donee for loss occasioned by, 269.
destruction of, by disentailing deed, 253.
different kinds of powers, 296.
disclaimer of, 630.
execution of, by deed, mode of, 547, 548.
by will, mode of, 411.
extinguishment of powers, 296, 315.
fraud on, 268, 269.
liability of donee for loss occasioned by, 269.
purchasers, effect on, *ib.*
infant, exercised by, under 18 & 19 Vict. c. 43..312, 314.

POWER—*continued.*
judicial separation, effect of, on joint, 297.
married women, exercise by, 295, 296, 405.
how might be given to, 295. 296.
release by, in respect of reversionary personalty, 315.
mortgage, to, does not authorize sale, 389.
perpetuities, rule against, when period runs on appointment, 243, 244.
release of, 296, 613.
for benefit of donee valid, 269.
revocation and new appointment, of, exercise by will, 429.
sale, of, whether authorizes mortgage, 389.
minerals and surface may be dealt with apart, 735—737.
trustee in bankruptcy, exercise by, 297.
will, exercise by, 411, 438.
general gift, exercise by, 426—430.
of power given to two persons or survivors, 403, 429.
See CONSTRUCTION OF WILLS.

POWER OF ATTORNEY. *See* ATTORNEY.

POWER OF SALE,
charge of debts gave implied, 388, 389.
mortgage with, authorised by power to mortgage, 389.
mortgagee, of, statutory, 562, 563, 592—595.
sale under, not invalidated by mistaken payment to tenant for life, 548.
nor by reservation of minerals, 735.
tenant for life, given to, by Settled Land Acts, 667, 678. *See* SETTLED LAND ACTS.
trustees, of, consent of tenant for life necessary to exercise of, 708, *see* 561.
statutory powers of trustees, 558—561, 565, 604.

PRACTICE,
charging orders, on making, 456.
crown suits, 111.
Limitation Acts, under, 174.
limitations of time in, 175, 176.
Partition Act, under, 743, 744, 746, 747.
Prescription Act, under, 16 -18.
Settled Estates Act, under, 651—655, 665—669.
Settled Lands Acts, under, 702, 703, 725—727.
Trustee Acts, under, 521, 522, 524—526.
Vendor and Purchaser Act, under, 571.

PRESCRIPTION. *See* PRESCRIPTION ACT; COMMON; EASEMENT.
Act. *See* PRESCRIPTION ACT.
abandonment of prescriptive rights, 29.
certain, must be, 22.
coal, right to take, may be claimed by, 28.
common, claim for, 23, 30, 31, 32. *See* COMMON.
common law, at, not superseded by act, 7, 11, 46.
corporation, against, 2, 104.
by members of, 22.
common, for, 35.
in trust for inhabitants, 24.
Crown, against, 30.
custom and, difference, 23.
easement, claim for, 26.
extinguishment of prescriptive rights, 29.
fees, claim to, 26.
fence, to maintain, *ib.*
fishery, for several, in tidal or non-tidal waters, 38.
grant, ancient, effect of, 29, 45.
right must be capable of, 21, 23, 26.
inhabitants of a town cannot prescribe, 23.
but may claim by custom, *ib.*
trust for, 24.
interruption, effect of, 29, 61.
land cannot be claimed by, 28.
lease, effect of, on, 22.

PRESCRIPTION—*continued.*
light, for, at common law, 92.
Prescription Act, under, 11—13.
litter, right to cut, 31, 37.
lost, how prescriptive rights may be, 28, 29.
markets, 26.
multitude of persons cannot prescribe, 6, 23, 37.
nature of, 21, 22, 23, 24, 26.
nuisance, will not justify public, 28, 99.
occupiers, cannot prescribe for profits *à prendre*, 24.
origin must be consistent with right claimed by, 29.
owner, must not exclude ordinary uses of land by, 22.
pasturage, for sole, 30.
period of user for, at common law, 14, 22.
personal or annexed to land, may be, 22.
pew, for, 88.
pleading prescriptive right of common, 33.
prescription against prescription, cannot be, 28.
public cannot prescribe, 28, 38.
quæ estate, in the, 16, 22.
reasonable, must be, 22.
sea-wall, to maintain, 26.
stallage, claim to, 27.
statute, how far may be contrary to, 28, 29.
thorns growing in a certain place, for, 31.
tolls, for, 26, 27.
unity of possession, effect of, 29.
way, for right of, 22, 26, 57, 61.
uninterrupted, must be, 6.
weir, for fishing, 38.
what may be claimed by, 22, 23, 26, 27, 28.
may not be, 28.

PRESCRIPTION ACT. *See* AIR—COMMON—EASEMENT—LIGHT—WATERWAY.
absolute, cases where right declared, 20.
air, right to passage of, 7, 99.
all persons interested, right must be good against, 7.
cattle, right to turn out, what may be claimed, 6.
common, claim for, 1, 2.
interruptions of right to, 15.
common law not superseded by act, 7, 11, 46.
Cornwall, Duchy of, how far act affects, 2.
crown, sect. 3 does not affect, 12.
disability, proviso as to persons under, 19.
easement, claim for, 4—10.
enjoyment of, must be as of right, 9.
capable of being granted, 7.
in respect of a dominant tenement, 5, 6.
susceptible of interruption, 7, 9.
what are within sect. 2..7.
enjoyment under, nature of, 7—10, 11.
agreement, under, not sufficient within sect. 1..3.
custom, under claim of, sufficient, *ib.*
must be as of right under sects. 1 and 2..3, 8, 9.
need not be as of right under sect. 3..12.
period of, 2, 4, 5, 10, 11, 13—15, 19, 20.
proof of, 3, 10, 18.
statute, under a, not sufficient, 9.
tenancy for life, during, 8, 12, 19—21.
evidence, of user under, 3, 10, 14.
admissible under general denial, 17.
extent of, to Ireland, not to Scotland, 21.
forty years, time excluded from period of, 20.
grant, claim by express, act does not interfere with, 46.
gross, rights in, not within act, 2, 37.
interruption, acquiescence in, 13, 15.
discontinuance of user not an, 14, 19.
effect of, 10, 11, 12, 13, 14, 15.

PRESCRIPTION ACT—*continued.*
interruption, acquiescence in—*continued.*
notice of, there must be, 13, 15.
stranger, by, sufficient, 15.
year, for less than, may be sufficient, 10, 15.
during last, 11, 14.
leave given, effect of, under sect. 2..9, 10, 18.
licence may be proved under general traverse, 10, 17.
over whole period, effect of, *ib.*
light, claim for, 11—13. *See* LIGHT.
litter, claim to cut, 31.
noise, right to make, acquisition of, 7.
origin of right must have been lawful, 4, 7.
periods under, 2, 4, 5, 10, 11, 13—15, 19, 20.
how to be computed, 13—15.
several together equal to statutory period, 20.
shorter not sufficient, 19.
pew, how far within, 88.
pleading under, 4, 16—18.
common law right as well as statutory, 18, 46.
profits à prendre, claim for, 1—4. *See* PROFITS À PRENDRE.
proof of enjoyment under, 3, 10, 18.
races, claim to hold, not within sect. 2..7.
reversion in sect. 8 does not include remainder, 21.
statute, enjoyment under a, not sufficient, 9.
tenancy for life, enjoyment during, 8, 12, 19—21.
tenant, acquiescence of, how far binding on lessor, 4, 12, 20.
acquisition by, of rights over other land of lessor, 3, 9, 12.
declarations by, will not bind lessor, 3, 4.
tenant for life, enjoyment as against, 12.
terms for life and years excluded from periods of forty years, 20.
tithes not within act, 2.
unity of possession, effect of, 5, 9, 12, 46.
user, nature of, 14.
right claimed can only be co-extensive with, 10.
water, claim by canal company to take, 7.
subterranean, claim to, *ib.*
watercourses, what are within sect. 2, *ib.*

PRESENTATION,
of livings, within what time to be made, 165.
prerogative presentation, *ib.*

PRESUMPTION,
Act of Parliament, of, 112.
death, of, 142, 143. *See* DEATH.
dedication of way to public, 50, 51.
encroachments by tenant are for benefit of landlord, 39, 40, 118.
grant, Crown, from, 112.
incorporeal rights, of, 45, 46.
right of way, private, 61.
inrolments and registration, of, 112.
payment of, bonds, 208.
legacies, 180.
mortgages, 177.
Prescription Act, restricted in claims under, 19.
satisfaction of judgments, 178.
statute, of, 112.
waste, of manor belongs to lord, 39.
adjoining highway, of ownership of, 56.
will not to be revoked by, 415.

PRETENCED RIGHTS,
dealings with, penal, 490.

PRINCIPAL AND AGENT,
interest between, 193.

PRIVACY,
no remedy for disturbance of, 99.

PROBATE DIVISION,
function in regard to will, of married woman, 406.

PROFITS À PRENDRE,
copyholders may claim, by custom, 23.
corporation, claim by, 22, 24, 35.
Crown, grant by, of, 24
custom, must be claimed by prescription not by, 23, 36, 37.
easements and, distinction between, 2, 3.
"inhabitants," claim by, 3, 23, 24, 37.
Crown grant to, 24.
nature of, 2, 3, 23, 37.
"occupiers," claim by, 23, 24.
period of prescription for, 1, 2, 4.
proof of enjoyment of, 3.

PROMISSORY NOTE,
acknowledgment of debt by giving, 226.
actions on, time within which must be brought, 213, 214.
bequest of, 402.
execution, may be taken in, 449.
indorsement on, of payment, does not stop time running, 218, 225.

PROSPECT,
covenant not to obstruct, enforceable, 99.
right to, cannot be acquired by enjoyment, *ib.*
view of shop window, *ib.*

PROTECTOR,
administrator not to be, 263.
alien not to be appointed, 265.
appointment of *ib.*, 266.
court should not appoint, 266.
death of appointed protector, on, who is, *ib.*
executory settlements, trustees of, may appoint, *ib.*
assign, not to be, 263.
bankrupt, may be, 261.
bare trustee to be, when, 264.
not to be, when, 263.
beneficial interest, owner of, is, 261.
Chancellor, Lord, when to be, 266, 275.
confirmed estates, in case of, who is, 262.
consent of, agreement to withhold, void, 268.
bankrupt, when tenant in tail, 281.
contract to give may be sufficient, 268, 274.
copyholds, how to be given in case of, 277, 278, 279.
court as, when to be given, 276.
effect of disposition without, 267, 270.
equity, exclusion of, as to, 274, 275.
how to be given, 274.
by the court, 275, 276.
inrolment of deed of, 274, 279, 282.
irrevocable, is, 274.
married women, in case of, *ib.*
necessary, when, 267, 268.
vesting order, in case of, 267, 499, 503.
controlled, not to be, 268.
court, when to be, 266, 275.
curtesy, estate by the, may constitute a protector, 261.
dealings between tenant in tail and, 268.
definition of, 261–265.
different settlement, owner of prior estate under, not, 261.
doweress not to be, 263.

PROTECTOR—*continued.*
entails created before the act, in case of, who is, 263, 264.
equity, exclusion of, as to, 268.
executor, not to be, 263.
executory settlement, trustees of, may appoint, 266.
felony, conviction of, *ib.*, 275.
husband of married woman protector convicted, 267.
first existing estate prior to estate tail, owner of, to be, 261.
notwithstanding assignment or incumbrances, *ib.*
frauds on powers, doctrine as to, not to apply to, 268.
heir not to be, 263.
infancy of, 266, 275.
lessee not to be, 263.
lunacy of, 266, 267, 275, 276.
married women, in the case of, who is, 262.
consent by, 274.
owner of prior estate excluded by sects. 26 and 27, when, who is, 263.
powers of, 267—269.
restored, estates, in case of, who is, 262.
resulting trust, estate by way of, may constitute the protector, 261.
shares, undivided, who is protector of, 262.
tenant in tail in possession is, as to tenant in tail in remainder, 261.
tenant to the *præcipe*, when, is, 263, 264.
trustee in respect of power of consent, is, 268.
trustees are, when, 262, 263.
when they are not, 262.
uncertain whether living or dead, 266.

PUMP,
contract to erect, specific performance of, 81.
repair of, 80.
right to take water from 6.

PURCHASE-MONEY,
court, in, how paid out to married women, 293, *see* 742.
payment out of entailed money, 289, 657.
entail, subject to, barring entail in, 288, 289, 657.
payment out of court of, 289, 657.
interest on, arrears of, recoverable, 188.
mortgagee, of land sold by, under statutory power of sale, 562, 594.
Partition Act, arising from sale under, 742.
purchaser's obligation to see to the application of, 391.
on sale, for payment of debts, 379, 390, *see* 370.
for payment of legacies, 391.
under Settled Land Act, 700.
by trustees, 604.
Settled Estates Act, arising under, application of, 655—657, 696.
Settled Land Acts, arising under, paid to trustees or into court, 689.
application of, 687—689.
leases, arising from sale of, 697.
timber, arising from sale of, 697.
solicitor, may be paid to, on production of deed with receipt, 614.

PURCHASER. *See* PURCHASE-MONEY—VENDOR AND PURCHASER.
application of purchase-money, liability to see to, 370, 379, 390, 391, 604, 700.
charitable trusts, effect of notice of, 153.
constructive notice to, restriction of, 629.
crown debts must be registered to affect, 465—469, *see* 474.
descent to be traced from, 355. *See* DESCENT.
forty years' title, entitled to, 566.
fraud of which he has no notice, protection against, 154, 155.
fraudulent appointment, effect on, 269.
Inheritance Act, in, meaning of, 352.
judgments, protection against, 477, 481, 482, *see* 461, 470—472.
liability to see to application of purchase-money, 370, 379, 390, 391, 604, 700.
lis pendens must be registered to affect, 464, 482.
possessory title will be forced on, 169.

PURCHASER—*continued.*
priority of, date of inrolment under Fines and Recoveries Act affects, 279, 291.
protection of, on sale, for payment of debts or legacies, 390, 391, *see* 370, 379.
on sale under S. L. Acts, 707, 708.
on sale by mortgagee, 594, 595.
on sale by trustees, 604.
Statute of Limitations, titles depending on, will be forced on, 169.
tenant at will, is, when, 128.

PURITY,
right to, of water in natural streams, 70.
in artificial streams, 73.

PURPRESTURE, 84.

QUARE IMPEDIT,
abolished, 170.
nature of proceedings in, 171.

QUARRIES,
custom for lord to work, 25.
within 3 & 4 Will. 4, c. 27..102.

QUASI ESTATE TAIL, 242.

QUEEN. *See* CROWN.

QUIETUS,
to Crown debtor to be registered, 468.

QUIT RENT,
nature of, 106.
redemption of, 611.

RABBITS,
commoner cannot interfere with, 41.

RACES,
claim to hold, not within Prescription Act, 7.
custom to hold, 25.

RAILWAY,
adverse possession, against, 121.
dower out of land taken by, 341.
easement, grant of, by, invalid, 7, 58.
execution against, 448, 450, *see* 479.
light, grant of, by, on sale of surplus land, 93.
sale of lands of, by judgment creditor, 479.
vendor's lien in case of sales to, 179.
water, taking, for locomotives, 74.
way, private, interference with, by, 66.
cannot grant, 58.
way, public, diversion of, by, 53.

RAIN-WATER,
right to discharge, 6, 71, 72.
no right to water flowing from adjoining house, 72.

REAL ACTIONS,
abolition of, 169, 170.

REAL ESTATE,
payment of debts out of, 365—398.
See PAYMENT OF DEBTS OUT OF REAL ESTATE.

RECEIPTS,
body of deed, in, sufficient, 614.
deed, in or on, authority to pay to a solicitor, 614.
mortgagees, of, on a sale, 562, 594.
purchaser, receipts in or on deeds binding in favour of, 614.
trustees, of, 604.
on sales under Settled Land Act, 700.

RECEIVER,
cannot be appointed under 27 & 28 Vict. c. 112, s. 8..479.
equitable execution, as, appointment of, 477.
fresh action for, not necessary, 477.
executor, when will be appointed as against, 383, 384.
mortgagee, appointment by, 562, 563, 592, 595.
agent of mortgagor, deemed to be, 563, 595.
powers of, when appointed by, 563, 564, 595, 596.
removal of, 564, 596.
time runs during possession of, when, 149, 150.

RECITAL,
estoppel, by, 258, 259.
title prior to agreed commencement, recital of to be deemed correct, 574.
twenty years old sufficient evidence, 566, 567.

RECOGNIZANCE,
Crown, in name of, 466—468.
guardian, by, not debt to Crown, 466.
land, does not affect, till delivery in execution, 476, 477.

RECOVERIES,
abolition of, 244.
alien, by, 253.
amendment of, 249, 250.
ancient demesne, of lands of, provisions as to, 246, 247.
confirmation of prior acts by, 270.
covenants to suffer, provisions as to, 245, 246.
custody of records of, 252.
defects in, remedied, 250, 251.
equitable estates, of, 250.
nature of, 244, 245.
origin of, 245.
parties to, 245, 251.
rent, on entailed, effect of, 254.
tenant for life, by, effect of, 253.
tenant to the *præcipe*, requisites for good, 250, 251.
void in part, 251.

RECTOR,
right to pew in chancel, 87.

REDEMPTION ACTION,
arrears of interest recoverable in, 187, 188.
sale in, 596—598.
within what time must be brought, 156, 197.

RE-ENTRY,
condition of, 124. *See* CONDITION.

REFUSAL,
by executor to transfer stock, vesting order in case of, 535.
by trustee to act, new trustee appointed, 519.
convey land, vesting order in case of, 532, 533.
transfer stock, vesting order in case of, 511, 512, 534, 535.

REGISTRATION,
annuities, of, 469, 470.
exercise of powers of S. E. Act, of, 668.
judgments, of, 461. *See* JUDGMENT.
in Middlesex or Yorkshire, 453.
lis pendens, of, 464, 465.
presumption of, 112.
rent-charges, of, 469, 470, 482, 483.
vacation of, 725.
wills in Middlesex, 568.
writs and orders affecting land, of, 481, 482, *see* 470—472, 478.

REIMBURSEMENT OF TRUSTEES,
every trust instrument deemed to contain clause for, 565.
under Settled Land Act, 701.

RELEASE,
of wife's reversionary chose in action by husband, 315.
of part of land charged with rent-charge, effect of, 546.
of part of land charged with judgment, effect of, 547.
of powers, 296, 613. *See* POWER.
See LEASE AND RELEASE.

REMAINDER,
contingent, destruction of, 490, 491.
See CONTINGENT REMAINDERS.
descent of estate in, 356.
dower out of, 344.
execution, cannot be delivered, in, 453, 477.
nature of, 358.
when right shall be deemed to accrue. *See* LIMITATION OF ACTIONS.

RENEWABLE LEASEHOLDS,
right of action accrues to landlord on renewal, 123.
Settled Estates Act, renewal under, 646.
Settled Land Acts, tenant for life may renew, 683.
trustees of, may renew, 560.

RENT,
account of, in equity, from what time, 190.
adverse receipt of, effect of, 134, 135.
agent, receipt by, effect of, 118.
apportionment of, on bequest of leaseholds, 392.
in respect of area, 546.
in respect of time, 442—445.
arrears of, what, are recoverable, 185, 186, 203.
when secured by specialty, 203.
debts of testator, is applicable in payment of, 378, *see* 370.
different kinds of, 105—107.
distress for, 106, 107, 185.
easement, cannot be reserved in respect of, 5, *see* 107.
entail of, 254.
execution under *fi. fa.*, landlord's right to rent, 451, *see* 126.
executor's liability for, 551, 552.
fee, in, action of debt for arrears of, *see* 107, 170.
incorporeal hereditaments, cannot as a rule be reserved out of, 107.
limitation of actions for, 113, 194.
for arrears of, 185, 186, 203.
non-payment of, does not bar landlord, 113, 114, 123.
old limitation act as to, 108.
payment of, evidence of tenancy from year to year, 132.
posthumous heir, right of, to, 356.
receipt for last payment of, effect, on sale of leaseholds, 574.
receipt of, to be deemed receipt of profits, 169.
wrongful receipt of, effect of, 134, 135.

RENT-CHARGE,
action, of debt for, 107, 170.
on collateral covenant for payment of, when barred, 198, 203.
apportionment of, in respect of area, 547.
in respect of time, 442—445.
executor's liability for, 552.
extinguishment of, 547.
nature of, 105, 106.
partition of, 740.
recovery of, 106, 107, 170, 609, 610, 722.
redemption of, 611.
under S. L. Acts, out of capital money, 719.
registration of, 469, 470, 482, 483.
release of, effect of partial, 546.

REPAIR,
of public ways, 52.
of private ways, 64.
of drains, 80.

REPAIRS,
heir, retainer by, for, against creditors, 370.
not improvement within S. L. Acts, 692, *see* 723, *Add.*
Settled Estates Act, money cannot be applied under, for, 656.
settled land generally, in case of, 656, *Add.*
tenant in common, by, no right of contribution for, 138.

REPLEVIN,
limitation of action for, 208.

RESERVATION,
fishing, of, 37, 57.
incorporeal hereditaments, of, operates as a re-grant, 3, 57.
lease containing, must be executed by the lessee, 57.
minerals, of, not to invalidate sale under power, 742.
shooting, of, 3, 57.
way, of private, 57.
of necessity, implied, 59, 60.

RESIDUARY DEVISE,
remains specific notwithstanding Wills Act, 424.
includes subject of lapsed and void devises, 425.

RESIDUE,
share of, time within which to be recovered, 180, 199.

RESTRAINT ON ALIENATION,
condition not to alien realty, when effectual, 299.
men, in case of, 299.
unmarried women, in case of, 299.

RESTRAINT ON ANTICIPATION,
absolute gift, in case of an, effect of, 298.
antenuptial debts, does not affect liability for, 322, 337.
charging order cannot be made in case of, 456.
creation of, 298.
dispensing with, 298, 299, 605, 606.
duration of, 298.
effect of, 298.
entail, does not prevent bar of, by married woman, 253.
executory settlement, insertion in an, 299.
husband's death, effect as to property bound by contracts, 327.
life estate without impeachment of waste is inconsistent with, 298.
M. W. P. Act, 1882, how far affected by, 327.
men, in case of, 299.
perpetuities, void if transgresses rule against, 298.
property on which it may be imposed, *ib.*
separate use, can only exist in connection with, *ib.*
separation, judicial, destroys, *ib.*
sequestration in divorce action, effect of, on, 327.
Settled Estates Act, does not interfere with powers under, 662.
Settled Land Acts, does not interfere with powers under, 712.
statutory powers, how far controls, 295, 315.
unmarried women, in case of, 299.
will, does not prevent disposition by, 298.

RETAINER,
administrator, by, 383.
assets under 3 & 4 Will. 4, c. 104, not out of, 378, 383.
creditors of equal degree, only against, 384.
debts, what may be retained, *ib.*
devisee, by, 371, 384
equitable assets, not out of, 377, 383.
equity to a settlement, effect of, on, 316.
executor by, 383, 384.
heir, by, 370, 371, 384.
receiver, when there is a, 384.
will not be appointed to interfere with, *ib.*
wife, by, as executrix of husband, 329, 384.

REVERSION,
Crown, in, not to be barred, 254, *see* 664, 709.
descent of estates in, 356.
dower out of, no, 344.
lease, on, title cannot be called for, 566, 574, 586.
merged, next estate to be reversion, 491, 492.
nature of, 358.
sale of, not to be set aside on ground of undervalue, 738.
time within which to be recovered. *See* LIMITATION OF ACTIONS.

REVERSIONARY INTERESTS,
interest recoverable on mortgages of, 187.
personalty, in, mortgage of, limitation of actions on, 199.
arrears of interest recoverable on foreclosure of, 187.
personalty of married women, disposition of, 315—317, 329.
acknowledged deed necessary, 315, 316.
husband's assignment, effect of, 315.
surrender of prior interests, effect of, 316.
settlement, comprised in, not within 20 & 21 Vict. c. 57..317.
proceeds of sale, in, of real estate of married woman, disposition of, 292.

REVERSIONER,
when right first accrues to, for purposes of limitation, 194, 195. *See* LIMITATION OF ACTIONS.
where there are concurrent rights, 145, 146.
non-payment of rent, how affected by 113, 114, 123.
proceedings by, in case of disturbance of rights of way, 66.
water, 77.
light, 95.

REVIVOR,
of judgment, lands bound by, 178, 179.
Statutes of Limitation in relation to, *ib.*

REVOCATION,
of licences, 47, 48.
of wills. *See* REVOCATION OF WILLS.
powers of, and new appointment, when exercised by will, 429.

REVOCATION OF WILLS,
abandonment of will not sufficient, 416.
alteration of estate, by, abolished, 421, 422.
animus revocandi must be, 417, 420.
appointments in wills, 430.
cancelling, by, 418, 420.
clear, must be, 416.
codicil, by, 415, 416.
codicils, of 415, 418.
dependent relative, 417.
destruction, by, 415, 417, 418.
animus revocandi must be, 417.
partial, *ib.*
domicile, change of, not to revoke, 439.
duplicate will, revocation of, 418.
express, 415, 416.
inconsistent devise, subsequent, 416.
intention, it is a question of, *ib.*
"last will," words do not necessarily import revocation, 415.
lost will, presumption of revocation, 418.
marriage, by, 414, 415.
married women, by, 419.
mistake, destruction by, 417.
obliteration, by, 418, 420.
onus of proof of, 418.
parol evidence as to intention, 416, 418.
of subsequent will, 416.
partial, by destruction, 417.
presumption from altered circumstances, no revocation by, 415.
signatures, tearing off, 417.
replacing, *ib.*

RIGHT OF ENTRY. *See* ENTRY.

RIPARIAN OWNER,
access to navigable river, right of, 82.
fishing, rights of, 38.
moor vessel, right to, 83.
river wall, duties as to, 84.
soil of bed, right to, 85.
water, rights in, 67—70.

RIVER,
bed of, ownership of, 84, 85.
when passes by conveyance of land on one bank, 85.
fishing in, rights of, 37, 38. *See* FISHERY.

RIVERS, NAVIGABLE,
abstraction of water, action by navigation company, 84.
access to bank of, right of private, 82, 84.
public, 83.
bed of, ownership of, 84, 85.
extinction of right of navigation, 83.
ferries, 87.
grounding, vessel, not trespass, 83.
landing, right of, presumption of grant of, 85.
moor vessel, right to, 83.
nuisance in, individual cannot abate, *ib.*
obstruction to navigation, action for, *ib.*
conservators cannot erect, *ib.*
damage by, liability of conservators for, 84.
riparian owners cannot erect, *ib.*
public rights on, 82, 83.
purpresture, 84.
soil of bed, ownership of, 84, 85.
steam power, right to use, 83.
sunk vessel, duty of owner, 84.
towing path, rights in respect of, 85.
weir obstructing navigation, when legal, 83.
what are, 82.

ROADS,
part of settled estates may be dedicated for, 650, 684. *See* HIGHWAYS.

ROMAN CATHOLIC,
patrons, 166.

RULES,
Conveyancing Acts, under, 635—642.
Fines and Recoveries Act, under, 308—311.
Land Charges Registration Act, under, 484.
Lunacy Act, 1890, under, 541, 542.
Settled Estates Act, under, 665—674.
See SETTLED ESTATES ACT.
Settled Land Acts, under, 725—733.
See SETTLED LAND ACT.

ST. LEONARDS' (LORD) ACTS,
22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38..545—557.
See CONTENTS.

SALARY,
apportionment of, in respect of time, 443, 444.
interest on arrears of, 193.

SALE. *See* VENDOR AND PURCHASER.
charging order, under, separate action must be brought for, 457.
Court may order a, in any action, 380.
decree for, provisions of Trustee Acts in case of, 515, 532.

SALE—*continued.*
devisee, in trust, by, for payment of debts, 386, 389.
of beneficial interest, 388, 390.
purchasers, protection of, 390, 391.
executor, by, for payment of debts, implied power, 388, 389.
statutory power, 389, 390.
purchasers, protection of, 390.
foreclosure action, in, 596—598.
incumbrances, provision for, on sale, 576, 577.
judgment creditor, on application of, 479, 480.
priorities of creditors in case of, *ib.*
minerals and surface apart, of, under power, 735—737.
mortgage, whether authorised by power of sale, 389.
mortgagee, by. *See* MORTGAGEE.
order for, effects conversion, 742.
partition, instead of, 739—748. *See* PARTITION ACTS.
power, under, not void because of mistaken payment to tenant for life, 548.
minerals and surface dealt with apart, 735, 737.
redemption action, in, 597.
reversions, of, not to be set aside merely for undervalue, 738.
Settled Estates Act, under, 648—650, 658. *See* SETTLED ESTATES ACT.
Settled Land Acts, under, 677—679, 685, 686. *See* SETTLED LAND ACTS.
trustees for sale, by, statutory powers, 558—560, 604.
consent of tenant for life necessary, 561, 708.

SAND,
custom to take, 39.
watercourse, right to send through, 7.

SATISFACTION,
Crown debts, on, entry of, 468, 474.
judgments, on, entry of, 476.
presumption of, 178.
lis pendens, on, entry of, 465.

SATISFIED TERMS,
cease after 31st December, 1845..493, 494.
dower, used to bar right to, 342.
protection of terms preserved in certain cases, 493, 494.
surrender of terms, presumption of, 494.

SAVINGS BANKS,
deposits in, by married women, to be their separate property, 318, 320, 330—332.

SCHEME,
of improvements under S. L. Acts, 692, 693, 724. *See* SETTLED LAND ACTS.

SCHOOLMASTER,
adverse possession by, of school, 118, *see* 130.

SCINTILLA JURIS,
existence of, dispensed with, 557.

SCIRE FACIAS,
action on, within what time to be brought, 177, 178.

SEA WALL,
erect, right to, 70.
maintain, prescription to, 26.
way over, public, 51.

SEA WEED,
no common law right of way to take, 86.

SEAMEN,
wills of, 412, 413.

SEARCHES,
for judgments, 483, 484, 627—629, 635.
for crown debts, 468, 627.
other searches, 627—629.

SEASHORE,
access to sea over, by adjoining owner, 86.
alluvium, ownership of, *ib.*
bathing, no right of, *ib.*
crown, right of, 85, 86.
fishing boats, right to draw up, 86.
foreshore, rights in respect of, *ib.*
what words will pass, *ib.*
manor, may be parcel of, *ib.*
shingle, right to remove, *ib.*
stones, right to take, from, 23.

SEISIN,
ancestor, of, formerly necessary in tracing descent, 355, 362.
curtesy, how far necessary for, 349, 350.
dower not dependent on husband's actual, 345.
meaning of, 355.
unity of, effect in claiming right of way, 58, 59, 65.
uses, to, not necessary to support future uses, 556, 557.

SEIZURE *QUOUSQUE*,
when lord can make, 114, 123, 124, 402.
when time begins to run against tenant in case of, 122.

SEPARATE ESTATE,
acquired after 1882 by woman married before, property, is, 329.
annuities granted by National Debt Commissioners, &c., 318, 320, 330—332.
ante-nuptial debts, liable to satisfy, 322, 333—335, 337.
contracts in respect of, 297, 325, 327, 328.
effect of husband's death, 327, 328.
costs in actions by or against married women, 325, 327.
creation of, 297, *see* 328, 329.
damages recovered by married women are, 325, 326.
recovered against married women payable out of, 325.
deposits in banks, 318, 320, 330—332.
destruction of, 297.
disposition of, 297, 325, 326, 328, 405.
duration of, 297.
earnings are, when, 317, 328, 329.
equitable assets, when, 377.
future, bound by contracts of married women, 325, 328.
intestacy of wife, rights of husband on, 326.
judgment, enforcement against, 327.
land, married woman may dispose of equitable interest in, 297.
legal interest, conveyance of, 305.
descended to married woman, rents of, are separate estate under M. W. P. Act, 1870..320.
legal assets, when, 377.
life estate under a settlement is, 328.
nature of, 297.
personalty, disposition of, *ib.*
coming under intestacy, deed, or will is, under M. W. P. Act, 1870 ..320.
policy on life of husband may be, 320, 321, 332, 333.
power of appointment, property subject to, is not, 328.
general, execution of, makes property liable to debts as separate property, 329, 381.
protection of, proceedings by married woman for, 333.
protectorship of settlement, confers, 262.
restraint on anticipation, 298.
See RESTRAINT ON ANTICIPATION.
society, shares in a, 319, 330—332.

SEPARATE ESTATE—*continued.*
stock and shares, 318—320, 330—332.
wages are, when, 317, 328, 329.
will, may be disposed of, by, 297, 325, 326, 405.
undisposed of on wife's death, husband's rights, 326.

SEQUESTRATION,
copyholds, of, 386.
effect on divorced wife's property, 327.
enforce judgment, to, 448, 451, 477, 479.

SERVICES,
included in term "rent" in Limitation Act, 106, 107.

SERVIENT TENEMENT, 5.

SET-OFF,
right to claim, when barred, 209, 218.

SETTLED ESTATES ACT, 1877..643—674.
application to court, how made, 651.
evidence on, 666, 667.
notice to be given of, 654, 655, *see* 673, 674.
practice as to, 665.
application of moneys arising under act, 655—657, 696, 697.
consent of other persons, when necessary, 652.
dispensed with, when, 652—654.
notices in place of, 652, 653, 665, 670.
conveyance on sale, effect of, 651.
costs, 658.
dedication for streets, gardens, &c., 650, 651.
Durham, jurisdiction in, 660.
entails created by Parliament, how far within act, 664.
extent of act, *ib.*
incumbrances, effect on powers under act, 663.
infant, applications and consents by, to be by guardian, 661, 665, 666.
guardian, appointment of, 666, 671.
lands of, within the act, 606, 644.
married woman, 663.
interpretation clauses, 643, 644.
Ireland, applications as to land in, 660.
Lancaster, jurisdiction in, *ib.*
leases, court may authorize, 644—648.
contracts for, may be authorized, 646.
copyholds, in case of, 646, 664.
general powers given to trustees, 647, 648.
mode of granting, 646, 647.
nature of leases which may be authorized, 644—646, 658.
part of settled land may be leased, 646.
renewal of, *ib.*
surrender and renewal of, *ib.*
leases by tenants for life, &c., 660, 661, 663.
lunatic, in case of, applications and consents by committee, 662, 666.
married women to be examined, 662, 663, 667, 671—673, 696.
not if married since December, 1882..326, 662.
notice, of exercise of powers to be placed on settlement, 655, *see* 668.
in place of consent, 652, 653, 665, 670.
orders under the act not to be invalidated, 658, *see* 620.
powers of act may be exercised repeatedly, 658.
powers of court, restriction on, *ib.*
register, county, land in, 668.
rules under the act, 659, 665—674.
sales, court may authorize, 648—650, 658.
consideration may be rent in case of sale for building, 649.
conveyance on sale, effect of, 651.
minerals may be reserved, 650.
settled estates within the act, what are, 606, 643, 644.
tenants for life to be deemed entitled to possession though land encumbered, 633.

SETTLED LAND ACTS,
applications to court to decide questions arising under, 701, 708.
practice on, 702, 725—727.
assignee of tenant for life, protection of, 706.
capital money, application of, 687—690.
devolution of, 689.
sources from which it can arise, 677.
conflict between provisions of act and settlement, 708, 709.
construction of provisions of act, 708.
contract, by tenant for life, general provisions as to, 695.
enforceable by and against successor, *ib.*
lease, for, not to form part of title to lease, 696.
not to exercise powers void, 706.
predecessors, of, completion of, 683, 695, 721.
conveyances by tenant for life, 685, 686, 708, 721.
are subject to certain estates and charges, 686.
copyholds, common, re-grant of, on enfranchisement, 679.
conveyance of, by tenant for life, 686.
enfranchisement of, 677, 678.
licences to copyhold tenants to lease, 684.
money for enfranchisement raiseable by mortgage, 685.
costs, capital money applicable in payment of, 688, 689.
cases as to, 703, 704.
of proceedings for protection of settlement, 697, 698.
settled property, payment out of, 702, 704.
court, applications to, practice on, 702, 725—727.
payment into, by direction of tenant for life, 726, *see* 689.
county court, jurisdiction of, 703, 704.
curtesy, tenant by the, is tenant for life within the act, 710.
estate deemed to arise under settlement by wife, 718.
dealings between tenant for life and the estate, 723.
dedication of land for streets and open spaces, 684.
definition of terms used in acts, 674—677, 708.
Durham, jurisdiction as to lands in, 704.
dwellings for the working classes, erection of, 725.
sale of land for, 679.
easements, grant or reservation of, 677, 721.
for mining purposes, 685.
exchange by tenant for life, 678, 679.
money for equality may be raised by mortgage, 685.
regulations as to, 679.
forfeiture, exercise of powers of tenant for life not to cause, 707, 722.
heirlooms, sale of, 698.
Improvement of Land Act, 1864, extension of, 695.
improvements, authorized by the acts, what are, 691, 692, 723.
concurrence of tenant for life with other persons in executing, 693.
maintenance of, by tenant for life, 693, 694.
rent-charges, redemption of, is an improvement, 719.
repairs are not, 692, *see* 723, *Add.*
scheme for, when necessary, 692, 693, 724.
waste may be committed in execution and repair of, 694.
incumbrances, effect on powers of tenant for life, 705, 706, *see* 678.
discharge of, 687, 688.
mortgage by tenant for life to discharge, 723.
transfer of, on sale, exchange or partition, 679, *see* 690.
infant absolute owner to be deemed tenant for life, 711.
powers of acts, by whom exerciseable when tenant for life is, 711, 712.
Ireland, application of acts to, 715, 716.
judgment for execution of trusts does not stop powers of tenant for life, 678.
Lancaster, jurisdiction as to lands in, 703.
land, meaning of, 675, 677.
acquired under the acts, how to be dealt with, 690, 691.
Land Commissioners, powers and authorities of, 693, 705.
Board of Agriculture, substituted for, 677, 705.

SETTLED LAND ACTS—*continued.*
leases, application of money paid in respect of, 697.
building, 680—682, 720, 722, 726.
confirm void leases, granted to, 683.
contract of predecessor, to give effect to, *ib.*
contracts for, by tenant for life, 695, 696.
covenant of renewal, to give effect to, 683.
fines on grant of, capital money, 717.
general regulations as to, 680, 721.
mining, 680—682, 685, 722, 726.
notice to trustees of intention to grant, 701, 717, 721.
power for tenant for life to grant, 680, 721.
renewal of, by tenant for life, 683.
surrender and new grant of, *ib.*
twenty-one years, for, 721.
void or voidable, confirmed by tenant for life, 683.
limited owners having powers of tenant for life, 709—711.
lunatic, application of acts when tenant for life a, 712, 713.
mansion-house, disposition of, by tenant for life, 722, 723.
rebuilding of, 723.
repairs to, 692, *Add.*
married women, application of acts to, 712.
minerals and surface may be dealt with apart, 685.
mining rent, part to be capital money, 682.
money in court, applicable as capital money, 696.
investment of, 689.
may be paid out to trustees, 689, 724.
money liable to be laid out in land applicable as capital money, 696.
mortgage, tenant for life may, to raise equality money, 685.
to raise money for discharging incumbrances, 723.
notice by tenant for life to trustees, 701, 702, 717, 721.
option of purchase in building leases, 720.
partition, tenant for life may join in, 678, *see* 679.
money for equality may be raised by mortgage, 685.
powers given by the S. L. Acts, cumulative, 708.
exerciseable from time to time, *ib.*
execution of deeds and things necessary for exercise of, *ib.*
powers of tenant for life cannot be assigned, 705.
cumulative on powers in settlement, 708.
effect of incumbrances on, 705, 706, *see* 678.
estate determinable on exercise of, effect of, 706, 707.
exerciseable from time to time, 708.
forfeiture not caused by exercise of, 707, 722.
limitation of, in settlement void, 706, 708.
powers in settlement exerciseable, 708, 709.
practice on applications to the court, 702, 725—727.
private act, restrictions of, do not affect powers under S. L. Act, 678.
proceedings for recovery and protection of settled land, 697, 698.
purchasers, protection of, 707, 708.
deemed to have given best price, *ib.*
payment into Court by, 726, *see* 689.
rent charges incurred for improvements, redemption of, 719.
reserved on grant for building purposes, 682, 722.
repairs not an improvement, 692, *see* 723, *Add.*
rules under S. L. Act, 725—727.
sale by tenant for life, 677—679, 685, 686.
conveyance on, 685, 686.
minerals and surface apart, 685.
notice to trustees, how far necessary, 678, 701, 702, 717.
out of court, to be, 726.
regulations as to, 679.
scheme of improvements, 692, 693, 724.
settlement, definition of, 674, 676, 721.
summons, applications to court to be by, 702, 725.
costs of, 703, 704, 726.
forms of, 725, 727—734.
titles of, 727, 734.
tenant for life, definition of, 675—677, *see* 709—714.
assignees of, protection of, 706.

SETTLED LAND ACTS—*continued.*
tenant for life—*continued.*
consent of, necessary for exercise of powers in settlement, 708, 709, 717, *see* 561.
dealings between estate and, 723.
judgment for execution of trusts does not stop powers of, 678.
limited owners having powers of, 709—711.
trustee for all parties is, 707.
timber, application of money arising from sale of, 697.
trust for sale, settlement by way of, 713—715, 717, 718.
powers only exercised by leave of court, 717, 718.
registration of orders giving leave, 718.
trustees for the purposes of the act, definition of, 675, 677, 724.
appointment of, 699, 724.
difference between tenant for life and, reference to court, 701.
duties of, *ib.*
notice by tenant for life to, 701, 702, 717, 721.
number of, to act, 700.
protection of, 700, 701.
receipts by, 700.
reimbursement of, 701.
undivided share, disposition by tenant for life, 685.
vacation of registration of writ or order affecting land, 725.

SETTLEMENT,
equity to. *See* EQUITY TO SETTLEMENT.
executory, should contain restraint on anticipation, 299.
infant, on marriage of, 312—314.
binding, if sanctioned by court, 312.
clauses to be inserted in, 314.
contract to make, voidable, if not sanctioned by court, 313.
jurisdiction under 18 & 19 Vict. c. 43..*ib.*
law, independent of 18 & 19 Vict. c. 43..312, 313.
post-nuptial settlements sanctioned, 313.
propriety of marriage will not be considered, *ib.*
sanction of court, how given, 314.
meaning of word in, Fines and Recoveries Act, 241.
Settled Estates Act, 1877..643.
Settled Land Act, 674, 676, 721.
M. W. P. Act, 1882, effect of, as regards, 337.
protector of. *See* PROTECTOR.
trust for sale, by way of, application of Settled Land Acts to, 713—715, 717, 718.

SETTLOR,
covenants implied when a person conveys as, 581, 582.
may appoint protector of settlement, 265, 266. *See* PROTECTOR.

SEVERANCE,
adjoining tenements, of,
implied grant of rights of water upon, 73, 74.
of rights of light, 93.
trusts, of, on appointment of new trustees, 521, 630, 634.

SEWAGE,
agreement as to, injunction to restrain breach of, 81.
drains, right to discharge through, 72.
extent of right, 62, 74.
rivers, pollution of, by, 72.
extent of right, 75.
public bodies, by, 79, 80.

SEWERS,
repair of, 80.
commissioners of, *ib.*

SHARES,
in public companies, may be charged by judge's order within Trustee Act, 1850..454.
liable to calls, bequest of, 392.
liability on, where assets of shareholder distributed by his executor or administrator after notice, 553.
married woman, belonging to, 319, 323, 330, 332—334.

SHELL FISH,
public right to fish for, 38.
several fishery for, 38.

SHELLEY'S CASE,
rule in, 358.

SHERIFF,
powers of, under writ of *elegit*, 446—448.
under writ of *fieri facias*, 449—451.
poundage of, 448.

SHOP WINDOW,
erection obstructing view of, not restrained, 99.

SIGN BOARD,
claim of right to erect, 6.

SIGN POST,
claim of right to erect, 6.

SIMPLE CONTRACT DEBTS,
action for, within what time to be brought, 208 *et seq.*
See LIMITATION OF ACTIONS.
acknowledgments, effect of, on running of time, 217, 227.
See ACKNOWLEDGMENTS UNDER STATUTES OF LIMITATION.
charge on land, effect on running of time, 199, 200.
disabilities, 216.
charged on realty by 3 & 4 Will. 4, c. 104, when, 379.
land of deceased debtor liable to, 377.
nature of, 384, *see* 209.
specialty debts, when given priority over, 378.
trader's real estates liable to, 371.

SISTER,
descent from, to be traced through parent, 360.

SMOKE,
air, right to pollute, with, 6, 99, 100.
chimney of next house, right to use for, 6.

SOCIETY,
property of married woman in, may be registered as separate, 319, 330—332.

SOIL (OWNERSHIP OF),
fishery, in relation to, 38.
highways, 54, 55.
lake of, 38, 85.
rivers, non-tidal, 84.
tidal, 85.
when passes by conveyance of land, *ib.*

SOLDIERS,
wills of, 412.

SOLICITOR,
action for money received by, barred in six years, 209, 210.
negligence by, when time begins to run, 211.
costs of, when barred, 214, 215.
fraudulent concealment of deeds by, punishable, 549.
lien of, charging order postponed to, 457.
for costs, allowed when costs barred, 211.
payment off of mortgage by, effect of, 160.
purchase by, from client, within what time set aside, 235.
trustee, when will be appointed, 520.

SOVEREIGN,
will of, 402.

SPECIAL CASE,
may be registered as *lis pendens*, 465.

SPECIAL CONDITIONS,
sale may be made by trustees subject to, 559, 604.

SPECIALLY ENDORSED WRIT,
when interest may be claimed in, 194.

SPECIALTY,
actions on, within what time to be brought, 202—208.
See LIMITATION OF ACTIONS.
company, liability of members of, is a, 203, 385.
debt by, what is, 203, 385.
action on, within what time to be brought, 202—208.
charge on land, specialty debt is not a, 370.
devisees liable to creditors by, 367, 368.
devises to be void against creditors by, 366.
execution, may be taken in, 449, 450.
heir, liability of, for, 370.
when bound by, 615.
priority over simple contract debts, when, 378.

SPECIFIC PERFORMANCE,
provisions of Trustee Act in case of decree for, 515, 516.

SPOIL BANKS,
accretions to land by, 86.
right to make, 6.

SPORTING (RIGHTS OF),
reservation of, 3, 57.
term of years in, must be by deed, 47.

STALE DEMANDS,
time a bar in equity in case of, 149, 233.

STALLAGE,
exemption from, how claimed, 27.
prescriptive right to, *ib.*
recovered, how, 27, 28.
tolls are rateable, 27.

STALLS,
custom to erect, 25.

STAMP DUTY,
acknowledgment of debt exempt from, 220.
vesting orders, on, 537.

STATUTE,
prescription or custom cannot be alleged against, 28.

STATUTE OF USES,
disentailing deed operating under, 253.
dower, in relation to, 341, 345.

STATUTES CITED. *See* TABLE OF STATUTES.

STATUTORY POWERS,
mode in which they must be exercised, 81.

STEWARD,
accounts of, application of Statutes of Limitation to, 210.

STOCK,
in funds or public companies may be charged by judge's order, 454. *See* CHARGING ORDER.
orders vesting, right to transfer. *See* TRUSTEE ACTS.

STOP ORDER,
on fund in Court of Chancery, 457.

SUBTERRANEAN WATER,
rights as to, 7, 69—71. *See* WATER.

SUMMONS,
advice of court, for, 554.
county court, in, to save Statutes of Limitations, 176.
M. W. P. Act, 1882, under, to decide questions between husband and wife, 335, 336.
Settled Estates Act, to appoint a guardian for purposes of, 665, 666, 671.
for directions as to serving notices, 652, 665, 669.
Settled Land Act, applications under, to be by, 702, 725—734.
Trustee Act, under, when application should be made by, 525.
Vendor and Purchaser Act, under, 568—571.

SUPPLEMENTAL DEEDS,
construction of, 614.

SUPPORT,
from buildings or land, 6, 7.

SURETY,
charging order, has priority over, 457.
Crown, of, has same priority, 382.
mortgagee, of, limitation of actions against, 199, 230.

SURRENDER,
copyholds, of, estoppel does not operate by, 259.
deed, must be by, 486, 487.
law, by operation of, 487.
based on estoppel, 258.
leases, of, married women, by, 295.
under Settled Estates Act, 646.
under Settled Land Act, 683.
married women, by, 292, 295.
terms, of, presumption of, 494.

SURVIVOR,
powers of appointment given to survivor of several, 403, 429.

SURVIVORSHIP,
presumption of, 143.

TACKING,
mortgagee of freeholds or copyholds may tack his simple contract debt as against the heir, 188, 378.
in the case of redemption by tenant by *elegit*, 478.
Vendor and Purchaser Act, provisions as to, 568.

TELEPHONE WIRES,
right to place, an easement, 6.
way, over public, restrained, 54.

TENANCY AT WILL,
nature of, 127.
determination of, 128.
provision of 3 & 4 Will. 4, c. 27, as to, 126.
mortgagor in possession, whether this creates, 128, 129.
whether *cestui que trust* in possession is tenant at will, 129, 130.

TENANCY FROM YEAR TO YEAR,
creation of, 131—133.
determination of, by notice to quit, 133, 134.
devolution of interest of tenant, 133.
provision of 3 & 4 Will. 4, c. 27, as to, 130, 131.

TENANT FOR LIFE,
apportionment between remainderman and, 293, 443.
consent of, required to exercise of, powers in settlement, 708, 709, 717.
powers under 23 & 24 Vict. c. 145, 561.
disentailing deed by, effect of, 253.
incumbrances not to affect powers of, 565, 663, 705, *see* 678.
leases by, under Settled Estates Act, 660, 661, 663.
mistaken payment to, not to avoid a sale, 548.
possession by, under invalid devise, effect of, 118, 119.
Settled Land Acts, definition of, in, 675, 676, 677, 709—714.
powers under, 677—686, 695, 697, 698, 721, 722.

TENANT FOR YEARS. *See* LANDLORD AND TENANT.

TENANT IN TAIL. *See* ESTATE TAIL.
after possibility of issue extinct, cannot bar reversion, 255.
has power of tenant for life under S. L. Acts, 710.
bankrupt, 280, 288.
avoidance of acts of, 284.
powers reserved, where, 285.
where bankrupt dead, *ib.*
charge by, 260, 261.
contract by, effect of, 272, 275, *see* 695, 709.
disposition by, 252—261, 271—276.
See FINES AND RECOVERIES ACT—DISENTAILING DEED—SETTLED LAND ACTS.
equitable, dispositions by, 253, 275.
of copyholds, 279.
freebench, widow entitled to, 343.
judgment against, ordered to execute disentailing deed, 453.
lease by, 254, 259, 260, *see* 709.
where lunatic, with reversion in crown, 255.
limitation of actions by, 146—148, 197, *see* 114.
lunatic, bar of entail by, 253.
lease by, 255, *see* 709, 712.
mortgage by, 260.
married woman, 253, 272, 273.
mortgage by, 259—261.
possession under defective conveyance by, 147.
right to recover land, when barred, 114, 146—148, 197.
Settled Estates Act, 1877, power to lease under, 660, 661, 663.
Settled Land Acts, has powers of tenant for life under, 709, 710.
voidable estates created by, 269.

TENANT TO THE *PRÆCIPE*,
protector of settlement, when to be, 263.
requisites to make, 250, 251.

TENANTS IN COMMON,
possession of one not to be deemed the possession of others, 136, 137.
remedy by one, to recover share of rent, 137, 138.
rent payable by one, who occupies the whole, 137.
repairs, no right of contribution for, 138.
wall, of, remedy for obstruction by one, 138.

TERM OF YEARS,
must be by deed, corporeal hereditaments, 486.
incorporeal hereditaments, 46.

TERMS,
attendant. *See* ATTENDANT TERMS.
long, enlargement of, 617, 618, 632.
satisfied, 493.
See SATISFIED TERMS.

THIRDS,
bar of widow's right to, 342.

TIMBER,
action of waste for cutting, 234, *see* 149.
dower out of, 340.
purchase-money of, rights of tenant for life in, 697.
sale of, authorized by court under Settled Estates Act, 648, 649.
mortgagee, by, 592.
tenant for life, by, under Settled Land Acts, 697.
traveller, right to move over land, an easement, 6.
yard, claim to light for, 11.

TITHE RENT-CHARGE,
apportionment of, in respect of time, 444.
arrears of, recoverable, 186.
how far within 3 & 4 Will. 4, c. 27..103.

TITHES,
apportionment of, in respect of time, 444.
arrears of, recoverable, 186.
claim for, by prescription, 46.
how far within 3 & 4 Will. 4, c. 27..101, 102, 103, *see* 2.
judgment a charge on, 451.
lease of, 108.
partition of, 740.
payments for, under 37 Hen. 8, c. 12, are within 3 & 4 Will. 4, c. 27.. 109.

TITLE. *See* VENDOR AND PURCHASER.
documents of, covenants for production of, 566.
vendor may retain, *ib.*
extinguished by 3 & 4 Will. 4, c. 27..167—169.
forty years, purchaser entitled to, 563.
landlord, of, lessee cannot dispute, 258.
rules as between vendor and purchaser in regard to, 566, 567, 574—576.
summons under Vendor and Purchaser Act, as to, 568—571.

TITLE DEEDS,
limitations of actions to recover, 149.
mortgagee selling may call for, 563, 594.
mortgagor has right to inspect and copy, 589.
production and safe custody of, 583—585.

TOLLS,
exemption from, how claimed, 28.
how claimed and recovered, 27, 28.
nature of, 27.
stallage, may include, *ib.*
traverse and thorough, difference between, 27, 28.
turnpike, not within 3 & 4 Will. 4, c. 27..102.
arrears of interest on mortgage of, recoverable, 102, 187.

TORT,
ante-nuptial, liability for, 322, 323, 324, 333—335.
husband, liability for wife's, 323, 324, 334, 335.
married woman, liability for, 325, 326.

TRADER,
real estate made liable to simple contract debt of, 371.

TREES,
between two properties, ownership of, 57.

TRESPASS,
action for, limitation of, 208, 210, 211.
highway, on, 54.
licence may excuse, 49.
married woman may sue for, 326.
possession, party in, may maintain action of, 49.
vessel aground at low tide, not, 83.
way, pleading right of, in defence to trespass, 54, 66.
what is not, 49.

TROVER,
when time runs in actions of, 208, 211.

TRUST,
acceptance of, what is, 294.
account of rents directed in case of, 190, *see* 231.
breach of, acquiescence in, 157, 233, *see* 299.
deceased trustee, enforced against assets of, 234.
limitation of action for, 231, 232, 234.
simple contract debt, 384, *see* 234.
specialty debt, how made, 385.
charities, for, 153.
constructive, effect on running of time, 150, 151, 231, 235.
Trustee Act, within, 498, 499.
debts, to secure payment of, 151, 181, *see* 231, 235.
devolution of trust estates, 567, 600.
escheat, trust property not liable to, 527, *see* 506.
estates, devolution of, 567, 600.
express, of land, time does not run till conveyance to purchaser, 150—154, *see* 231.
effect on the running of time, 150, 181, 189, 200, 231, 235.
resulting, when there will be, 262.
separate use of married woman, for. *See* SEPARATE ESTATE.
severance of trusts, 521, 630, 634.

TRUST ESTATES,
devolution of, 567, 600.
liable to execution, 446, 447.
See CESTUI QUE TRUST—EQUITABLE ESTATES—TRUST—TRUSTEE.

TRUSTEE,
absence of, decree may be made in, 528, 529.
adverse possession by, 118, 152.
advice of court, application for, 554, 557.
appointment of new, under the Conveyancing Act, 1881..600—603.
donee of power cannot appoint himself, 602.
separate sets of trustees, 630, 634.
vesting trust property on appointment, 603.
appointment under Trustee Acts, 517—526.
application, how made, 525.
who may make, 524.
felon, in place of, 536.
old trustee, liability of, 524.
practice on, 521, 522, 524—526.
reappointed in order to get vesting order, trustee will not be, 519.
vesting orders on appointment, 522, 523.
when appointment will be made, 517—519.
who will be appointed, 520.
appointment, charities, in the case of, 527.
committee of lunatic, donee of power, by, 517, 538.
lunacy, in, 540, *see* 500, 518, 536.
attorney, power of, payments by trustee in pursuance of, 550, 551, *see* 612, 630, 631.
bare trustee, married woman may convey land as *feme sole*, 567.
charities, appointment of new trustees in case of, 527.
vesting orders in case of, 527, 540.
compromise or compound, power to, 605.
consent to act on appointment by the court, how given, 521, 541, 543.
constructive, who is, 235, 499.
co-trustee, how far liable for acts of, 555, 556, *see* 700.
deceased, estate liable for breach of trust, 234.
devise to, passes the fee, 432, 433.
devolution of trust estates, 567, 600.
disclaimer by, 294.
escheat on attainder of, how far there is, 527, 528.
executor becomes, of legacies, when, 181.
express, who is for the purpose of limitation, 151, *see* 181, 189.
fee, when trustees take the, 432, 433.
indemnity of, 555.

TRUSTEE—*continued.*
interest between *cestui que trust* and, 193.
leasing, powers of, may be given under Settled Estates Act, 647.
liability of, for acts of other persons, 555, 556, *see* 700.
limitation of actions against, 231, 232, 234, *see* 150—153, 200.
lunatic, appointment of new trustee, 518, 536, 540.
vesting orders in case of, 500—503, 538—543.
maintain infants, power to, 608, 609.
manage infant's property, power to, 607—609.
married woman, actions by and against, 336.
conveyance of land by, 293—295.
transfer of stock, &c., by, 336.
new trustees, powers of, 522, 601, 603.
payments by, under powers of attorney, 551, *see* 612, 630, 631.
policy on life of husband for benefit of wife, of, 321, 332, 333.
possession of, is possession of *cestui que trust*, 152, *see* 118.
powers of, 522, 601, 603.
compromise and compound, to, 605.
maintenance of infants, 608, 609.
management of infant's land, 607, 608.
survivor may exercise, 605.
protector, when to be, 262, 264, 265. *See* PROTECTOR.
receipts of, 604, *see* 700.
reimbursement of, 555, *see* 701.
removal of, 519.
renewable leaseholds, may renew, 560.
money for this purpose raised by mortgage, 561.
retirement of, 602, 603.
sale, for, statutory powers of, 558—560, 567, 604.
consent of tenant for life necessary, 561, 708, 717.
Settled Estates Act, powers of leasing vested in, under, 647.
Settled Land Acts, for purposes of. *See* SETTLED LAND ACTS.
severance of trusts, 521, 630, 634.

TRUSTEE ACTS. *See* TRUSTEE.
absence of trustee, decree may be made in, 528, 529.
absolute beneficial interests, vesting orders as to, 496, 510, 511, 512.
action, may be directed, 530.
order may be made in, 526.
applications under, how made, 525, 526.
practice on, 521, 522, 524—526.
who may make, 524.
appointment of new trustees under, 517—526. *See* TRUSTEE.
Bank of England to comply with orders, 513, 535.
cannot be found, vesting order when trustee, 504—506, 510, 511.
cases in which now unnecessary to resort to acts, 496.
chambers, when applications under the acts should be in, 517, 525, 532.
charities, orders in case of, 527, *see* 540.
chose in action, right to sue for (referred to in sections relating to stock).
effect of order vesting right to sue for, 513, 514.
colonial lands, jurisdiction over, 530, *see* 538.
commission in lunacy, power to direct, 530.
companies to comply with orders, 535.
constructive trustee within the acts, 499.
contingent right, meaning of in acts, 497, 499.
of trustees and mortgagees released by the court, 501, 504, 505, 507, 515, *see* 538.
convey, meaning of in acts, 497.
power to appoint a person to, 508—510, *see* 538, 539.
conveyance, meaning of, in acts, 497.
decree for, application of acts in case of a 515.
copyholds, effect of vesting order as to, 514.
costs of proceedings under the act, 529, 530.
lunatics, in case of, 501.
Crown, acts extended to private property of, 499.
death of trustee, without heir, 506, 507.
unproveable, 506, 510, 511.

TRUSTEE ACTS—*continued.*
deceased person, vesting order of stock standing in the name of, 503, 512, 535.
devisee, meaning of in acts, 498.
a trustee after order for sale, 515.
escheated estates, application of Act of 1852 to, 532.
exchange of lands, application of acts in case of, 515.
executor, trustee appointed to perform duties of, 499, 519.
executrix, husband of, a trustee within acts, 510.
foreclosure action, application of acts in case of, 516.
heir, out of jurisdiction, vesting order where, 504.
trustee dying without, 506, 507.
infant, contingent rights of, released, 504.
conveyance by, judgment for, 516.
heir of a testator, vesting order as to legal estate in, 503.
heir of vendor, vesting order, 504.
money of, to be paid into court, 528.
tenant in tail, vesting order bars entail, 503.
trustee or mortgagee, vesting orders, 503.
trustee of stock, vesting order, 533, 534.
interpretation of terms in, 496—499.
Ireland, application of acts to, 531.
Irish lands, jurisdiction over, 530, 531.
jurisdiction, under the acts, 496, 530.
heir out of, vesting order where, 504.
trustee or mortgagee out of the, vesting orders of land, 504, 505, 506.
of stock, 510, 511.
last trustee, vesting order when uncertain if dead, 506.
lunacy, jurisdiction in, 500, 518, *see* 538—540.
disputed, 500, 519, 530.
whether application should be made in, 500, 518.
lunatic, vesting order when personal representative of deceased person is, 503, *see* 539.
lunatic trustee or mortgagee,
appointment of new trustee, 518, 536, *see* 540.
contingent right of, released, 501, *see* 538.
costs of proceedings in case of, 501.
infant, when lunatic is, jurisdiction in chancery, 500, 503, 540.
vesting orders of land, in case of, 500, 501, *see* 538.
of stock in case of, 502, *see* 539.
married woman may present a petition under, 326.
mortgage, meaning of, in the acts, 498, 499.
paid off, jurisdiction in case of, 499, 505, 507, 508.
transfer of, under the acts, 499, 501.
mortgagee, vesting order after death of, when money paid off, 507, 508.
mortgagor, absconding, vesting order, 505.
old trustee, how far discharged from liability, 524.
orders to be conclusive evidence of facts alleged, 526.
palatine courts, 510.
partition, application of acts in case of, 515, 516, 532, 742.
petitioner, new trustee should be, 511.
recent legislation, effect of, on 496.
refusal of executor to transfer stock, 535.
of trustee to convey land, 532, 533.
to transfer stock, 511, 512, 534, 535.
to act, new trustee appointed, 519.
sale of land, decree for, vesting order to carry into effect, 532.
for payment of debts, release of contingent rights, 515.
service, 505, 525.
severance of trusts, 521, *see* 630, 634.
sole trustee, meaning of, 499, 511.
specific performance, application of acts in case of, 515, 516.
stamp duty on orders under acts, 537.
stock, meaning of, in acts, 497, 498.
deceased person, in name of, vesting order as to, 503, 512, 535.
directions as to transfer of, 517.
effect of order vesting right to transfer, 513.
trustee refusing to transfer, 511, 512.

TRUSTEE ACTS—*continued.*
summons, when applications under the acts should be by, 517, 525, 532.
survivor, vesting order when uncertain who was, 506.
trust, meaning of, in acts, 498, 499.
trustee, meaning of, in acts, *ib.*
unborn persons, meaning of, 516.
unborn trustee, contingent rights released, 507.
uncertain if trustee living or dead, 506, 510, 511.
unsound mind, money of person of, to be paid into court, 528.
trustee of, appointments and vesting orders in case of, 500, 518, 538—541.
vendor, when is a trustee within the acts, 499, 516.
vesting order of land, form of, 504, 505, 523.
of stock, form of, 511, 513, 523, *Add.*
effect of, 513.
on appointment of new trustee, 522, 523.
when married woman refuses to convey under the Fines and Recoveries Act, 300.

TURBARY,
common of, 30, 35.
Ireland, in, 36.

TURNPIKE TOLLS,
not within 3 & 4 Will. 4, c. 27..102.
arrears of interest on mortgage of, recoverable, 102, 187.

UNBORN PERSON,
power for court to release contingent rights of, 507.

UNDERLETTING,
effect of licence to underlet restricted, 544, 545, *see* 588, 634.

UNDERVALUE,
not sufficient ground for setting aside sale of reversion, 738.

UNDERWOOD,
on waste of manor, right to, 30, 40.

UNDIVIDED SHARE,
may be dealt with under the Settled Land Acts, 685.

UNITY OF OWNERSHIP,
effect of, in case of claims to right of,
common, 29, 42.
way, 58, 59, 65.
water, 76.
light, 12, 95.
when to be specially pleaded, 17.

UNIVERSITIES,
right of presentation, where patron Roman Catholic, 166, *Addenda.*

USER,
of ways, extent of right, 51, 52, 64.
of water, extent of right, 74.

USES,
future or contingent, provision for, 556, 557.

USES TO BAR DOWER,
formerly used, 342.
will not deprive of her dower a woman married since the passing of Dower Act, 343.

VACATION,
of writ or order affecting land, 725.

VAULT,
licence to make, an easement, 6.
to be buried in, should be by deed, 48.
prescription for right of burial in particular, 91.

VENDOR,
constructive trustee, when he is, 499.
death of, on, executor may complete, 576.
documents of title, when entitled to retain, 566.
fraudulent, punishment of, 549.
lien of, nature and effect of, 178, 179.
limitation of actions on, 176, 178.
Locke King's Act, is a charge within, 393, 397, 398.

VENDOR AND PURCHASER. *See* PURCHASER—TITLE—CONVEYANCING ACT—VENDOR—VENDOR AND PURCHASER ACT.
abstract, effect of sect. 3 of Conveyancing Act, 1881, on right to, 576.
right to, on sale in lots, 575.
apportionment of rents between, 443.
constructive notice to purchaser restricted, 629.
documents, copies of, expenses of, 575.
undertaking for safe custody of, 585.
vendor may retain, 566.
enfranchised copyholds, sale of, title to enfranchise cannot be called for, 574.
incumbrances, provision for, on sale, 576, 577.
leaseholds, on sale of, assumption that lease or underlease valid, 574.
receipt for last payment of rent, effect of production of, 574, 576.
reversion, title to, cannot be called for, 566, 574, *see* 629, 696.
production of documents, acknowledgment of right to, 583—585.
covenant for, 566.
expenses of, 575, 576, 584.
requisitions as to, 574, 575, 576.
recitals of prior title assumed to be correct, 574.
twenty years old sufficient evidence, 566, 567.
requisitions on title prior to date of commencement, 574.

VENDOR AND PURCHASER ACT, 1874..566—571.
applications to court under, 568—571.
questions which have been decided, 569, 570.
validity of contract cannot be questioned on, 568, 569. *See Addenda.*
rules as to title under open contract, 566, *see* 574, 576.
application to trustees, 567.
voluntary gift, question as to, has been decided under, 571.

VESTING DECLARATION,
on appointment of new trustees, 603.

VESTING ORDERS. *See* TRUSTEE ACTS.

VOIDABLE ESTATES,
created by tenant in tail, when confirmed, 269.
by bankrupt, 283.
leases confirmed by tenant for life under Settled Land Act, 683.

VOTE,
right to, in respect to, pews, 89.
stalls in market, 27.

WAIVER,
of breaches of covenant and conditions restricted, 556.
distress is waiver of forfeiture, 125.

WALL,
remedy where one tenant in common of a, excludes the other, 138.

WARRANT OF ATTORNEY,
cannot be amended, 249.

WARRANTY,
estate tail not barrable by, 252.
not to bar right of entry, 272.
what is, 272.

WASHING PLACE,
claim to, as an easement, 6.

WASTE,
approve, right of lord to, 40.
encroachments on, effect of, 116, 117.
by tenant of manor, presumed to belong to lord, 39, 40, 116.
granted by custom, may be, 39.
highway, adjoining, ownership of, 56.
inclosed by custom, may be, 39.
limitation of actions for acts of, 149, 234.
presumed to belong to lord, 39.
tenancy at will of, 126, 127.
tenant for life may commit, in executing improvements under the Settled Land Acts, 694.
underwood on, right to, 30, 40.
way over, private, 63.

WATER. *See* EASEMENT—PRESCRIPTION—WATERCOURSE.
abstraction of, action by navigation company, 84.
acquisition of rights in, 73, 74.
alteration of mode of enjoyment, 75, 76.
appropriation of, in case of natural streams, 68.
contracts in respect of, 81.
action for breach of, *ib.*
corporations with statutory powers, duties and liabilities of, 81, 82.
custom for, inhabitants to take, 25, *see* 74.
pollution, 74.
tin bounders to divert, 26, 74.
discharge on adjoining land, right to, 71, 72.
divert, custom for tin bounders to, 26, 74.
licence to, 48.
right to, 7, 69, 70, 71.
prescriptive right to, 71.
drain land, right to, 68, 69.
escape of, action for, 80, 81.
extent of right to, 74.
extinction of rights to, *ib.*
flood, right to divert, 70.
grant of, express or presumed, 73, *see* 577.
implied, 73, 74, *see* 577.
injunctions as to, 78.
irrigation, for, right to take, 48, 74.
licence, creation of rights by, *ib.*
mill for, right to, 69, 73, 75.
nuisance in respect of, remedy for, 76, 77.
pollute, right to, 70, 72.
custom, by, 74.
extent of, 75.
implied grant of, 74.
lost by suspension, 76.
pollution, action to restrain, 79, 80.
right to stop, 76.
purity of, right to, 70.
railway taking, to supply locomotives, 74.
reasonable use of, 74.
remedies for disturbance of rights in, 76, 77.
right to flowing, does not depend on ownership of soil, 85.
subterranean, 7, 69, 70.
grant of, effect of, 71.
pollution of, action for, 79.
purity of, right to, 70.
undefined channel, in, cannot be prescribed for, 7, 70, 71.

WATER—*continued.*
suspension of right to, 76.
statutory powers in relation to, 81, 82.

WATERCOURSE, 67—87. *See* EASEMENT—PRESCRIPTION—RIVER—RIVER, NAVIGABLE—WATER—NAVIGATION.
abandonment, 76.
access to, right of, 62.
acquisition of rights in, 4, 73.
alienation of rights in respect of, 70.
alter, grantor cannot, 73.
alteration of mode of enjoyment, 75, 76.
of course, effect of, 69, 75.
artificial, right to, 6, 72.
divert, right to, *ib.*
grant of, 73.
purity of water in, right to, *ib.*
riparian owner, rights of, 69, 72.
bed of, ownership of, 85.
change of course, effect of, 69, 75.
contracts as to, actions on, 81.
corporation, vested in, 73.
with statutory powers, duties and liabilities of, 81, 82.
custom, acquisition by, 74.
damages for disturbance, 78.
deed required to create right to, 74.
defined channel, what is, 69.
disturbance, abatement of, 76.
acquiescence in, effect of, 71, 78.
remedies for, 76.
divert, right to, 7, 68, 71.
by custom, 26, 74.
by licence, 48.
diversion, action for, 77.
waterworks company, by, 82.
drain land into, right to, 68.
drains. *See* DRAINS.
establish, bill to, 78.
extinction of, 76.
grant, express or presumed, 73.
implied, 73, 74, *see* 577.
statute, contrary to, cannot be presumed, 73.
incorporeal hereditament, right to is, 67.
injunctions as to, 78.
interruption of, 15.
irrigation, right to divert for, 68, 74.
land, conveyance of, what passes under, 577.
licence for, 48, 74, 76.
mill, for, right to dam, 68.
grant for, 73.
natural, rights of riparian owner, 67—69, 70.
nuisance, remedies for, 76 *et seq.*
obstruction of, action for, 77.
damage, not necessary to show, *ib.*
lawful, how far, 77, 78.
pen back, right to, 71.
pipes, through, right to, 80.
pollute, right to, 72.
custom, by, 74.
extent of, 75.
implied grant, by, 74.
lost by suspension, 76.
public bodies by, 79, 80.
polluted water, right to send, through, 7, 70.
pollution, acquiescence, effect of, 80.
action for, 79.
injunction to restrain, 79, 80.
previous pollution does not justify, 79.
stop, right to, 76.

WATERCOURSE—*continued.*
pollution, waterworks company, by, 82.
See POLLUTION OF WATER.
Prescription Act, within, 773. *See* PRESCRIPTION ACT.
pure water in, right to, 76, 73.
reservation of, no implied, 73.
reversioner, action by, 77.
rights in respect of, alienation of, 70.
special, acquisition of, 70.
riparian owners, rights of, in natural, 67—69, 70.
in artificial, 69.
river wall, duties of riparian owner as to, 70.
sand, right to send, through, 7.
scour bed, right to, 68, 77.
statutory powers, exercise of, 81, 82.
suspension of right to, 76.
tributaries, right of riparian owner to, 68.
unity of ownership, effect of, 76.
weeds, navigation company not liable to remove, 81.

WATERWORKS COMPANIES, 74, 82.

WAY, PRIVATE,
abandonment of, 65.
acquisition of, 4, 57—62.
agreement as to, enforced by injunction, 67.
alteration of dominant tenement, 65.
appurtenant, will pass without special mention, 58, 577.
church, through a, 22.
coals, to carry, 62, 63.
common law, claim at, 14, 61.
conveyance of, 61, 616.
custom, claim by, 6, 23, 57.
deed necessary to create and pass, 61.
deviate, right to, 64.
different kinds of, 57.
disturbance of, 66.
remedy for, *ib.*
establish, action to, *ib.*
evidence of grants of, 63.
extent of, 57, 58, 62—64.
express grant, under, 62, 63.
implied grant, under, 60.
user, when acquired by, 64.
extinction of, 58, 65, 66.
formed road will pass where unity of seisin, 59.
implied grant of, 59.
fountain, to, claimed by custom, 6.
grant of, express, 58, 61.
implied, 59, 60, 577.
presumed, 61.
highway, access to, 57, 61.
injunction in respect of, 67.
interruption, what is, 61, 65.
land, conveyance of, what ways are included in, 58, 60, 577.
lessee, of, over other land of lessor, 8, 58, 61.
licence for, 67.
limited rights, 57.
manure, right to lead, what is, 57.
minerals, to carry, 62.
nature of, 57.
necessity, of, 59, 60.
extent of, 60,
only entitled to one, 60.
reservation of, implied, 59, 60.
negligence, liability for, 64.
non-user, effect of, 29, 65.

WAY, PRIVATE—*continued.*
obstruction of, 66.
injunction to restrain, 67.
partition, creation on, 62.
plan on conveyance, effect of, 29, 65.
pleading in actions for obstruction, 66.
prescription, claim by, 22, 26, 57, 61.
Prescription Act, claim under, 4 *et seq.* *See* PRESCRIPTION ACT.
presumption of grants of, 61.
public way may co-exist with, 57.
railway company cannot grant, 58.
remedy against, for interference with way, 66.
repair of, 64.
reservation of, 57, 59.
severance, what ways will pass on, 58—60.
soil of, ownership of, 55.
suspension of, 58, 61, 65.
statute, acquisition by, 62.
extinction by, 66.
tenant, acquiescence by, 8, 61.
grant by one, to another, 8, 61.
unity of seizin, when there is, what will pass, 58, 59.
extinction by, 65.
use, conveyance by way of, 616.
user, grant presumed from, 61.
extent of, 64.

WAY, PUBLIC,
abandoned, cannot be, 53.
bridge over, 51.
churchyard, over, 49.
creation of, 50.
damages for obstruction, when individual can sue for, 53, 54.
dedicate, who can, 51, *see* 650, 684.
dedication of, assent of parish, 52.
intention of owner must be considered, 50.
limited, 51, 52.
particulars of, ordered, when set up in defence, 18, 50.
private way exists, where, 57.
presumption of, 50, 51, 57.
settled estates, in case of, 650, 684.
what amounts to, 50, 51.
destruction of, 53.
deviate, right to, 52.
disturbance of, 53.
remedy for, 53, 54.
diversion by railway, 53.
evidence of, 50, 51, 54.
extends over whole surface, right of passage, 50.
extinction of, 53.
field, over, subject to right to plough, 52.
inclosure of common, effect of, 53.
injunction for interference, 54.
interruptions, effect of, 50.
licence for, 50, 52.
mountain, over, 51.
nuisances on, 54.
pleading way as defence to trespass, 50.
reasonable user, what is, 54.
repairs of, 52, 53.
sea-wall, over, 51.
telephone wires over, erection restrained, 54.
tenant, acquiescence of, effect of, 51.
thoroughfare, may exist where there is no, 49.
soil, ownership of, 54, 55.
when, can exist, 49, 52.
wood, through, 51.

WAYLEAVES,
leases of, may be granted under Settled Estates Act, 644.
Settled Land Act, 685.

WEIR,
easement, right to, is, 6.
fishing, prescription for, 38, 39, 71.
licence to erect, 48.
obstruction to navigation, when legal, 83.

WELL,
fouling a, penalty for, 82.
non-user of, effect of, 76.
subterranean water, rights in relation to, 69.
water, right to take, from, is interest in land, 78.
is an easement, 3, 7.
way, right of, to, not continuous easement, 59.

WELSH MORTGAGES,
nature of, 162, 163.

WIDOW,
dower of, 340—349. *See* DOWER.
election, when put to, 346, 347.
freebench of, 343.
intestate, of, rights of,
where barred of distributive share in husband's personalty, 342.

WILL. *See* CODICIL—CONSTRUCTION OF WILLS—DEVISE—REVOCATION OF WILLS—WILLS ACT.
abroad, of British subjects residing, 438, 439, 440.
in exercise of power, 411, 438.
acquired after date of will, property, 401, 422—425.
aliens may make will of realty or personalty, 402.
application of 24 & 25 Vict. c. 114, to, 438.
alterations in, attestation of, 419, 420.
confirmed by subsequent codicil, 410.
date of, presumption as to, 419.
executed as will, must be, *ib.*
parol evidence as to, *ib.*
probate, form of, where there are, 420.
alteration of estate after date of, effect of, 421, 422.
appointment, executed like other wills, 411.
general gift operates as, 426—430. *See* CONSTRUCTION OF WILLS.
revocation of, by subsequent will, 430.
survivor of two persons, exercised by will of, 403, 429, *Add.*
attestation of, 407—409, 413, 414.
form not necessary, 407, 409.
testator dying without heirs, in case of, 402.
autre vie, estates *pur*, disposable by, 401.
blanks at foot of, 436, *Add.*
British subjects, residing abroad, of, 438, 439, 440.
in exercise of powers, 411, 438.
naturalized, 438, 439, 441.
cancellation of, effect of, 418, 420.
chose in action not disposable by, 402.
codicil, confirmation of invalid will by, 410.
confirmation of will and other codicils by, 418, 419.
incorporation of unattested papers by, 410.
re-execution of will by, 434, 435.
See CODICIL.
construction of. *See* CONSTRUCTION OF WILLS.
contingent interests disposable by, 401.
contract to sell land devised, effect of, 422.
conveyance subsequent to will, effect on devise, 421, 422.
copyholds, disposable by, 401, 402, 403, 404.
fees and fines payable on devise of, 403, 404.
will to be entered on court rolls, 404.

WILL—*continued.*
date from which will speaks, 422—425.
excepting clauses, with reference to, 425.
lunatic, in case of, *ib.*
married woman, in case of, 405, 406.
objects of gifts, with reference to, 425.
powers, with reference to the execution of, 429.
deed, in form of, 411.
destroyed will not revived by codicil, 410.
destruction of, 415, 417. *See* REVOCATION OF WILLS.
devisable interests in land, what are, 401, 402, 403.
devise. *See* DEVISE; CONSTRUCTION OF WILLS.
domicil in relation to, 401, 402, 438—441.
British subject dying abroad, of, 440.
change of, does not invalidate will, 439.
conventions as to, 440, 441.
power exercised by will valid according to law of, 411, 438.
dower may be barred by, 346, 347. *See* DOWER.
duplicate will, revoked by revocation of other, 418.
entry, rights of, disposable by, 401.
error, words cannot be omitted on ground of, 407.
evidence, parol, admission of, as to,
date of alterations, 419.
execution of will, 407—409.
identity of incorporated documents, 410.
intention to revive a will, 421.
revoke a will, 416, 418.
lost will, 407, 416.
execution of, 407—411.
evidence as to, 407—409.
presumption of due, 409.
executor may be witness, 414.
executory interests disposable by, 401.
fee passes where no words of limitation, 430, 432.
foreign, when probate required of, 411.
what documents will be looked at in construing, 438.
fraud, words inserted by, rejected, 407.
general gift operates as exercise of power, 406, 426—430. *See* CONSTRUCTION OF WILLS.
heir, testator dying without, how far Wills Act applies, 402. *See* HEIR.
incorporation of unattested papers, 410.
probate in case of, 410, 411.
infant, of, 405.
interlineations, 419, 420. *See* WILL—alterations.
invalid, made valid by subsequent valid instrument, 410.
land, general devise of, effect of, 426. *See* CONSTRUCTION OF WILLS.
leaseholds, wills of, governed by *lex loci*, 401, 439.
bequest of, and subsequent purchase of fee, 422, 423.
lex loci governs will of real estate, 401.
lost, contents proved by secondary evidence, 407, 416.
lunatic, of, 402, 425.
mariner, of, 412, 413.
marriage, revocation by, 414, 415.
exception in case of will executing power, *ib.*
married woman, of, 326, 405, 406, *see* 295, 296, 297.
date from which will speaks, 405, 406.
executrix, may appoint executor to represent estate, 405.
general gift in, operates as exercise of power, 406, 428.
Married Women's Property Act, 1882, in relation to, 325, 326.
personalty, non-separate, with consent of husband, 405.
power may be exercised by, 295, 296, 405.
probate, form of, 406.
Probate Court, function of, in relation to, 406, 407.
property acquired after husband's death, 326, 405, 406.
revocation of will exercising power, 405, 419.
separate estate may be disposed of by, 297, 325, 326, 405.
Middlesex, registration of will of land in, 568.

WILL—*continued.*
mortgage estates, devise of, subsequent acquisition of equity of redemption, 422.
mutilation of, presumption of date of, 418.
naturalized British subject, 438, 439, 441.
obliterations, 419, 420.
paper pasted over whole bequest will not be removed, 420.
paper pasted over the amount only, will be removed, *ib.*
parol evidence, admission of. *See* WILL—evidence.
personal estate, of, governed by *lex domicilii*, 401.
possessory title is disposable by, 168, 402.
power, of appointment, exercise by will. *See* CONSTRUCTION OF WILLS.
of revocation and new appointment, exercise by will, 429.
two persons, or survivor, to, 403, 429, *Add.*
will in exercise of, valid if according to law of domicile, 411, 438.
presumption, due execution, of, 409.
lost will, in case of, 418.
mutilation, in case of, *ib.*
no revocation by, 415.
probate, effect of, 406, 438.
form of, in case of alterations, 420.
incorporated papers, 410, 411.
married woman, 406.
Probate Court, function of, *ib.*
promissory note, bequest of, 402.
property disposable by, what is, 401—408.
publication, equivalent to delivery, 411.
not necessary, 413.
real estate, of, governed by *lex loci*, 401.
re-execution by codicil, 434, 435.
republication of, 435.
married woman surviving her husband, in case of, 406.
residuary devise remains specific, 424.
includes lapsed and void devises, 425.
revival of will or codicil must be express, 420, 421.
revocation of, 415—419. *See* REVOCATION OF WILLS.
seamen, of, 412, 413.
signature of testator, acknowledged in presence of witnesses, 407, 408.
before attestation, must be, 407.
mark sufficient, *ib.*
person for testator, by, *ib.*
position of, 407, 436, 437.
seen by the witnesses, must be, 408.
witnesses, in presence of, 407, 408.
signature of witnesses, initials sufficient, 408.
presence of each other, need not be, 409.
of testator, must be in, 408, 409.
same side of paper as testator's, need not be, 409.
sufficient, what is, 408, 409.
soldiers, of, 412.
sovereign, of, 402.
surrender to use of, not necessary, 401, 402.
unattested papers incorporated in will, 410, 411.
witness, creditor may be, 414.
executor may be, *ib.*
gift to, in will when void, 413, 414.
incompetency of, not to invalidate will, 413.
signature of, 408, 409.
writing must be in, 407, *see* 412.
Yorkshire, registration of will of land in, 568.

WILLS ACT,
curtesy, given by sect. 33..349.
only applies to persons having an English domicile, 402.
does not extend to wills made before 1838..434.
nor to Scotland, 435.

WINDING UP,
interest allowed on debts proved in, 193.
effect of, on running of time, 215.

WINDMILL,
passage of air to, right cannot be acquired by prescription, 7, *see* 99.

WINDOW,
right to passage of light through. *See* LIGHT.
of air, through, 99.

WITNESS,
gift to, void, 413, 414.
no lapse where bequest in joint tenancy to several, of whom one was witness, 414. *See* WILL.
to will, 408.

WOOD,
public way through, 51.

WRECK,
grant of, 86.
way of necessity, in case of right to take, 60.

WRIT,
of dower and *quare impedit* abolished, 170.
of summons to save the Statute of Limitations, 174, 175.

WRIT OF *ELEGIT*,
what may be extended under, 446—448.
sheriff's poundage, 448.

WRIT OF EXECUTION,
registration of, under 23 & 24 Vict. c. 38..470—472.
under 27 & 28 Vict. c. 112..477, 478.
under 51 & 52 Vict. c. 51..481, 482, 484.
searches for, 483, 484.
vacation of, 481, 725.
Yorkshire, in case of lands in, 477.

WRIT OF *FIERI FACIAS*,
bills and notes, seizure under, 449.
indemnity to sheriff in respect of actions on, *ib.*
charging order made to assist, 450.
companies, against, 451.
de bonis ecclesiasticis, *ib.*
landlord's right to rent, *ib.*, *see* 126.
property which may or may not be taken under, 449—451.
sale under, 451.

WRIT OF *SCIRE FACIAS*, 177, 178.